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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3399 OF 2018

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| 1. | Ramkunwar s/o Kundanlal Gupta | PETITIONERS |
| | Age - 86 years, Occ - Agriculture & Business | |
| 2. | Nirmaladevi w/o Ramkunwar Gupta | |
| | Age - 83 years, Occ - Household | |
| 3. | Rajendrakumar s/o Ramkunwar Gupta | |
| | Age - 61 years, Occ - Agriculture & Business | |
| 4. | Mahendrakumar s/o Ramkunwar Gupta | |
| | Age - 64 years, Occ - Agriculture and Business | |
| 5. | Jitendrakumar s/o Ramkunwar Gupta | |
| | Age - 60 years, Occ - Agriculture & Business | |

All R/o Sadar Bazar Police Station Road,
Old Mondha, New Jalna
Taluka and District - Jalna

VERSUS

- | | | |
|----|--------------------------------|-------------|
| 1. | Hurubegum w/o Sharif Khan | RESPONDENTS |
| | Age - 61 years, Occ - Business | |
| 2. | Afroz s/o Sharif Khan | |
| | Age - 40 years, Occ - Business | |
| 3. | Pyari Begam Sarfaraj Khan | |
| | Age - 65 years, Occ - Business | |
| 4. | Mehemoodkhan Gulam | |
| | Age - 55 years, Occ - Business | |
| 5. | Chotemiya Gulam Dastagir, | |
| | Age - 55 years, Occ - Business | |
| 6. | Ekbalmiya Gulam Dastagir, | |
| | Age - 53 years, Occ - Business | |

7. Ayyubkhan Gulam Dastagir,
Age - 45 years, Occ - Business
8. Zakirkhan Sarfaram Khan,
Age - 40 years, Occ - Business
9. Naserkhan Sarfaram Khan
Age - 45 years, Occ - Business

All R/o Murtives, Kadrabad, Jalna
Taluka and District - Jalna

.....
Mr. Ajeet B. Kale, Advocate for the petitioners
Mr. Amol B. Chalak, Advocate for respondents No. 1 and 2
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 5th JULY, 2018

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for parties.
2. Petitioners are plaintiffs in Regular Civil Suit No. 500 of 2012 instituted for injunction against present respondents. Along with the suit, the plaintiffs had filed an application for temporary injunction. Trial court had rejected the request under temporary injunction application and the same has been confirmed by appellate court in miscellaneous civil appeal No. 40 of 2017 at the instance of plaintiffs - petitioners and, as such, the petitioners are before this court.

3. Mr. A. B. Kale, learned advocate appearing on behalf of the petitioners vehemently submits that since 1958 or for that matter from even before that the plaintiffs have been continuously, without any interruption, in possession of the property till the date of the suit. However, a surreptitious activity had been undertaken by the respondents with government authorities and certain orders had been passed. Orders adverse to the interest of the plaintiffs hitherto passed have been set aside and the matters have been remitted to the concerned authorities for reconsideration afresh. He submits that it is undeniable position that the plaintiffs all along have been in possession of suit property and in such a case, under an erroneous assumption about possession being not lawful, injunction has been refused to be granted disregarding clear position that the plaintiffs are indeed in physical possession of the property at least since 1958 onwards, continuously.

4. Mr. Kale, continues to submit that the respondents who stake claim to the property as *Inam* holders have yet to establish their such claim and until such an event takes place, respondents have no right to the property and much less to disturb the long standing possession of the plaintiffs who are

