

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

WRIT PETITION NO. 5946 OF 2021

- 1] Ramesh S/o Uttamrao Bhusare
Age 45 years, Occu.Agriculture
R/o C/o Nana Bansidhar Raut,
Near Shri Saraswati Bhuwan Vidyalaya,
Bidkin, Tq. Paithan, Dist.Aurangabad
Through his POA Holder :
Vishnu S/o Baban Thange,
Age 31 years, Occu.Agriculture,
R/o Krushnapur, Tq. Paithan,
Dist.Aurangabad.
- 2] Sanjaykumar S/o Shrikisan Ladwani
Age 43 years, Occu.Agriculture
R/o Plot No.28, Suryanagar,
Bidkin, Tq. Paithan, Dist.Aurangabad.
Died through his L.Rs.
- 2-A] Sonali W/o Sanjaykumar Ladwani
Age 38 years, Occu-Household,
R/o Bidkin, Tq.Paithan,Dist.Aurangabad
- 2-B] Ritesh S/o Sanjaykumar Ladwani
Age 19 years, Occu : Education
R/o Bidkin, Tq. Paithan, Dist.Aurangabad
- 2-C] Rohit S/o Sanjaykumar Ladwani
Age 17 years, Occu : Education
R/o Bidkin, Tq.Paithan, Dist.Aurangabad
- 2-D] Shrushti D/o Sanjaykumar Ladwani
Age 09 years, Occu Nil
R/o Bidkin,Tq.Paithan,Dist.Aurangabad
- 3] Ashok S/o Maruti Hiwale
- ..APPLICANTS
[ORIG.PETITIONERS]

Age 44 years, Occu-Agri
R/o Kaikadi Balli, Bidkin
Tq.Paithan,Dist.Aurangabad.

.. PETITIONERS

VERSUS

1] Shri Saraswati Bhuwan Education Society
Aurangabad (A Charitable Trust Registered
under the Provisions of Maharashtra Public
Trust Act),Through General Secretary:
Dr.Nandkumar Govind Ukadgaonkar,
Age 71 years, Occu-General Secretary,
R/o Shri Saraswati Bhuwan Secondary &
Higher Secondary School
(Saraswati Bhuwan Vidyalaya)
Bidkin, Tq. Paithan, Dist.Aurangabad.

2] Shri Saraswati Bhuwan Secondary &
Higher Secondary School
(Saraswati Bhuwan Vidyalaya)
Bidkin, Tq. Paithan, Dist.Aurangabad.
Through its Headmaster :
Madhukar Sahebrao Birhare
Age 46 years, Occu.Headmaster
R/o Saraswati Bhuwan Vidyalaya,
Bidkin, Tq. Paithan,Dist.Aurangabad.

RESPONDENTS

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Mr. J.M.Murkute,Advocate for the petitioners
Mr. P.F.Patni, Advocate for respondent Nos 1 and 2

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CORAM : MANGESH S. PATIL, J.
DATE : 23.08.2021

ORAL JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned
advocate for the respondents waive service. With the consent of both the

sides the matter is heard finally at the stage of admission.

2] The petitioners are the original defendants in a Special Civil Suit instituted by the respondents. They are challenging the interim mandatory injunction granted by the learned Civil Judge on the application (Exh. 5) and confirmed by the District Court dismissing petitioners' Appeal.

3] The facts in brief leading to the filing of this petition are to the effect that the respondents averring that the suit property having been gifted to them by one Uttam Rambhaji Bhusare and Dagdu Rambhaji Bhusare by a registered gift deed dated 1.10.1992 asserted their title and possession. The petitioner No. 1 happens to be a son of one of the donors. By the sale deed dated 29.9.2020 he sold the suit property to the petitioner Nos. 2 and 3. Having come to know about it the respondents filed the Civil Suit on 25.11.2020 seeking a declaration that the sale deed is null and void and claimed perpetual injunction restraining the petitioners from disturbing their possession and from creating any third party interest. In addition the respondents also claimed mandatory injunction directing the petitioner Nos. 2 and 3 to remove the temporary tin structures installed on the suit property.

4] By way of application (Exh. 5) the respondents claimed temporary injunction not only in consonance with their main relief of perpetual injunction but also in tune with their main relief regarding mandatory injunction. The request of the respondents for temporary relief both in respect of temporary injunction not to alienate and not to disturb possession as also temporary mandatory injunction has been found favour with the two Courts below. Hence, this Writ Petition.

