

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3173 OF 2018

Shivaji Vithoba Bodke	...Petitioner
Versus	
Stephen Noel Disouza & ors.	...Respondents

Mr. Prashant Patil, for the Petitioner.
None for the Respondents.

CORAM: N. J. JAMADAR, J.

DATED : 7th JUNE, 2022

Order:-

1. Mr. Patil, the learned Counsel for the petitioner, sought time to take instructions. However, having regard to the nature of the issue raised in the petition, the learned Counsel was requested to make submissions on the merits of the matter.
2. Heard Mr. Patil, the learned Counsel for the petitioner.
3. The petitioner – defendant no.1 has preferred this petition assailing judgment and order dated 12th January, 2018 passed by the learned District Judge, Nashik, in Miscellaneous Civil Appeal No.22 of 2017, whereby the appeal preferred by the petitioner against an order dated 15th February, 2017, passed by the learned Civil Judge, Junior Division, Dindori, restraining defendant no.1 from committing any encroachment over the suit

land beyond the area of the tin shed erected therein, till the disposal of the suit, came to be dismissed.

4. The respondent nos.1 and 2 – plaintiffs instituted the suit for declaration and perpetual injunction against the petitioner – defendant no.1 and respondent no.3 – defendant no.2 with the averments that the defendant no.1's father Vithoba had conveyed a parcel of agricultural land admeasuring 50 R out of survey No.36/A ("the suit land") under a registered Sale Deed dated 16th December, 1996, to the defendant no.2. The latter was put in possession of the said land and mutation was effected in the record of rights of the suit land vide Mutation Entry No.295. The defendant no.2, in turn, sold the suit land to the plaintiffs by executing a registered Sale Deed on 19th June, 2006. The plaintiffs were put in possession of the suit land. The defendant no.1, however, encroached upon a portion of the suit land and erected an unauthorized tin shed. The defendant no.1 threatened to encroach over the rest of the suit land. Hence, the plaintiffs were constrained to institute the suit for declaration and perpetual injunction and also seek temporary injunction against defendant no.1.

5. Defendant no.1 resisted the application by filing say and written statement, containing a counter-claim as well. The

defendant no.1 contended, *inter alia*, that the defendant no.1's predecessor in title namely Vithoba had not sold the suit land to the defendant no.2 under the Sale Deed dated 16th December, 1996. In fact, under the said Sale Deed, defendant no.2 had purchased 50 R land in the North-East corner of southern portion of the agricultural land bearing Gat No.36/A. However, in the Sale Deed executed in favour of the plaintiffs, the defendant no.2 had incorrectly mentioned that the suit land was sold to the plaintiffs. It was further contended that even the 50 R area of the land in the North – East corner of the southern side of Gat No.36/A has continuously been in possession of defendant no.1 since the year 1998 and thereby the defendant no.1 perfected title over the said portion by way of adverse possession despite the execution of the Sale Deed dated 16th December, 1996. The defendant no.1, thus, by way of counterclaim, sought a declaration that defendant no.1 acquired title over the said land by way of adverse possession.

6. The Trial Court, after appraisal of the pleadings, documents and submissions canvassed across the bar was persuaded to grant temporary injunction restraining defendant no.1 from committing any encroachment over the suit land, beyond the area over which tin shed was erected, till the

disposal of the suit. The Trial Court was of the view that the plaintiffs – respondent nos.1 and 2 succeeded in establishing a *prima facie* case, the balance of convenience tilted in favour of the plaintiffs and refusal to grant injunction would cause irreparable loss to the plaintiffs.

7. Being aggrieved, the petitioner – defendant no.1 preferred Miscellaneous Appeal No.22 of 2017. The learned District Judge did not find any ground to interfere with the exercise of discretion by the Trial Court. Noting that, indisputably, the predecessor in title - defendant no.1 had executed a Sale Deed in favour of defendant no.2 and the latter's name was mutated to the holder and cultivator's column of the suit land, the Appellate Court observed that it would not be open to defendant no.1 to claim any right in respect of the suit land and the question as to whether defendant no.1 perfected title to the suit land by way of adverse possession was the matter for trial.

8. Being further aggrieved, the petitioner – defendant no.1 has invoked the writ jurisdiction of this Court.

9. Mr. Prashant Patil, the learned Counsel for the petitioner, submitted that the Trial Court did not at all advert to the question as to whether the suit land is the very same property which was sold by the predecessor in title of defendant no.1 to

defendant no.2. Mr. Patil submitted that the identity of the property which was the subject matter of the Sale Deed dated 16th December, 1996 was at the hub of the controversy. However, the learned Civil Judge did not at all delve into the said aspect. Nor the Appellate Court made any endeavour to correct the mistake into which the Trial Court had fallen. In this view of the matter, according to Mr. Patil, interference is warranted in exercise of writ jurisdiction.

10. First and foremost, the scope of interference in exercise of the writ jurisdiction in the face of concurrent findings of facts by the Courts below is required to be kept in view. This Court would not be justified in interfering with the order passed by the Court of first instance, which has been affirmed in appeal by the first Appellate Court, for the only reason that there is a factual error and on re-appreciation of the material a different view is possible.

11. On the aforesaid touchstone, the nature of the defence sought to be put-forth by the petitioner – defendant no.1 assumes significance. An endeavour was made to demonstrate that the suit land is not the very property which was sold by the predecessor of defendant no.1 to defendant no.2, the predecessor in title of the plaintiffs. Had the defence been

confined to this aspect different considerations would have come into play. The defence of defendant no.1 goes far beyond, in as much as the defendant no.1 asserts that even in respect of the agricultural land which was sold under the Sale Deed dated 16th December, 1996, defendant no.1 has perfected the title by way of adverse possession as in the year 1998 defendant no.1 established hostile possession to the knowledge of defendant no.2 over the said portion of the agricultural land. This brings in the element of equity in the frame. In the face of the registered Deed of Conveyance, under which defendant no.2 transferred the suit land to the plaintiffs, the Courts below were justified in drawing an inference that the plaintiffs established *prima facie* title over the suit land. Since the factum of erection of the tin shed was, by and large, undisputed, the apprehension on the part of the plaintiffs of encroachment over the balance suit land was sustainable.

12. In the aforesaid view of the matter, the Trial Court applied correct principles while considering the prayer for temporary injunction. As the discretion was exercised by the Trial Court and the Appellate Court was justified in not interfering with the exercise of discretion as no perversity was evident, this Court does not find any justifiable ground to interfere with the orders

passed by the Courts below, in exercise of extraordinary writ jurisdiction. Hence, the petition does not deserve to be entertained.

13. The petition stands dismissed.

14. However, in the backdrop of the nature of the controversy, it may be expedient to request the learned Civil Judge seized with the matter, to decide the suit as expeditiously as possible.

15. With the aforesaid direction, the petition stands dismissed.

[N. J. JAMADAR, J.]