

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3365 OF 2022

1. Ambadas s/o Dashrath Malusare,
Age- 73 years, Occ- Agriculture.
2. Sambhaji s/o Ambadas Malusare,
Age- 45 years, Occ- Agriculture.
3. Pandurang s/o. Ambadas Malusare,
Age- 42 years, Occ- Agriculture.
4. Prashant s/o. Pandurang Malusare,
Age- 21 years, Occ- Agriculture.
5. Pramod s/o. Pandurang Malusare,
Age- 18 years, Occ- Agriculture,
6. Usha Sambhjaji Malusare
Age- 38 years, Occ- Agriculture.
7. Mangal Pandurang Malusare,
Age- 35 years, Occ- Agriculture.
All R.o. Ajnuj, Pawarwadi,
Tq. Shrigonda, Dist. Ahmednagar.
8. Sonu @ Ranjeet Balu Gaikwad,
Age- 22 years, Occ- Agriculture,
R.o. Jinti (Gaikwad Vasti)
Tq. Karmala, Dist. Solapur.
9. Sampat s/o. Babu Giramkar
Age- 52 years, Occ- Agriculture,
10. Alka Sampat Giramkar
Age- 48 years, Occ- Agriculture.

11. Ganesh Sampat Giramkar
Age- 32 years, Occ- Agriculture,
Nos. 9 to 11 R/o. Ajnuj Malwadi,
Tq. Shrigonda, Dist. Ahmednagar.

PETITIONER

[Orig. Defendant No 1 to 11]

VERSUS

1. Meera w/o. Raosaheb Giramkar
Age- 35 years, Occ- Agriculture,
R/o. Ajnuj Malwadi, Tq. Shrigonda,
District- Ahmednagar.
2. Dattatraya s/o. Arjun Suryawanshi
Age- 45 years, Occ- Agriculture,
R/o. Jainkwadi, Tq. Baramati,
Dist. Pune.

RESPONDENTS

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Mr. Rahul Tambe, Advocate for the petitioners.
Mr. Dilip Rode for Respondent No. 1.

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 9th MARCH, 2022

PRONOUNCED ON: 24th MARCH, 2022

JUDGMENT :

1. The Petitioners are aggrieved by the order passed by the Civil Judge Junior Division, Shrigonda, below Exhibits- 22 and 24 in Regular Civil Suit No. 317/2020.

2. Regular Civil Suit No. 310/2019 is filed by the Petitioner No. 1 against the Petitioners No. 2 to 11 and Respondents No. 1 and 2 for partition, separate possession, declaration and injunction in respect of ancestral property mentioned in the plaint. The defendants appeared in the suit and contended in the written statement that they have sold part of the suit property on 11.02.2020 to respondents No. 1 and 2. The petitioner No. 1 amended the suit and arrayed the respondents No. 1 and 2 as defendant Nos. 10 and 11 and sought relief that the sale deed executed in favour of respondents by the original defendants No. 1 and 2 dated 10.02.2020 and 11.02.2020 be declared null and void as the same is hit by principle of *lis pendens* and the same is not binding on 1/6th share of the petitioner No. 1. The amended copy of the plaint was filed on 18.02.2022.

3. The respondents filed Regular Civil Suit No. 317/2020 seeking permanent injunction in respect of portion of Gut No. 245 purchased by them from defendants No. 1 and 2 in Regular Civil Suit No. 310/2019. The said Gut No. 245 is also mentioned as suit property in Regular Civil Suit No. 310/2019. The petitioners resisted this suit by filing the written statement.

4. The petitioners filed application Exhibit-22 seeking appointment of court commissioner for bringing on record actual and factual position of the suit property in Regular Civil Suit No. 317/2020. The same is rejected by the trial Court holding that the said suit is filed for injunction and it is not for removal of encroachment and it is not necessary to inspect the suit property. This order is impugned in the present petition.