enjoying the same under an instrument of ownership. He submits that order dated 11th October, 1982, which would be vaunted by the other side, is no longer in subsistence and has been set aside and the matter has been sent back for reconsideration. So is the case about onward activity with reference to said order and the same as well has been sent back for reconsideration. He submits that order dated 11th October, 1982 as annexed to the petition would show that the same has been passed without issuing notice to the plaintiffs or for that matter their predecessors. The same has come to light only after a proposal had been sent by Sub Divisional Officer, Jalna to Additional Collector, Jalna for carrying out mutation entries. The request had been turned down by the Additional Collector. In revision therefrom the respondents succeeded and based on the same, purported mutation had taken place, however, the petitioners had challenged the order of Commissioner and the Minister had stayed its effect and ultimately the matter has been remanded to Additional Commissioner again. Thereupon, mutation entry bearing No. 8206, has been carried out as well as *panchanama* has been drawn wherein possession of the plaintiffs has been shown. He submits that all these relevant aspects, which are germane while considering application for temporary

injunction, have been missed out by two courts hitherto.

5. According to learned advocate, the two courts have proceeded with temporary injunction application as if suit was being decided that too without issues and without evidence. He submits that it is not a case that on the date of the suit, the plaintiffs had not been in possession at all.

6. Mr. Kale, learned advocate for the petitioners, submits that according to his instructions, as yet no proceedings under the *Atiyat* Inquiries Act have been initiated by the respondents. However, version of learned advocate for the respondents is otherwise.

7. On the other hand, learned advocate Mr. A. B. Chalak, appearing on behalf of respondents, vehemently submits that the plaintiffs cannot be said to be in possession of suit property at all. He contends that originally suit land belonged to one Sarfaraz Khan, who was holder of the '*grant*'. After his death there had been illegal transfer of property in the name of Mahendrakunwar, Rajendrakunwar and other persons. Since necessary steps for removal of their names were not being taken, an action was compelled to be initiated and accordingly directions were issued on 11th October, 1982. He submits that

pursuant to orders of the Additional Commissioner dated 28th February, 2013, possession has been duly taken over under a *panchanama* and mutation entry bearing No. 7203 has been carried out accordingly. He further contends that all these relevant and vital aspects have been skipped to be referred to by the plaintiffs in their pleadings and in the application and, as such, it would not be said that plaintiffs have approached the courts with clean hands dis-entitling them from equitable relief like injunction. He submits that law largely is settled that unless plaintiffs can stake claim to lawful possession, injunction would not be issued against the defendants. He purports to refer to and rely on a decision of the Supreme Court in the case of "*Rame Gowda (Died) LRs V/s M. Varadappa Naidu (Died) LRs and Another*" reported in (2004) 1 SCC 769, purporting to point out paragraph No. 12 therefrom wherein reference has been made to a judgment in the case of "*Fakirbhai Bhagwandas V.s Maganlal Haribhai*" reported in AIR 1951 Bom 380 : 53 Bom LR 163. Wherein it appears to have been observed that if a person proves that he was in lawful possession and his possession has been threatened, in such a case, irrespective of title, he may be able to have injunction. With reference to the same, he contends that unless a person claims to be in lawful possession, injunction would not be issued and, as

such, according to him, the courts hitherto have not committed any error, much less error of the nature requiring interception of impugned orders under the discretionary powers of the high court.

8. Mr. Chalak goes on to refer to a judgment of this court in the case of “*Harcharanjit Singh Thind (Capt) V/s Deeksha Thind and Others*” reported in 2008 (6) Bom. C. R. 771 putting focus on following observations thereunder -

“ It is well settled principle that the party who suppresses from the Court, material facts, does not deserve the grant of any discretionary relief, much less a temporary injunction. It is also well settled that a Court will not help a party who has not come with clean hands. In this view of the matter also, the application ought to have been rejected. There is no merit in this appeal and, accordingly, the same is hereby dismissed. ”

9. For the very same purpose, learned advocate also refers to and relies on a decision of the Supreme Court in the case of “*Premji Tatansey Shah and Others V/s Union of India and Others*” reported in (1994) 5 SCC 547.

10. As relief of injunction is discretionary and equitable, he submits that non reference to the orders passed by the authorities would tantamount to suppression of material facts

and, as such, injunction should not be issued. He submits that mere revenue entries would not be sufficient to indicate lawfulness in the possession. The property claimed by the plaintiffs are *Inam* lands. He, therefore, urges not to indulge into request being made under the writ petition.

