

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7788 OF 2017

Namdev Maroti Kabade
Age - 59 years, Occ - Agriculture
R/o Kumbharwadi, Taluka - Georai,
District - Beed

PETITIONER

VERSUS

Dr. Mayur s/o Jaynarayan Harkut
Age - 31 years, Occ - Medical Practitioner
and Agriculture R/o Madalmohi,
Taluka - Georai, District - Beed

RESPONDENT

.....

Mr. V. D. Salunke, Advocate for the petitioner
Mr. Dhiraj R. Jethliya, Advocate for the respondent

.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 5th JULY, 2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties finally by consent.
2. Petitioner - plaintiff being unsuccessful on two occasions to secure temporary injunction before trial and appellate courts, as the courts have turned down his request, is before this court.
3. The petitioner - plaintiff has instituted proceedings seeking declaration and perpetual injunction bearing Regular Civil Suit

No. 361 of 2015 claiming disturbance to his possession over disputed property after purchase of land gut No. 103 by defendant No. 1. Along with the plaint, an application for temporary injunction had been moved, since there had been immediate threat to his possession over 56 Are disputed land. Ad interim injunction had been granted initially, however, subsequently, the same came to be vacated by trial court under order dated 13th October, 2015, rejecting temporary injunction application.

4. The matter was taken up by the petitioner in Miscellaneous Civil Appeal No. 108 of 2015 before appellate court. However, under order dated 15th April, 2017, the appeal came to be rejected and as such, present writ petition.

5. Learned advocate Mr. Salunke appearing for the petitioner, submits that the courts hitherto have been in error in getting swayed away by the consolidation record rather than material placed before them showing possession of plaintiff over disputed property. Learned advocate contends that his possession over disputed property is from a long time from even before consolidation had taken place. He submits that even preparation of consolidation record had not been in accordance with the

material placed before the consolidation authorities. He contends, despite that being referred to by trial court, the court has not given the same its due. He contends that over and above this, defendant No. 1 had after the property had been purchased caused at least three measurements of Gut No. 103. While two earlier measurements did not show the portion occupied by the petitioner, yet, last of the measurements does show that the petitioner being in occupation of 56 *Are* land from gut No. 103. He, therefore, submits that at the stage of interim injunction, *prima facie* burden has been discharged by the plaintiff that he is in possession of suit property.

6. He submits, the petitioner - plaintiff traces his origin of possession over area of 56 *Are* disputed land to old lands survey No. 280 and 281 comprising 3 Hectare, 84 *Are*. Plaintiff contends that he had been owner of 3 Hectare, 84 *Are* land comprising then lands survey No. 280 and 281, however, upon application of consolidation scheme, area owned by him is shown to have been reduced to 3 Hectare, 28 *Are*, forming gut No. 102. He claims that it did not affect plaintiff's actual possession and he continued to be in possession of his erstwhile holding of 3 Hectare, 84 *Are* land.

7. While this has been the position from long time, according to petitioner, adjoining land holder whose area is shown to have grown by 56 *Are* upon application of consolidation scheme to 2 Hectare, 42 *Are* comprising gut No. 103, had purportedly sold whole of Gut No. 103 to present respondent under a registered sale deed dated 6th March, 2013. The property came to be sold to defendant No. 1 by defendant No. 2 taking disadvantage of consolidation record. Yet, according to plaintiff actual physical possession of the plaintiff had never been disturbed.

8. Countering aforesaid submissions, Mr. Jethliya, learned advocate appearing on behalf of the respondent-defendant, submits that long standing consolidation record is testimony of the fact that petitioner - plaintiff cannot lay claim to ownership and possession to any portion in land Gut No. 103 admeasuring 2 Hectare, 42 *Are*. He submits that the land had been purchased after taking into account relevant record. Claim of the petitioner-plaintiff about him being in possession of the disputed property is illegitimate, improper and illegal. The record does not bear anywhere that the plaintiff can be said to be in possession of disputed land at any point of time. He submits that the last measurement map is of little relevance and consequence for, the same does not depict correct position and as rightly considered

by trial court, it does not have any presumptive value, although prepared by concerned authorities. It is well settled that civil courts are not supposed to go beyond and consider veracity and efficacy of consolidation order and the record. He further adverts to that as yet consolidation record has been intact.

