

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11235 OF 2016

Bapu Krishna Patil & Anr.	...	Petitioners
V/s.		
Vikramsinh Vilas Khade	...	Respondent

- Mr.Umesh H. Pawar for the Petitioners.
- Mr.Abhijit M. Adagule for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 13th MARCH, 2018.

P.C. :

1] Heard learned counsel for the Petitioners and learned counsel for the Respondent.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 3rd December 2015 passed by the District Judge-1, Kolhapur, thereby allowing Miscellaneous Civil Appeal No.134 of 2015, which was preferred against the judgment and order below Exhibit-5 passed in Regular Civil Suit No.287 of 2015 by the Jt. Civil Judge Junior Division, Kolhapur, on 2nd May 2015.

3] Brief facts of this Writ Petition are to the effect that:

Respondent herein has filed the Suit before the trial Court contending *inter-alia* that the suit land bearing Gat No.354, admeasuring 28.3 R and popularly known as “Tambalychi Jamin”, situated at Kalambe tarf Kale, Taluka Karveer, District Kolhapur, was originally owned by his grandfather's sister Tanubai Patil. After her death and during the lifetime of Tanubai Patil also, Respondent's grandfather was cultivating the suit land. After the death of his grandfather Narayan Jivaba Khade, Respondent's uncle Pandurang Khade was cultivating the suit land with the Respondent. The Petitioners have no concern therewith. The name of Respondent's uncle Pandurang Khade is also appearing in the record of rights of the suit land in possession column along with two others, including the Respondent. As the Petitioners started causing obstruction to the possession of the Respondent, he was constrained to file a Suit simpliciter for injunction along with the Application for interim injunction at Exhibit-5.

4] This Application came to be resisted by the present Petitioners contending *inter-alia* that they are in possession of the suit land. The suit land, which was belonging to Tanubai Patil, is now

owned by them. They have also obtained the Succession Certificate in respect of the Suit land. The said Succession Certificate is not challenged by the Respondent or anyone else, and in such situation, the Respondent has no right to get the relief of interim injunction.

5] The trial Court has, accepting the contentions of the Petitioners rejected the Respondent's application for interim injunction. However, against the said order, when the Respondent approached the Appellate Court, the Appellate Court has allowed the application for interim injunction and restrained the Petitioners from causing obstruction to the possession of the Respondent over the Suit land.

6] While challenging the impugned order of the Appellate Court, the submission of learned counsel for the Petitioners is that admittedly, the Petitioners are the legal heirs of the Tanubai Patil, if one has regard to the genealogy, which is given at page No.40 of the Writ Petition. According to the said genealogy, Tukaram Patil was the original owner of the property. He has two sons by name Rama and Bala. Rama has one son by name Krishna and the Petitioners are legal heirs of Krishna; whereas Bala has one son by name Dadu and Tanubai was the wife of Dadu and therefore, after the death of Tanubai, the land should go the legal heirs of Tukaram, who are the

present Petitioners and hence, as Respondent had no legal right over the suit property, the trial Court has rightly rejected his application for interim injunction. It is submitted that the name of the present Respondent is not at all appearing in 7/12 extract. Even his uncle Pandurang Khade has also not filed any affidavit in support of the case of the Respondent. Respondent has also not challenged the Succession Certificate issued in the name of the Petitioners. In such situation, according to learned counsel for the Petitioners, the trial Court has rightly appreciated the material on record and rejected the application for interim injunction. It was not proper on the part of the Appellate Court, therefore, to interfere in the said discretion exercised by the trial Court and to set-aside the said order.

7] To substantiate this submission, learned counsel for the Petitioner has relied upon the judgment of this Court in the case of *Ganesh D. Daivajna V/s. Prakash S. Salkar*, 2000(3)3 Mh.L.J.347, to submit that even at the time of deciding the application for temporary injunction, the Court has to consider that the possession ought to be a lawful possession, in order to enable the party to seek protection from the Court, by way of equitable relief. Here, in the case, it is submitted that, even accepting that Respondent is in possession of the suit property as it is not referable to the lawful title, the Appellate Court

has committed an error in granting relief of interim injunction to the Respondent.

8] Per contra, learned counsel for the Respondent has supported the order of the Appellate Court by pointing out the material on record, which the trial Court has not considered.

9] The said material clearly pertains to the entries in the 7/12 extract of the Suit land, which go to show that since the lifetime of Tanubai Patil, the Respondent's grandfather Narayan Jivaba Khade, and thereafter, Respondent's uncle Pandurang Khade and two others are cultivating the Suit land and they are in possession thereof. That possession can be traced to the year 1978-79 and at no time these entries in 7/12 extract in the cultivation column, of the Respondent and his family members are challenged at any time, though the Petitioners are very much aware about the same. As pointed out by learned counsel for the Respondent, even in the sugar cane bills, though the Gat No.354 of the Suit land is not mentioned, the land is mentioned by its name as "Tambalychi Jamin". These bills also do show that it is the Respondent and his uncle who are cultivating the Suit land and they are in possession thereof.

10] It may be true that specifically the name of Respondent is

not appearing in 7/12 extract but the entries in 7/12 extract go to show that the name of Pandurang Khade is appearing along with two others. It is not the case of the Petitioners that any other third person apart from Pandurang Khade or the Respondent was ever in possession of the Suit land.

11] Therefore, *prima-facie*, at this stage, as observed by the Appellate Court, the entries in the 7/12 extract which are standing in the name of Respondent and his family members having the presumptive value, unless rebutted at the time of trial, specifically going in favour of the Respondent. It is pertinent to note that the Petitioners have not challenged the said entries, though according to them, they have obtained the Succession Certificate to the properties of Tanubai Patil. Until those entries are set-aside and the presumption is rebutted, at this interim stage, such possession needs to be protected from any unlawful attempt of dispossession.

12] Moreover, this possession of Respondent also cannot be called as that of an encroacher or of a totally rank trespasser. It is pertinent to note that, if during the lifetime of Tanubai Patil also, Respondent and his family members were cultivating the Suit land and that possession is for more than 30-40 years, then it is a 'settled possession'. Law requires that such settled possession needs to be

protected against any unlawful attempt of dispossession.

13] As to judgment of this relied upon by learned counsel for the Petitioners to submit that possession ought to be lawful to enable the party to seek protection from Court by way of equitable relief, it necessarily implies that the possession, which is sought to be protected should not be recent one or that of the encroacher or the trespasser. There has to be some lawful reference thereto. Here, in the case, having regard to the settled possession of the Respondent and his family members since the lifetime of original owner Tanubai, it cannot be said that the Appellate Court has committed any error in protecting such possession, by passing the impugned order of temporary injunction in favour of the Respondent.

14] The Writ Petition therefore being without merit, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]