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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3061 OF 2017

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| 1. | Ankush Manaji Jadhav
Age - 57 years, Occ - Agriculture | PETITIONERS |
| 2. | Sopan Ankush Jadhav,
Age - 37 years, Occ - Agriculture | |
| 3. | Jalindar Ankush Jadhav,
Age - 32 years, Occ - Agriculture
No.2 and 3 R/o Unchegaon, Ramnagar,
Taluka - Paithan, District - Aurangabad | |
| 4. | Aruna Prakash Jadhav,
Age - 50 years, Occ - Agriculture | |
| 5. | Prakash Shahu Jadhav,
Age - 52 years, Occ - Agriculture
Nos. 4 and 5 R/o Kadgaon,
Taluka - Pathardi, District - Ahmednagar | |
| 6. | Kailash Prakash Jadhav,
Age - 32 years, Occ - Agriculture
R/o Tajanpur (Sade)
Taluka - Shevgaon, District - Ahmednagar | |

VERSUS

- | | | |
|----|--|-------------|
| 1. | Govind Chandrabhan Shirsath
Age - 33 years, Occ - Agriculture | RESPONDENTS |
| 2. | Sachin Nanasaheb Shirsath,
Age - 50 years, Occ - Agriculture | |
| 3. | Lahu Manaji Jadhav,
Age - 54 years, Occ - Agriculture | |
| 4. | Nanda Lahu Jadhav,
Age - 47 years, Occ - Agriculture | |
| 5. | Kusum Ankush Jadhav, | |

Age - 42 years, Occ - Agriculture
All R/o Kadgaon, Taluka - Pathardi,
District - Ahmednagar

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Mr. Yuvraj V. Kakade, Advocate for the petitioners
Mr. Prashant R. Nangare, Advocate for respondents No.1 and 2
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 15th JUNE, 2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by consent of learned advocates for the appearing parties.
2. Writ petition has been moved by defendants No. 1, 3 and 6 to 9 in Special Civil Suit No. 228 of 2014 instituted by present respondents No. 1 and 2 seeking perpetual injunction against defendants No. 1 to 9 in respect of property bearing Gut No. 131 admeasuring 2 Hectare 52 Are situated at Kadgaon, Taluka - Pathardi, District - Ahmednagar.
3. Learned advocate Mr. Kakade has vehemently submitted that while application for temporary injunction in said suit had been confined only against defendants No. 2, 4 and 5 and the temporary injunction application had been rejected, Miscellaneous Civil Appeal No.51 of 2015 came to be preferred against all the defendants, including present petitioners, ignoring

that temporary injunction application had been considered only against defendants No. 2, 4 and 5 and not against present petitioners. The appeal has been allowed, in the process, there is loss of opportunity to contest temporary injunction application at first instance before trial court. He accordingly, submits that the decision rendered in such miscellaneous civil appeal, as such, is untenable against present petitioners.

4. So far as merits are concerned, he contends that original owner of suit property, Dhanaji Jadhav had executed a mortgage deed in favour of one Raoji Nagare with tenure of five years. Subsequently, Raoji died in 1951 and the property came to be recorded in the name of his two wives - Sundarabai and Chandrabhagabai. In 1953 Dhanaji died. Revenue record depicted that Dhanaji had been tenant of the property, albeit, subsequently, said entry came to be deleted.

5. He further submits that Chandrabhagabai and Sundarbai purportedly sold suit property to one Kisan Pote. Yet, according to him, transactions so entered into in respect of suit property did not affect that transaction by Dhanaji in favour of Raoji was mortgage and as such, sale by the women did not have any legal efficacy. He further contends that the petitioners are

descendants of Dhanaji Jadhav and Manaji Jadhav, two brothers, who were owners of suit property and that they have dwelling houses situated over some portion of the property.

6. Mr. Kakade further refers to a *pursis* filed on behalf of plaintiffs at Exhibit-60 wherein, hearing of Exhibit-5 - temporary injunction application had been confined to defendants No. 2, 4 and 5 and not the petitioners. He further purports to refer to an order dated 11th June, 2014 passed by Joint Civil Judge, Junior Division, whereunder show cause notice had been issued to all the defendants and two orders dated 24th June, 2014 under which initially the court had restrained defendants No. 2, 4 and 5 from interfering with suit property and subsequently had liberated injunction in respect of dwelling houses of said defendants No. 2, 4 and 5.

7. Learned advocate contends that there is no authenticity to the claim made by plaintiffs about ownership and possession over suit property. Trial court has observed that record does not depict any credibility to the passing of property into the hands of plaintiffs. Observations of trial court would depict that the claim of plaintiffs does not rest on any genuine record and for want of authentic and genuine record, the plaintiffs were not held

entitled to for injunction and application Exhibit-5 was rejected.