9. He submits, while revenue as well as consolidation record shows plaintiff to be in possession of only 3 Hectare, 28 Are land, plaintiff's claim to possession of 3 Hectare, 84 Are land is superfluous, unreal and untenable. He submits that there is no evidence by the plaintiff showing him to be in possession of disputed portion of land and is simply relying on the measurement map. In the circumstances, two courts hitherto have rightly appreciated the matter in controversy in its proper perspective and have come to a right conclusion.

10. He goes on to submit that even otherwise this court should dissuade itself from disturbing orders having regard to conclusions under paragraph No.38 by the Supreme Court in its judgment in the case of *"Surya Dev Rai V/s Ram Chander Rai and Others"* reported in (2003) 6 SCC 675. Supervisory powers are to be exercised to keep subordinate courts within bounds of their jurisdiction and when subordinate court has assumed jurisdiction

which it does not have and / or has failed to exercise jurisdiction which it has or where there is failure of justice or grave injustice is caused. He further refers to clause No. 7 of paragraph No. 38 of the same judgment contending that the supervisory jurisdiction is to be exercised sparingly and only in appropriate case. He submits that the present matter is not such a case wherein it can be said that there have been any errors committed, which are, manifest or are relatable to jurisdiction of courts. He submits, both the courts have concurrently held that the plaintiff does not have any *prima facie* case nor balance of convenience lies in his favour or for that matter irreparable loss would be caused to him.

11. He further refers to a decision of the Supreme Court in the case of “*Maria Margarida Sequeira Fernandes and Others V/s Erasmo Jack De Sequeira*” reported in (2012) 5 SCC 370 and refers to paragraph No. 80 thereof, in turn which refers to a decision of Delhi high court in “*Thomas Cook (India) Ltd., V/s Hotel Imperial*” reported in (2006) 88 DRJ 545 wherein terms "due process" or "due course" have been discussed and paragraph No. 83 of said judgment deals with gravity of granting of interim injunction.

12. Learned counsel for respondents, therefore, urges this

court not to meddle with concurrent findings rendered by courts hitherto in respect of *prima facie* case, balance of convenience and irreparable loss. He submits that defendant No. 1 has purchased the property for value without notice. He has been put in possession of the property under a registered deed and there had been no objection thus far to the transaction. He, thus urges this court to take overall view of the matter and reject the writ petition.

13. While arguments are so advanced on either side, plaintiff traces his possession to a time even before consolidation scheme had been applied. Despite consolidation record, petitioner appears to be in possession, which to quite some extent is borne out from the map which has been drawn at the instance of defendant No.1 himself. Not only he is shown to be in occupation of 56 Are land from Gut No. 103 but also a constructed residential accommodation in said portion is shown. There does not appear to be a serious contest about existence of residential construction. This particular aspect, though has been touched upon by trial court, its implication has not been appreciated at all. Appellate court has given a complete go bye to the same. The appellate court has failed to apply its mind to relevant aspects while considering temporary injunction

application and courts have got influenced by revenue record disregarding position depicted by map at the instance of defendant No. 1 himself.

14. It appears that the petitioner lays claim to possession over 3 Hectare, 84 *Are* land tracing its origin to the composition of said land while record was maintained by lands survey number, particularly survey No. 280 and 281. It further appears that defendant No. 1 had after purchase of property caused measurement of Gut No. 103 thrice in succession. It is intriguing as to how and why these three different occasions have arisen for measurement. It also emerges that there is third measurement caused at the instance of defendant No. 1 himself, giving an indication of 56 *Are* land being occupied by plaintiff – petitioner. The consolidation record albeit shows Gut No. 102 comprising land belonging to the plaintiff and Gut No. 103 comprising land now belonging to defendant No. 1 and earlier to defendant No. 2.