5] The learned Advocate Mr. Murkute for the petitioners would vehemently submit that they have been disputing the very gift deed. Therefore, so long as its genuineness is not established the respondents are not entitled to claim any ownership over the suit property on that basis. The learned Advocate would further submit that there are specific recitals in the plaint itself admitting possession of the petitioners over the suit property. The respondents have specifically mentioned that the petitioner Nos. 2 and 3 have entered into the possession and erected tin shop. The respondents ought to have claimed possession rather than mandatory injunction and consequently, no temporary mandatory injunction could have been granted. The learned Advocate referring to the decision in the case of **Misrilal Misra V/s Ikram Husein; BLR 1978(80) 659** submits that by virtue of the provisions of Order XXXIX Rule 1 Section 94(e) of the C.P.C. and Sections 38 and 39 of the Specific Relief Act, in any event, the facts and circumstances of the matter in hand are such that no temporary mandatory injunction could have been granted by the two Courts below legally. Though the respondents are claiming to have derived title to the property on the basis of the gift deed there is no material to show that since thereafter they have taken any steps to give effect to it. The revenue record or the municipal record has never been mutated pursuant to such gift and therefore, this was an important circumstance which having been overlooked by the Courts below, the respondents were not entitled to temporary mandatory injunction.

6] The learned Advocate Mr. Patni for the respondents supports the orders of the Courts below. He submits that the document being relied upon by the respondents is a registered gift deed and therefore, a legitimate

presumption is available to be drawn as has been precisely noted by the Courts below. He would further submit that the donors have never disputed the execution of the registered gift deed at any point of time and even the petitioner No. 1 who happens to be son of one of the donors has never questioned it. Since the document is compulsorily registerable, knowledge is attributable to the world at large and even till date the petitioner No. 1 has never questioned it. The learned Advocate Mr. Patni would further demonstrate that even conduct of Uttam, one of the donors, is relevant. As has been noted by the learned Civil Judge in the impugned order in paragraph No. 101, while disposing of a portion of the property bearing city survey No. 145 by executing a registered sale deed dated 8.2.2002 while showing the boundaries, it has been specifically mentioned that the portion under sale is bound by the portion gifted to the respondents towards West. It is therefore, apparent that the *factum* of such gift was admitted by donor Uttam even 10 years after execution of the gift deed. He would further point out that the learned Civil Judge has elaborately discussed and pointed out as to how going by the extent of the entire City Survey No. 145, the suit property can easily be carved out. Number of sale deeds have been executed by Uttam disposing of different portions of the same City Survey number to various persons. The learned Advocate Mr. Patni would further submit that the respondents have not admitted possession of the petitioners over the suit property. They have specifically averred that the petitioners have surreptitiously trespassed over the suit property during the period of pandemic taking advantage of closure of the school being run by the respondents on the adjoining property. The suit property has been under use of the respondent which runs a school for preparation of mid day meals and even for toilets for the use of girl students.

7] Taking into consideration all the aforementioned aspects, the learned Civil Judge has also specifically considered the balance of convenience between larger interest of the girl students as against the private interest of the petitioners as individuals. He would then submit that though the relief of mandatory injunction in temporary form is to be granted in exceptional cases, the Courts below have clearly demonstrated as to how the matter in hand presents one such exceptional circumstance.

8] Lastly, the learned Advocate Mr. Patni would submit that inspite of a specific undertaking given before lower Court not to create any third party interest, the petitioners have indulged in such act and have tried to create third party interest by leasing out some shops from the tin structures hurriedly erected on the suit property. He would therefore, submit that the two Courts below have concurrently arrived at a conclusion as to how the respondents are entitled to now only temporary injunction restraining the petitioners from creating third party interest and obstructing respondents possession but even holding them entitled to temporary mandatory injunction.

9] I have carefully considered the rival submissions and the impugned orders as also the papers. At the outset one needs to begin by reminding ourselves that the petitioners are invoking the writ jurisdiction of this Court while challenging concurrent orders of the two Courts below. There is inherent limitation for this Court to exercise such jurisdiction. It is only if it could be demonstrated that the two Courts below have grossly erred in appreciating the facts and the law and their decisions suffer from perversity and arbitrariness that this Court is expected to intervene in exercise of writ jurisdiction. If the decisions taken by the Courts below are reasonable and

based on plausible appreciation of the material on the record, this Court is not expected to intervene merely because a different view is available to be taken.

10] Again one needs to bear in mind that a temporary injunction in mandatory form which has the effect of granting main relief can only be granted in exceptional circumstances and in the rarest of rare case as has been rightly borne in mind by the learned Civil Judge and the lower Appellate Court.

11] So far as the dispute pertaining to the gift deed is concerned, it is a matter of record that it is a registered gift deed executed by the father of the petitioner No. 1 Uttam and Uttam's brother. It was executed in the year 1992. It is a document which is compulsorily registerable under the Registration Act. Its effect is that of attributing its knowledge to the entire world.

12] It is also pointed out by the learned Civil Judge that Uttam executed a sale deed of a portion of the very same CTS No. 145 to one Draupadabai and while showing boundaries the suit property has been shown to be lying to the West of the property under sale. Since this sale deed was executed in the year 2002, after about 10 years of execution of the gift deed, this conduct of Uttam further confirms and ratifies execution of the gift deed.