8. Learned advocate further goes on to contend that the appellate court, however, despite aforesaid observations of trial court, overlooking the same, had misdirected itself and had also been oblivious of that plaintiffs could not rest their claim on any authentic record as observed by the trial court. Learned judge of appellate court has been in error in going by the ostensible recent revenue record disregarding the factual position. Learned advocate contends that after execution of document in 1947 by Dhanaji, the land, revenue record shows, was barren.

9. Countering aforesaid submissions, learned advocate Mr. Nangare submits that suit has been filed by plaintiffs with reference to execution of title deed in their favour. He submits that entire record, since 1947 evinces that petitioners have no nexus whatsoever with suit property. There have been series of transactions from time to time over and in respect of suit property passing the title of the property from one hand to the other under registered deeds. He refers to consolidation record to aforesaid effect. He further purports to refer to revenue record maintained in respect of suit property. He submits that at no point of time, revenue record shows, after 1947, present

petitioners, who claim themselves to be descendants of Dhanaji and Manaji, to be in any way concerned with suit property let alone its possession. Learned advocate goes on to contend that so far as objection to impugned order passed by appellate court about hearing of temporary injunction required in respect of defendants No. 2, 4 and 5 is concerned, while *pursis* had been compelled to that effect since quite a few of defendants had been avoiding service and in the process, the plaintiffs' possession was getting insecure and meddled with. While their application for temporary injunction came to be rejected, appeal came to be preferred against all the defendants. In appeal all the defendants had accordingly appeared. At no point of time, during the course of hearing of the appeal, any objection had ever been raised on behalf of the petitioners that any prejudice is being caused to them because they did not get opportunity to contest temporary injunction application nor they did submit that hearing of miscellaneous civil appeal can be confined only in respect of defendants No. 2, 4 and 5. Their participation in hearing of appeal has been full fledged. They have filed not only their written statement but even response to the miscellaneous civil appeal. He submits that under the circumstances, it is too late in the day to take exception to the impugned order and turn

around on such a technical plea. Petitioners are estopped from veering around and object to the impugned order on that ground.

10. Having heard learned advocates as aforesaid and on perusal of the order impugned in present petition, appellate court appears to have taken stock of the situation. The appellate court has observed in paragraphs No. 10 and 11 of the impugned order thus -

“ 10. The extract of consolidation shows that Punja Kisan and Asarabai Kisan are the owners of Survey nos.26/2 and 26/8, mutation no.525 shows that on 29.12.1953 Kisan purchased S. No.26/8 for Rs.400/-, index extract to that effect is also filed on record. Index extract shows that Kisan Pote purchased S. No.26/2 for Rs.600/- in 1956, mutation no.41 dated 12.03.1986 shows the names of Asarabai and Punja in respect of G. no.131 the trial court held that mutation entries are not certified by competent authority and document on the basis of which these entries are taken are not filed on record. But whether those entries are proper or bogus is the matter of evidence, we are deciding Exh.5 application, we have to see prima facie case, possession is to be seen and not title on the date of suit so the observations of learned trial Court in this regard are not proper and interference is called for.

11. The 7/12 extract shows that plaintiffs are in possession of suit property. On the date of suit, names of defendants are not appearing. It is pertinent to note that mutation entries are not challenged, unless mutation entries or sale deeds are not set aside, at this stage, it cannot be held that those documents are doubtful. The defendants have not challenged the entries passed at the time of consolidation. The letter of

Tahsildar also shows that whatever allegations were made by the defendants with the police station, there is no substance. Considering all these facts and the fact that on the date of filing of suit, the names of plaintiffs are appearing as possessor of suit property. Hence, prima facie plaintiffs are in possession of suit property and if injunction is not granted, they will suffer irreparable loss and balance of convenience also lies in their favour. Considering all these facts, I am of the opinion that the order passed by the learned trial court below exh.5 is not proper and legal, and interference is called for, the interest of both parties can be secured by expediting the hearing of original suit.”

11. Aforesaid, observations appear to be with reference to record as is placed before the court, which indicates that the plaintiffs to a large extent have been able to show, with reference to material record, that they are in possession of suit property. Appellate court has further appreciated not only names of defendants are not appearing in revenue record, but also mutation entries or sale deeds have not been challenged nor those have been set aside yet. Additionally, petitioners have not been in a position to show by any credible material infusing substance in the contentions as have been advanced on behalf of the petitioners about them having dwelling houses over the suit property. Appreciation by the appellate court appears to be with reference to record as is appearing in the matter and at this stage does not appear to be away from record. Rest of the contentions as are advanced on behalf of the petitioners before

this court as well as before lower appellate court would be required to be substantiated by evidence in the suit.

12. In the circumstances, this does not appear to be a case wherein impugned order deserves to be meddled with. Writ petition, as such, stands dismissed. Rule stands discharged. No order as to costs.

13. Suit, however, may be proceeded with as expeditiously as possible by letting opportunity to the parties to adduce evidence in support of their contentions.

[SUNIL P. DESHMUKH, J.]