15. Trial court has purportedly referred to material produced by the plaintiff about statements indicating possession of petitioner over 3 Hectare, 84 *Are* land, however, trial court has not given regard to the same, since statements pertain to period

prior to preparation of consolidation record and not after and the consolidation record depicts plaintiff to be owner only in respect of 3 Hectare, 28 *Are* land and not more and since consolidation record is not a province of civil court. Trial court has refused to give any regard to the last of the measurement maps observing that same may not give rise to any presumption since having created for specific / special purpose.

16. The appellate court has absolutely not taken into account measurement maps. Appellate court has considered that consolidation authorities have recorded statements of interested persons, however, forms No. 6 were issued by the consolidation officers in favour of plaintiff as well as defendant No. 2 in respect of 3 Hectare, 28 *Are* and 2 Hectare, 42 *Are* lands and seven twelve extracts depict accordingly from long time. Appellate court has referred to area of survey No. 280 and 281 and also to that plaintiff and defendant No.2 are sons of Shripati who was one of the four sons of deceased Balaji to whom those lands belonged to. However, appellate court has not taken into account origin of possession as claimed by the plaintiff – petitioner as he had been in possession before consolidation record and claimed continuance of actual physical possession accordingly despite consolidation record.

17. Claim of plaintiff – petitioner to a certain degree, at this stage, is buttressed by last of the measurement maps caused at the instance of defendant No. 1 and had been prepared by a government officer. The map not only shows area and occupation of plaintiff but also shows existence of residential structure contained in the same. In the circumstances, at this stage, it appears that there is some material giving rise to consider credibility to claim of possession of plaintiff over portion of 56 *Are* land. Whether the same is rightful or not is a matter to be considered at an appropriate stage. Reasons given while rejecting claim for temporary injunction are of the nature as if the courts have been adjudicating finally rights of the parties. Adjudication of rights would take place in accordance with procedure by trial. The petitioner – plaintiff at this stage appears to have occupied a portion of Gut No. 103 about 56 *Are* land, as shown in the map, and defendant No. 1 is not in position to dispute existence of residential construction as shown in the last of the maps drawn at his instance. It is a case wherein trial as well as appellate court ought to have considered the same, looking at the historical background claimed coupled with that there had three successive measurements caused by defendant No. 1 and from the last of the measurement map placed on

record, *prima facie* the plaintiff appears to be in possession of disputed portion of property and that if his possession is tried to be disturbed before adjudication of rights, it would cause grave and irreparable loss to him and as such, balance of convenience does appear to be in favour of plaintiff – petitioner at this stage of the matter.

18. In the circumstances, writ petition stands allowed. Two decisions, one by trial court on Exhibit-5 in Regular Civil Suit No. 361 of 2015 dated 29th April, 2015 and the other by appellate court in Miscellaneous Civil Appeal No. 108 of 2015 dated 15th April, 2017, are untenable and accordingly stand quashed and set aside. Application Exhibit-5 in Regular Civil Suit No. 361 of 2015 for temporary injunction stands granted and shall have operation during pendency of the suit. Rule is made absolute in aforesaid terms. No order as to costs.

19. At this stage, Mr. Jethliya, learned advocate earnestly requests to expedite trial of the suit, which has been pending since 2015 and further requests that observations made hereinbefore in this order shall not be considered as observations on merits and shall not influence court while deciding the suit. The request appears to be legitimate. Trial

court to proceed with the suit as expeditiously as possible and dispose of the same as early as possible, preferably within a period of nine months from the date of receipt of writ of this order. Observations made in this order as well as the observations of trial and appellate courts in their respective orders are at the interlocutory stage and as such, shall not be taken as a guide elsewhere and do not have any binding efficacy. The suit shall be decided on its own merits without getting influenced by aforesaid orders.

[SUNIL P. DESHMUKH, J.]

drp/wp7788-17