5. The petitioners also filed application Exhibit-24 under Section 10 of Code of Civil Procedure seeking stay to the Regular Civil Suit No. 317/2020 contending that they have earlier filed Regular Civil Suit No. 310/2019 and the plaintiffs in Regular Civil Suit No. 317/2020 are also arrayed as parties in Regular Civil Suit No. 310/2019, wherein they can contest the said suit by filing written statement. Since in both the suits the suit property is same and both the suits are within the jurisdiction of the trial Court, in view of pendency of Regular Civil Suit No. 310/2019 the subsequent suit i.e. Regular Civil Suit No. 317/2020 be stayed, till the decision of Regular Civil Suit No. 310/2019. This application is rejected by the trial Court. This order is also impugned in the present petition.

6. Heard the rival submissions of learned advocate for the Petitioners and learned advocate for Respondent No 1. Admittedly, Regular Civil Suit No. 310/2019 is filed by the petitioner No. 1 seeking partition, separate possession and injunction claiming that the suit property is ancestral joint family property and the respondents tried to take forcible possession of the property. The petitioner therefore, will have to prove his case that the respondents tried to take forcible possession of the property. In these facts it is necessary to bring on record actual and factual position of the suit property by appointment of court commissioner. The trial Court has rightly rejected the application Exhibit-22 holding that the Regular Civil Suit No. 317/2020 is filed simplicitor for injunction and not for removal of encroachment. Therefore, it is not necessary to appoint the court commissioner. By relying on the decision in *Dhondiram Nivrutti Pawar Vs. Laxman Khashaba Pawar* (Civil Writ Petition No. 1196/2017), the trial Court held that the machinery of the Court cannot be used for collecting evidence. The approach of the trial Court in rejecting the application Exhibit-22 is just, legal and proper and there is no illegality or perversity in the order passed below Exhibit-22.

The challenge raised by the Petitioner to the impugned order passed below Exhibit-22 therefore fails.

7. So far as the impugned order passed below Exhibit- 24 is concerned, while rejecting the application the trial Court has held that the respondents are not parties in Regular Civil Suit No. 310/2019. The impugned order is passed on 18.02.2022 and it appears from the record that the amendment application is filed by the petitioner No. 1 on the same day. The respondents are defendants No. 10 and 11 in the amended plaint. However, the trial Court has held that the respondents/plaintiffs are not parties to Regular Civil Suit No. 310/2019. The subject matter of Regular Civil Suit No. 317/2020 and Regular Civil Suit No. 310/2019 are different and both the parties are not litigating under the same title. It further held that there is nothing on record to show that the continuance of present suit would cause prejudice to the defendants.

8. The above finding recorded by the trial Court are contrary to the record. The respondents are defendants No. 10 and 11 in

Regular Civil Suit No. 310/2019. The subject matter of Regular Civil Suit No. 317/2020 i.e. Gut No. 245, admeasuring 5 Hectare 49 R, is also the subject matter in Regular Civil Suit No. 310/2019. The Petitioner No. 1 i.e. the plaintiff in Regular Civil Suit No. 310/2019 has claimed a declaration against the respondents that the sale deed executed in their favour is hit by the principle of *lis pendens* and the same be declared null and void and not binding on 1/6th share of the petitioner No. 1. Thus, it is clear that the Regular Civil Suit No. 310/2019 is previously instituted and Regular Civil Suit No. 317/2020 is subsequently instituted. The matter in issue in subsequent suit (Regular Civil Suit No. 317/2020) is directly and substantially in issue in previous suit (Regular Civil Suit No. 310/2019). The parties to both the suits are also same. The trial Court before whom the previous suit is pending has jurisdiction to grant relief claimed in subsequent suit. In that view of the matter, the trial Court ought to have allowed the application Exhibit-24 filed by the petitioners. The impugned order passed below Exhibit-24 is therefore, unsustainable and same is hereby quashed and set aside. The application Exhibit-24 is allowed.

9. Rule is made absolute in above terms with no order as to costs.

[NITIN B. SURYAWANSHI]
JUDGE