

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 804 OF 2019

Chandkhan Imamkhan Pathan,
Age : 75 years, Occu. Agriculture,
Residing at Village Yeota, Tq. Jafrabad,
District Jalna

.. Petitioner

Versus

1] Sanjay Vishwanath Shewale,
Aged : 45 years, Occupation : Agriculture

2] Sheelabai w/o Sanjay Shewale,
Aged : 40 years, Occupation : Agri. & Household,

Both R/o Yeota, Tq. Jafrabad,
Dist. Jalna

.. Respondents

...

Mr. A.S. Shejwal, Advocate for petitioner
Mr. Paresh B. Patil, Advocate for respondent on.1-*caveator*

...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 05-02-2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties finally, by consent.

2. Learned counsel for petitioner and respondents have vehemently submitted their cases purporting to make reference to various aspects involved in the matter. While learned counsel for petitioner Mr. Shejwal scathingly attacks judgment of appellate

court, learned counsel for respondent no. 1 Mr. Patil strongly supports the decision.

3. Petitioner is original defendant in regular civil suit bearing no. 69 of 2016 instituted by respondents – original plaintiffs seeking restraint on defendant from causing obstruction to plaintiffs' possession in respect of property bearing *gat* no. 235 admeasuring about 7 *Acre*, 10 *Guntha* situated at village Yeota, taluka Jafrabad, district Jalna showing on the northern side of it a road, contending that,

Said land has been purchased by them way back in 1997 under two registered sale deeds from Sakharam Saluba Mapari and Bhika Saluba Mapari and since then they are in continuous undisturbed possession of the same.

Defendant-petitioner herein has no concern with said land and yet, in 2010, the defendant-petitioner instituted regular civil suit bearing no. 107 of 2010 for cancellation of sale deeds executed by Saluba Mapari and Bhika Mapari in 1997 in favour of present plaintiffs and for declaration of title in respect of entire portion. Said suit had been dismissed for want of prosecution.

Even before aforesaid suit, present petitioner had filed regular civil suit bearing no. 104 of 1981 against Bhika Mapari and Sakharam Mapari seeking specific performance and injunction in respect of portion of 4 *Acres* from said *gat* no. 235 and the same had been decreed in 1981. The Mapari brothers had preferred appeal bearing no. 53 of 1995. Said appeal had been dismissed-in-default, however, the same had been restored and allowed, setting aside *ex-parte* decree in regular civil suit no. 104 of 1981 and directing said suit to be restored. Vide order dated 17-12-2015 passed in miscellaneous civil application no. 7 of 2014, regular civil suit no. 104 of 1981 had been restored and renumbered as regular civil suit no. 1 of 2016 and the same is pending.

Present petitioner-defendant is meddling with their possession over aforesaid area of land which the plaintiffs have purchased from Mapari brothers necessitating plaintiffs to file above referred regular civil suit bearing no. 69 of 2016.

4. Petitioner-defendant had appeared and filed his written statement in regular civil suit no. 69 of 2016 denying the claims made in plaint. It is claimed by him, regular civil suit no. 107 of 2010 had not been prosecuted since earlier suit no. 104 of 1981

(renumbered as regular civil suit no. 1 of 2016) had been restored in 2015. It is claimed by petitioner that he is in possession of entire area and has disputed four boundaries given in sale deeds in favour of plaintiffs.

5. In the application for temporary injunction (**Exhibit-5**) at the behest of plaintiffs, trial court had considered vide order dated 06-07-2017, that in 1980, vendors of the respondents-plaintiffs had sold the property from *gat* no. 235 from northern side and, in such a case, sale deed of 1997 in respect of the property on northern side in favour of respondents-plaintiffs is not a viable proposition. It has further been considered that while the petitioner-defendant has disputed, the boundaries referred to in the plaint and that the plaintiffs are in possession under transaction with Mapari brothers.

6. The trial court has also considered that while the sale deeds in favour of plaintiffs are of 1997, correction in same had taken place almost after 15 years and that plaintiffs have not referred to same. Trial court considered it improbable that error would creep in, in both the sale deeds of 1997. Trial court had specifically referred to that in the suit of 2010 by present defendant against present plaintiffs, written statement of present

plaintiffs in said suit has not been placed on record and it is not clear as to whether there is any admission by defendant.

7. Whereas, appellate court appears to have ignored contentions of present petitioner-defendant about agreement of sale of 1980 and northern portion being purchased by him thereunder from *gat* no. 235. It is not clear as to with reference to what appellate court has observed, there is admission of present petitioner. It appears to have been considered by appellate court that while petitioner in his suit of 2010, has approached the court seeking possession, same has not been considered by trial court.

8. On the whole, it appears that the matter will have to be re-appreciated by appellate court since order impugned appears to be deficient in respect of the claims made by present respondents-plaintiffs as also about claims by petitioner-defendant about purchase and the proceedings of 1981.

9. In the circumstances, impugned order dated 09-04-2018 passed by learned *ad hoc* district judge-3, Jalna in miscellaneous civil appeal no. 59 of 2017 is set aside. Miscellaneous civil appeal no. 59 of 2017 stands restored for decision afresh, considering all aspects involved in the matter.

10. Needless to refer to that observations appearing in this order are at interlocutory stage of suit and are only of *prima facie* nature and shall not have any influence in decision making in appeal.

11. Miscellaneous civil appeal no. 59 of 2017 to be proceeded with expeditiously and same be disposed of within a period of four (4) months from date of receipt of writ of this order.

12. Writ petition is disposed of.

13. Rule made absolute accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/