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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3943 OF 2022

Ajay Amrutlal Bora,
Age – 57 years, Occ – Business
R/o Sadhana Agency, Market Yard,
Ahmednagar, District - Ahmednagar

PETITIONER

VERSUS

Ajit Anil Aavasrkar
Age – 31 years, Occ – Business
R/o Near Datta Mandir, Aavsarkar Mala
Wakode Road, Ahmednagar
District – Ahmednagar

RESPONDENT

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Mr. S. P. Brahme h/f Mr. Shaikh Mazhar A. Jahagirdar, Advocate
for the petitioner

Mr. V. D. Hon, Senior Advocate i/b Mr. A. V. Hon, Advocate for
the respondent

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 19th APRIL, 2022

ORDER :

1. This petition, filed under Articles 226 and 227 of the Constitution of India, takes exception to the order dated 9th February, 2022 passed by District Judge -4 Ahmednagar in Miscellaneous Civil Appeal No. 57 of 2021.

2. The petitioner – original plaintiff has filed Special Civil Suit No. 159 of 2021 seeking declaration that the plaintiff be declared owner of Plot No. 52 admeasuring 2400 square feet out of which

on western there is construction on the area of 1110 square feet (hereinafter for short "the suit property"), by way of adverse possession and seeking cancellation of sale deed dated 17th June, 2021 executed by original defendants No.1 to 4 in favour of defendant No.5 (respondent herein) and for perpetual injunction that defendant No. 5 should not disturb the peaceful possession of the petitioner over the suit property, where the petitioner is running Sadhana Agency. Along with the plaint, the petitioner filed application for temporary injunction (Exhibit-5).

The petitioner has averred in the plaint that the petitioner that initially the suit property was owned by Bora family. Defendants No.1 to 4 are the members of the Bora family. Bora family, since beginning, was running business of fertilizers, seeds, pesticides, insecticides etc. The suit property was originally owned by Shobhachand Kundanmal Bora, who sold it to Popatlal Ganeshlal Bora in the year 1990. Amrutlal Ganeshmal Bora and Rajendra Amrutlal Bora started partnership business in the name of Sadhana Agency in the suit property. The partnership was dissolved on 1st April, 1992 and Sadhana Agency remained with the petitioner. The petitioner is running the said agency in the suit property as sole proprietor, by retaining possession of the suit property. The petitioner further averred

that defendants No. 1 to 4 executed a registered sale deed dated 17th June, 2021 in respect of the suit property, in favour of defendant No.5 wherein though it is mentioned that possession of the suit property is given to defendant No.5, however, the actual physical possession of the suit property remained with the petitioner. The petitioner, therefore, claimed the above reliefs.

3. In support of the contention that the petitioner is in possession of the suit property, the petitioner placed on record, shop act licence, tax receipts issued by the corporation, GST Registration Certificate, Registration Certificate of Sadhana Agency and other necessary permissions and licences issued in the name of Sadhana Agency. The petitioner claimed that the Government record shows that since 2001, the petitioner is the sole proprietor of Sandhana Agency and he, therefore, is in possession of the suit property since then without any obstruction by original defendants No.1 to 4.

4. Defendants No. 1 and 2 appeared and resisted the suit as well as the temporary injunction application. They contended that the suit property was the self acquired property of deceased Popatlal and after his demise, the defendants No.1 to 4 being his legal heirs, the property devolved in their name. Due to family need, they sold the suit property to defendant No.5 by executing

registered sale deed. After the sale deed, possession was handed over to defendant No. 5 and since thereafter, the defendants or the plaintiff have no concern with the suit property. They further contended that the plaintiff and defendants were running one agriculture related product shop in plot No. 95, however, the plaintiff has no concern with the said plot. Hence, they prayed for dismissal of the suit as well as temporary injunction application.

5. Defendant No. 5 also opposed the suit and the temporary injunction by filing written statement.

6. After hearing the parties, the trial court allowed the temporary injunction application (Exhibit-5) filed by the petitioner.

7. Being aggrieved by the said order passed by the trial court, the respondent preferred Miscellaneous Civil Appeal No. 57 of 2021 before the district court. The appellate court allowed the appeal and set aside the order passed by the trial court below Exhibit-5 and rejected the application Exhibit-5. This order is impugned in the present writ petition.

8. Heard learned advocate for the petitioner and learned senior advocate for the respondent.

9. Learned advocate for the petitioner assailed the impugned order submitting that the first appellate court has misread and misconstrued the pleadings of the petitioner in the plaint and has erred in reversing well reasoned order passed by the trial court. By relying on a decision of the Hon'ble Supreme Court in "***Wander Ltd. And Others V/s Antox India P. Ltd.,***" 1990 Supp (1) SCC 727, he submits that the trial court has rightly exercised the discretion on the basis of the documents placed on record by the petitioner. The order passed by trial court cannot be said to be arbitrary, capricious or perverse. The appellate court has erred in taking a different view than the one taken by the trial court. Hence, the impugned order passed by the appellate court is unsustainable and the same is liable to be quashed and set aside by confirming the order passed by the trial court.

10. Per contra, learned senior advocate has strongly supported the impugned order contending that contradictory pleadings are raised by the petitioner. He further submits that the petitioner has pleaded that he is part of the Bora family i.e. family of original defendants No.1 to 4 and, therefore, he cannot seek declaration of title by adverse possession, as there cannot be an adverse title against co-owners and co-sharers of the property. He further submits that the sale deed executed by defendants

No.1 to 4 in favour of the respondent contains a specific recital that original defendants No.1 to 4 have handed over possession of the suit property to the respondent. Since the sale deed is a registered document, the same has to be taken into consideration in support of the case of the respondent that he is in possession of the suit property.