11. In the circumstances, indisputable position emerges that there has been sale deed executed in favour of predecessors of the present petitioners, way back in 1958 in respect of the suit properties and based on the same certain mutations had been carried out and the position continued till 2012 without any interruption. The revenue entries till 2012 continued to show in respect of the suit land, plaintiffs to be owners in possession. It has to be noted that despite order dated 11th October, 1982, there had been no alterations in revenue record till the date of suit. Having regard to the material placed on record, the plaintiffs relate their possession to the execution of sale deed and claim lawful title to the suit property. Legality or otherwise about sale deed or for that matter possession of the plaintiffs over suit property had not been disputed by the respondents till the date of the suit. Proceedings with respect of suit property, it appears were initiated. With respect to the same, it appears, orders passed hitherto by the authorities concerned have been

set aside and the matter is getting reconsidered afresh under the orders passed by higher authorities.

12. The position with regard to considerations at the stage of temporary injunction is quite eloquently referred to and expositioned in the decision of this court in the case of “*Baban Anantrao Naik V/s Pramila Uttamrao Yenare and Another*” reported in 2011 (6) ALL MR 15 (S. V. Gangapurwala, J.). It is observed in said case that the factum of possession would be only relevant factor while determining application for temporary injunction. These observations have been made by the learned judge with reference to decision of the Supreme Court in the case of *Rame Gowda (supra)* relied upon by learned advocate for the respondents. In the judgment of Supreme Court as well in paragraph No. 11 it has been specifically referred to that what is relevant to be considered that irrespective of title, a person in settled possession of property can seek injunction.

13. In the circumstances, while physical possession of the plaintiffs over the property, as would be on the date of the suit, as may appear from the record, may have to be given its due. The consideration which apparently has weighed with the two courts hitherto about possession being lawful or not, would not

be said to be conclusively determined at this stage of matter. So far as temporary injunction is concerned, plaintiffs' claim about being in possession of suit property since the date of the sale deed appears to be supported by material on record, which may not be ignored, showing plaintiffs being in possession. There is no contrary material available on record indicating anyone else to be in possession. There appears to be *prima facie* case in their favour. Their such long standing possession is getting disturbed under the activities of the respondents. The respondents' claims with respect to suit property are yet to be vindicated. The respondents have not been in a position to show to be in possession of suit property on the date of suit. The balance of convenience appears to be in favour of the plaintiffs. The considerations which have weighed with the two courts hitherto, appear to be, at this stage, rather overstretched and erroneous.

14. In the circumstances, while question about legality of title to the suit property of the plaintiffs contending that lands have been *Inam* lands has been raised, yet position about their possession since 1958 based on sale deed would not be said to be unsettled. There is long revenue record, based on the same, in favour of the petitioners.

15. In view of aforesaid, it does not appear that orders passed by the two courts hitherto though concurrent, are tenable and sustainable. As such, order dated 6th April, 2017 passed by 6th Joint Civil Judge, Senior Division, Jalna on Exhibit-5 in Regular Civil Suit No. 500 of 2012 and dated 14th August, 2017 passed by Ad hoc District Judge-2, Jalna in Miscellaneous Civil Appeal No. 40 of 2017 are set aside. Temporary injunction application Exhibit-5 filed by the petitioners in Regular Civil Suit No. 500 of 2012 is granted as prayed for.

16. Writ petition stands allowed. Rule is made absolute in aforesaid terms.

17. Regular Civil Suit No. 500 of 2012 be proceeded with expeditiously and would be disposed of as early as possible. It is further made clear that observations made in this order are for the purpose of decision of writ petition and shall not have efficacy any further. In all fori decisions be given without getting influenced by the observations made in this order.

[SUNIL P. DESHMUKH, J.]