

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO. 10816 OF 2014

Santosh Shivajiappa Reshme
age 42 years, occ. Agriculture
r/o Shivaji Chowk, Nilangar
Tq. Nilanga, Dist. Latur

.. PETITIONER

VERSUS

1. Vishwanath Dhondiba Davne
age 65 years, occ. Agriculture
r/o Savta Mali Chowk, Nilanga
Tq. Nilanga, Dist. Latur
2. Shevantabai w/o Tulshiram Chambarge
age 77 years, occ. Household
r/o Nilanga, Tq. Nilanga
Dist. Latur
3. Vrindabai Anilkumar Wadwale
age 30 years, occ. Household
r/o Nilanga, Tq. Nilanga
Dist. Latur.
4. Anilkumar Santram Wadwale
age 35 years, occ. Household
r/o Nilanga, Tq. Nilanga
Dist. Latur.

.. RESPONDENTS

Mr. A.P. Bhandari, advocate for petitioner.
Mr. S.G. Chapalgaonkar, advocate for respondent no. 1.

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**CORAM : S. B. SHUKRE, J.
DATE : 24th FEBRUARY, 2017.**

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith.
2. Heard finally by consent of learned counsel for the respective parties.

3. This writ petition challenges the order dated 12th June, 2014 passed by the learned Civil Judge, Senior Division, Nilanga, in Regular Civil Suit No. 388/2001 thereby allowing application of original plaintiff, respondent, vide Exh. 216 seeking temporary mandatory injunction with direction to restore possession of the suit property to respondent no. 1 by removing tin shed and any other construction made in the suit property as well as the order of the learned District Judge dated 8th October, 2014, confirming the order dated 12th June, 2014.

4. It is the contention of learned counsel for petitioner that while granting temporary mandatory injunction, the learned Civil Judge as well as the learned Additional District Judge had ignored the basic parameters which govern the exercise of such a drastic power. He submits that the issue of tenancy was adjudicated upon by the tenancy Court by answering reference and, therefore, the courts below ought to have given appropriate consideration to the same. According to him, respondent no. 1 was not held to be the tenant and, therefore, the courts below should have found that no prima facie case was made out by respondent no. 1, which, however, was not done by the courts. He also submits that under section 5 of the Hyderabad Tenancy Act, there cannot be any letting out of the property in between the family members and, this aspect was also not considered by the trial Court. He further submits that no evidence was adduced by respondent no. 1 and, there being no sufficient material to come to the conclusion about existence of prima facie case in favour of respondent no. 1,

the Courts committed patent illegality in granting temporary mandatory injunction.

5. In support of his contention, he relies upon cases of Kishore Kumar Khaitan & another Vs. Praveen Kumar Singh **AIR 2006 SC 1474**, Dorab Cawasji Warden Vs. Coomi Sorab Warden and other **AIR 1990 SC 867** and Nilavabai Sida Khajure Vs. Chanamalappa Bassappa Khajure and others **1977 BCI (O) 50**.

6. Learned counsel for contesting respondent no. 1 submits that all these aspects have been appropriately considered by the Courts below and, therefore, there is no need to make any interference. According to him, no perversity or patent illegality manifest from the record of the case can be seen and, therefore, this is not a fit case for upsetting the impugned orders.

7. On going through the impugned orders as well as the law settled by the Honourable Apex Court governing exercise of power to grant temporary mandatory injunction as held in the cases of Kishor Kumar Khaitan and Dorab Cawasji Warden (supra), I find that both the Courts below have followed the principles laid down by the Honourable Apex Court and recorded concurrent findings of fact, based upon the material available on record and, as such, I do not see any patent illegality or perversity in the impugned order.

8. In the cases of Kishor Kumar Khaitan and Dorab Cawasji Warden

(supra), the Honourable Apex Court has held that the remedy of temporary mandatory injunction is rare and can be granted only in extra ordinary circumstances when the prima facie material clearly justify a finding that status quo ante be restored by interim order and interest of justice would suffer without it.

9. In the instant case, one can very well see that the Courts below have considered the material available on record as well as evidence in the nature of affidavit filed on behalf of respondent no. 1 and, therefore, certainly, this is not a case wherein no evidence was adduced by the parties. This evidence and the material available on record, which consists of 7/12 extracts (exh. 185, 199 and 140) did show that at the time of filing of the suit, the suit property was in prima facie possession of respondent no. 1. Therefore, I do not see any ground to say that view taken by the Courts below is illegal. Thus, this is not a case wherein in exercise of extra ordinary writ jurisdiction, this Court would interfere in the impugned order.

10. Learned counsel for petitioner submits that the reference regarding tenancy has been answered by the tenancy Court in favour of petitioner and, therefore, the Courts below ought to have taken this fact into consideration in appropriate manner. But, I must say, such determination by tenancy Court so far has not attained finality and the appeal is still pending. Therefore, the argument of the learned counsel for petitioner cannot be accepted.

11. About the case of Nilavabai (supra) I do not think that it would be of any assistance to the case of petitioner for the reason that the issue involved here is one of possession on the date of filing of the suit. The question of tenancy is presently pending for final adjudication and, therefore, one has to examine the claim of respondent no. 1 from the view point of existence of prima facie case or arguable case vis-a-vis possession on the date of suit and since, respondent no. 1 has been found to have demonstrated existence of such prima facie case in his favour, concurrently by both the Courts, there is no reason for me to substitute the view taken by the Courts below by another, just because it is possible.

12. In these circumstances, I find no substance in this petition. Petition deserves to be dismissed and the same is dismissed accordingly. Rule discharged.

13. At this stage, learned counsel for petitioner prays for staying the effect of this order for a period of six months. However, considering the fact that both the Courts below have recorded concurrent findings of fact, based upon material available on record, such a prayer now cannot be granted and, it is rejected accordingly.

(S. B. SHUKRE)
JUDGE