11. Learned senior advocate would submit that Crime No. 835 of 2021 was registered with Kotwali police station at the instance of petitioner's wife, wherein it is stated that unknown persons have broke open the lock of Sadhana Agency and have encroached upon the said shop and have thrown out the goods and articles from the shop and removed the board of Sadhana Agency and installed the board of Omsai Agency and changed the locks and have illegally taken possession of the suit property. Thus, it is clear that the petitioner has admittedly lost possession of the suit property and, therefore, he is not entitled for injunction. He submits that there is no substance in the petition, hence, the same may be dismissed.

12. Admittedly, the suit filed by the petitioner is on the basis of his possession. To establish his possession, the petitioner has placed on record the shop act licence, tax receipts issued by the corporation, GST Registration Certificate, Registration Certificate

of Sadhana Agency and other necessary permissions and licences issued in the name of Sadhana Agency, partnership deed, dissolution deed of partnership etc. It is not in dispute that the petitioner is the sole proprietor of Sadhana Agency. The documents placed on record by the petitioner *prima facie*, establish that the petitioner is in possession of the suit property since 2001, without any obstruction by original defendants No.1 to 4.

13. On the other hand, the respondent has relied on the recital in the sale deed executed in his favour by the original defendants No.1 to 4 to the effect that possession of the suit property was handed over to the respondent.

14. The trial court, therefore, was justified in granting temporary injunction in favour of the petitioner, by recording a finding that the petitioner has *prima facie* proved his possession over the suit property and the balance of convenience is in favour of the petitioner. If injunction is not granted in favour of the petitioner and if the respondent forcibly takes possession of the suit property, irreparable loss would be caused to the petitioner. The trial court, therefore, has rightly allowed the temporary injunction application (Exhibit-5).

15. The appellate court has failed to appreciate the documents placed on record by the petitioner to establish his possession over the suit property, in the proper perspective. The appellate court appears to have misread and misconstrued the pleadings of the petitioner in the plaint while recording a finding that in the appeal, the petitioner has come with a new story that his possession over the suit property, is hostile to Bora family and the said contention is self destructive, if compared with the pleadings in the plaint. On going through the pleadings in the plaint, it does not appear that the petitioner has come up with a new story than what is pleaded by him in the plaint. The finding of the appellate court that the plaintiff has now changed his case and come with a self destructive theory which is not at all pleaded in the suit is, therefore, unsustainable.

16. The appellate court has further erred in placing explicit reliance on the recital in the sale deed executed in favour of the respondent that possession of the suit property is handed over to the respondent at the time of execution of the said sale deed. It appears that only paper possession is shown to have been given to the respondent, when in fact, the record shows that the petitioner was and is in possession of the suit property.

17. It is not possible to accept the argument of the learned

senior advocate that since the sale deed executed in favour of the respondent is a registered document, the same supports the case of the respondent that he is in possession of the suit property. Since the record *prima facie* indicates that the petitioner is in possession of the suit property, this argument cannot be accepted. At the cost of repetition, it may be mentioned here that only paper possession appears to have been given to the respondent at the time of executing the sale deed and the actual possession was not handed over to the respondent. There is nothing on record to show that Popatlal, the original owner or defendants No.1 to 4 were running business in the suit property.

18. Learned advocate for the petitioner was right in placing reliance in "*Wander Ltd and Others*" (*Supra*), wherein the Hon'ble Supreme Court has held thus -

"8. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on own important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged

user of the Trade-Mark on which the passing-off action is founded. We shall deal with these two separately.

9. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

19. Applying the above principles to the case in hand, it is clear that without there being any material on record to show

that the trial court has exercised its discretion arbitrarily, capriciously or perversely, the appellate court has erroneously interfered in the order passed by the trial court. There is nothing on record to show that the trial court has granted injunction in favour of the petitioner by ignoring the settled principles of law regulating grant of interlocutory injunction. Ignoring this, the appellate court has set aside the order passed by the trial Court. The appellate court has re-assessed the material and has reached to a conclusion different from the one reached by the trial court. The view of the trial court is reasonable and this court is of the considered view that the appellate court is not justified in interfering in the same.

20. The documents on record *prima facie* show that the petitioner is in possession of the suit property since 2001, which is effective and undisturbed. Thus, the petitioner appears to be in actual physical possession of the suit property over a sufficiently long period. The possession of the petitioner is to the knowledge of the original owner and after him, his heirs i.e. original defendants No.1 to 4. Nature of possession of the petitioner over the suit property will be decided during the trial, however, since *prima facie* the petitioner has proved his possession over the suit property, the trial court was justified in

granting injunction in favour of the petitioner. The appellate court has committed an error in setting aside the trial court's order and dismissing the application Exhibit-5 of the petitioner.

21. For the aforesaid reasons, the writ petition is allowed in terms of prayer clause "B". Impugned order dated 9th February, 2022 passed by District Judge – 4, Ahmednagar in Miscellaneous Civil Appeal No. 57 of 2021 is quashed and set aside.

22. Learned senior advocate for the respondent submits that hearing of the suit may be expedited. Considering the facts of the present case, the trial court is directed to decide the special civil suit No. 159 of 2021 within a period of one year from today. Parties shall co-operate in the expeditious disposal of the suit.

23. At this stage, learned senior advocate for the respondent requested to stay this order for a period of four weeks so as to enable the respondent to approach the Hon'ble Supreme Court. Request is accepted. This order shall remain stayed for a period of four weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE