

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5071 OF 2021

BABAN SOPAN NIKALJE
VERSUS
UTTAM WAMAN BANSODE AND OTHERS

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Advocate for Petitioner : Mr. Anant Deokate h/f. Mr. S.G. Kawade
Advocate for Respondents No. 1 to 10: Mr. N.S. Tekale

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 11th JULY, 2022

ORDER :

. The petitioner by this petition impugns the order dated 21.01.2021, passed by the learned Civil Judge, Junior Division, Bhoom, below Exhibit-5 in Regular Civil Suit No. 507/2020, which is confirmed by the District Court in Miscellaneous Civil Appeal No. 04/2021.

2. The petitioner is the plaintiff who has filed suit for declaration and injunction. The suit is resisted by the respondents/original defendants. Along with the suit application Exhibit-5 for temporary injunction is filed. After hearing the parties, the Trial Court rejected the application and said rejection order is confirmed by the Appellate Court. Hence, the present petition.

3. Heard the learned advocate for the petitioner and learned advocate for the respondents.

4. It is not in dispute that on the basis of compromise decree passed in Regular Appeal No. 114/1979, predecessor of petitioner was given 5 Acres 10 Ghunta land out of western portion of survey no. 61 abutting to Banganga project. A portion of 2 Acres 30 Ghunta towards eastern side was given to the respondents. Compromise further mentions that both the parties shall measure their own area and if during the measurement it is found that some excess area is received by either of the parties, the excess area shall be distributed equally amongst them. On the basis of this compromise, decree is passed. Mutation entries are effected pursuant to the said compromise decree. In this background, the petitioner was constrained to file present suit seeking declaration and injunction in respect of said suit property, admeasuring 5 Acres 10 Ghunta i.e. 2 Hectare 10R.

5. While rejecting the injunction application filed by the petitioner the Trial Court as well as the first Appellate Court have held that in terms of compromise, no measurement is carried out by either of the parties. Thus, survey no. 61 in which the suit

property is situated is not measured. Some of the portion from survey no. 61 has been acquired for Banganga project and for road. Certificate issued to the predecessor of the petitioner as well as will deed which is claimed to be executed by the grandfather of the petitioner in favour of his mother do not mention boundaries. Though, 7/12 extract and mutation entry is relied upon by the petitioner, the same is not sufficient to hold that the petitioner is in possession of suit property.

6. Both the Courts while rejecting application Exhibit-5 have failed to take into consideration the compromise decree passed in Regular Appeal No. 114/1979. The boundaries are already described in the compromise. As per the compromise decree, suit property admeasuring 5 Acres 10 Ghunta is given to Tanubai. So also, 2 Acres 30 Ghunta is given to the respondents. Though, clause no. 4 of said compromise decree mentions that the parties shall carry out measurement of their own areas and if some excess area is found to be in possession of either of the parties, the same should be divided equally between the parties, but that does not mean that the area 5 Acres 10 Ghunta which was allotted to Tanubai was required to be measured, so as to, prove possession of the petitioner. Both the Courts below have

misread and misconstrued the clauses of the compromise and thereby erred in coming to a conclusion that in absence of measurement it is not possible to accept that the petitioner is in possession of suit property. Since, both the Courts have failed to consider that there is *prima facie* case in favour of the petitioner and balance of convenience lies in his favour and irreparable loss would be caused if injunction is refused to the petitioner. The impugned orders therefore cannot be sustained and same are liable to be quashed and set aside. In the result, writ petition is allowed in terms of prayer clause 'B'.

7. The impugned order dated 11.02.2021 passed by learned District Judge-1, Bhoom, in Miscellaneous Civil Appeal No. 4/2021, confirming the order dated 21.01.2021 passed by the learned Civil Judge, Junior Division, Bhoom, below Exhibit-5 in Regular Civil Suit No. 504/2020, is hereby quashed and set aside.

8. Application Exhibit-5 is allowed.

9. No costs.

[NITIN B. SURYAWANSHI, J.]