

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,**BENCH AT AURANGABAD****WRIT PETITION No. 8802 / 2018**

1. Vaijnath S/o Sambnaik Gajre,
age 73 years occupation retired
R/o B-40/4, near Railway Gate, Shivaji Nagar,
Aurangabad.
2. Gangadhar S/o Sambnaik Gajre,
age 68 years occupation nil
R/o Vidyanagar, near Ganpati Temple,
Parbhani Taluka & Dist. Parbhani.

...Petitioners

VERSUS

Kisan S/o Chokhoba Gaikwad,
age 71 years occupation agriculture
R/o Budha Nagar, Manwat Tal. Manwat Dist. Parbhani

...Respondent

Mr. P.N. Kalani, Advocate for petitioners
Mr. K.B. Jadhav, Advocate for respondent.

CORAM : ROHIT B. DEO, J.

DATE : 3rd January, 2020

J U D G M E N T :

1. Heard.
2. Rule. Rule is made returnable forthwith. Heard finally by consent.
3. Petitioners are the plaintiffs in Regular Civil Suit No. 60 of 2012, brought for decree of perpetual injunction.

4. The suit is resisted by the respondent/defendant, who *inter alia* contended that he is a tenant in possession as regards 3H.40R land, which is the subject matter of the suit. The written statement is substantially not entirely founded on the assertion that the defendant is a protected tenant and reference is made to certain proceedings initiated under the Tenancy Law.

5. In view of the pleadings in the written statement, the plaintiffs took out a motion for framing an additional issue regarding protected tenancy. This application is rejected by the order impugned on the ground that since the suit is for injunction simpliciter, the issue of protected tenancy would not arise.

6. The order impugned is unsustainable in law.

7. The fact that the suit is for injunction simpliciter, would not imply that the issue of tenancy would not fall for consideration at all. The Trial Court would have to consider the facts of the case and then record a categorical finding on, "Whether the issue of tenancy would arise ? "

8. It would be pertinent to reproduce the following paragraphs from the decision of the Division Bench in ***Bhagwanrao s/o Jijaba Auti Vs. Ganpatrao Mugaji Raut and another, 1987 (3)***

Bom. C.R. 258 :

" 24. [Section 37](#) of the Specific Relief Act, 1963, provides that temporary injunctions are such as are to continue until a specified time, or until the further order of the Court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908, while a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. [Section 37\(2\)](#) is the key to the entire controversy. Even in a suit for a permanent injunction simpliciter, where rival contentions as regards possession are made, it has to be considered on merit as to who has a better right for possession. Obviously, when a plaintiff claims to be a tenant and is in possession, and it is established that he is in possession on the date of the suit, perpetual injunction can be granted in his favour, only if the defendant has no better right than him (Plaintiff). If the defendant is the owner of the property, the plaintiff as a tenant in the present state of tenancy legislation has certainly a better right than the owner for possession, provided he establishes tenancy rights. It is only in such a case that perpetual injunction can be issued in his

favour. For deciding the issue of perpetual injunction, a question as regards the rights of either the plaintiff or the defendant as a tenant is necessarily involved and has to be decided first, and when such a question is to be dealt with only by the authority under the Tenancy Act, Civil court's jurisdiction to consider and decide such a question is barred and a reference becomes absolutely necessary.

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26. *Where there is a duty enforceable by law, whether express or implied, whether arising out of a contract or otherwise, the relief of injunction can be granted, unless considerations of expediency or convenience determine the discretion of the Court otherwise. Perpetual injunction can be granted where right exists or where right is created, or where right is cognizable by law. It can be granted to prevent the infringement of that right. When a tenant comes to the Court contending, inter alia, that he is a tenant-in-possession and that there is a real threat to his possession from the defendant, who may either be a trespasser or a land-owner, an injunction to protect his possession can be granted, provided the tenant establishes the alleged right of tenancy, if it is disputed. He has*

to prove that he is not only in possession but that his possession is referable to his tenancy right. A corresponding obligation is cast on the defendant, if he is an original owner, not to disturb the right of the plaintiff in respect of possession. A decree can be passed only when the tenancy right of the plaintiff is established in such a situation. To grant relief only on the basis of possessory title would cause injustice, may led to multiplicity of proceedings and in some case deprive the rightful owner of enjoyment of the property.

27. *It was contended by Shri Bora, the learned Counsel for the defendant, that once it is established that the plaintiff is in exclusive possession then injunction restraining the defendant from dispossessing the plaintiff must be issued as a matter of course. We are, however, of the opinion that an injunction may not be granted as matter of course in all cases. The conduct of the plaintiff seeking equitable relief of permanent injunction has necessarily to be seen. It must not be tainted with illegality. In other words, the possession alleged by the plaintiff must be a lawful one. The plaintiff cannot also be allowed to seek advantage of his own wrong. The plaintiff must come with clean hands, i.e. in respect of transaction between the parties to the suit. In other words, the plaintiff must be in a position to satisfy the conscience of*

the Court that his own acts and dealings in the matter have been fair, honest and free from any taint of fraud or illegality. A suppression of material fact can be a ground for refusing the relief of permanent injunction. Thus, in a case of plaintiff who claims to be a tenant-in-possession, it is necessary for the Court to satisfy itself that the plaintiff is really a tenant-in-possession and has a legal right to be in possession, and then only a perpetual injunction can be granted. It is, therefore, that when a plaintiff alleges tenancy rights under the Land Reforms Legislation in Maharashtra and other States, the same has to be investigated before a decree for permanent injunction can properly be granted in his favour. Similar is the case when a suit for permanent injunction is resisted by a tenant. A permanent injunction would not ordinarily be granted against a tenant who has a better right than plaintiff. This, however, would depend on the establishment of the tenancy right, and which can be decided only in Tenancy Courts.

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32. *Having, therefore, considered the conflicting views in the field, we are of opinion*

that in a suit simpliciter for permanent injunction, it is necessary to frame an issue of tenancy either in favour of the plaintiff or the defendant, as the case may be."

9. It is, therefore, trite law that even in a suit for permanent injunction simpliciter, it may be necessary for the Court to frame an issue of tenancy since ultimately one of the considerations for grant or refusal of permanent injunction qua the possession of the suit property, would be who has a better claim to possession.

10. The order impugned is, therefore, set aside and the matter is remitted to the Trial Court to hear the parties and decide the application for framing an additional issue in the light of the articulation by the Division Bench in the case of ***Bhagwanrao Jijaba Auti*** (supra).

11. Rule is made absolute in above terms.

(ROHIT B. DEO)
JUDGE