13] At no point of time the donors ever chose to challenge the gift deed and even the petitioner No. 1, for that matter, never disputed it till filing of the suit. If such is the state of affairs, as far as the title to the suit property is concerned, *prima facie* it would vest in the respondents.

14] As far as the aspect of possession is concerned, there would be a presumption that the possession would follow title. Once it is *prima facie* found that the title to the suit property vests in the respondents by virtue of the registered gift deed, it will have to be assumed that they are in possession since the date of its execution. It is for the petitioners to prove otherwise. Mere inaction on the part of the respondents to get the municipal or revenue record mutated pursuant to the gift deed would not be sufficient to discharge the burden.

15] Going by the pleadings, respondents have nowhere admitted petitioners' possession over the suit property. It has been specifically averred that taking advantage of the fact that the respondents' school was closed for Diwali vacation, the petitioners removed the tin compound erected around the suit property and committed trespass in the night of 12/11/2020. On the very next day i.e. 13.11.2020 the respondents approached the police but no action was taken by the police authorities. Again they committed trespass on 17.11.2020 and demolished the ladies toilets and erected ready made tin structures over the suit property. This averment in paragraph No. 14 of the plaint cannot in any circumstances be regarded as admission by the respondents of petitioners' possession. The submission of petitioners' Advocate relying upon these averments and seeking to treat it as an admission of possession needs to be discarded.

16] Conversely, there is absolutely no material on the record to demonstrate that the petitioner No. 1 had been in possession of the suit property for all this period since execution of the gift deed which he could have legally handed over to the other petitioners to whom he has sold it by

the impugned sale deed dated 29.9.2020.

17] The law as regards grant of temporary injunction in mandatory form is regulated by Section 94 of the C.P.C. and Section 38 of the Specific Relief Act. It cannot be issued to change the situation at the spot or the date of the Suit. However, it can certainly be issued to bring about a *status quo ante*. When like in the matter in hand, the facts are peculiar and warrant it. The petitioner No. 1 has sold the suit property to the petitioner Nos. 2 and 3 in the month of September 2020 and there are allegations about they having trespassed over the suit property in the month of November 2020. It is not the case of the petitioners that already the tin structures were in existence over the suit property and its possession was handed over to the petitioner Nos. 2 and 3 after execution of the sale deed. It is quite apparent that the situation at the suit property has undergone change immediately before filing of the suit on 25.11.2020. The circumstances are indeed exceptional making the case rarest of rare one as has been elaborately discussed and pointed out by the two Courts below, which are sufficient to grant temporary injunction in mandatory form.

18] True it is that granting such relief is akin to grant of the main relief of mandatory injunction. However, when the facts and circumstances as discussed hereinabove are such that the Courts cannot turn a blind eye to the happenings immediately before filing of the suit, no exception can be taken to the observations and conclusions of the two Courts below holding the respondents entitled to temporary mandatory injunction. In this regard it is also important to note that the petitioners seem to be conducting themselves in a manner and going to the extent of defeating the rights of the respondents.

As is pointed out above the petitioner Nos. 1 executed the impugned sale deed in favour of the petitioner Nos. 2 and 3 in the month of September 2020 and even after filing of the suit on 25.11.2020, couple of persons claiming to be the lessees of the shops erected over the suit property by the petitioner Nos. 2 and 3 with the leave of the Court, challenged the self-same order passed by the learned Civil Judge by preferring appeals before the lower Appellate Court and in fact even their appeals were tagged together with the petitioners' appeals and have been dismissed by this common impugned order which is common in all these appeals. This clearly demonstrates *mala fides* on the part of the petitioners to defeat the respondents' claim.

19] The decision in the case of **Misrilal Misra** (Supra) was rendered in the facts and circumstances peculiar to the matter in that case. The facts and circumstances discussed hereinabove in the matter in hand are peculiar. In that matter, the plaintiffs were admitting that the defendant was in possession of the suit property on the date of the suit. In the matter in hand, as is demonstrated by the Courts below and as has been observed hereinabove, the respondents have never admitted petitioners' possession which they have described to be a trespass and the circumstances clearly justify their such stand. Therefore, the petitioners are not entitled to take any benefit from the decision in the case of **Misrilal Misra** (Supra).

20] All these circumstances have been borne in mind by the two Courts below while passing the impugned order. The decisions by no stretch of imagination can be said to be either perverse or arbitrary so as to enable this Court to interfere in exercise of the writ jurisdiction.

21] The Writ Petition has no merit and it is liable to be dismissed.

22] The Writ Petition is dismissed. It is made clear that the observations made hereinabove are only for the limited purpose of deciding the Writ Petition and the trial Court shall not feel influenced by those.

23] The Rule is discharged.

[MANGESH S. PATIL, J.]

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