

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

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.8977 OF 2022**

Shri. Akabar Gulab Mulla .... Petitioner  
Versus  
Shri. Mahamad Gulab Mulla & Ors. .... Respondents

Mr. Sandeep S. Koregave for the Petitioner.

**CORAM : VALMIKI SA MENEZES, J.**

**DATE : 18<sup>th</sup> NOVEMBER, 2022**

**PC. :**

1. Rule. Rule made returnable forthwith by consent of parties.
2. This is a Writ Petition under Article 227 of the Constitution of India impugning Judgment dated 06.03.2020 passed by the District Judge-2, Ichalkaranji, Dist. Kolhapur in Miscellaneous Civil Appeal No.15/2019, filed by the original Plaintiff in Regular Civil Suit No.401 of 2016; the learned District Judge has dismissed the plaintiff's appeal filed under Order 43 Rule 1, and confirmed order dated 28.02.2019 passed by the learned Civil Judge, Senior Division, Ichalkaranji in the said suit, rejecting the petition/plaintiff's application for temporary injunction at Exh.5 of the said file.
3. Heard learned counsel for the petitioner and learned AGP for the State. Perused record.

4. The case of the petitioner in the plaint, as stated before the Civil Court was that he was in possession of the land which is an agricultural land bearing Gat No.474/A, having total area of 4.22 Hectares, which belonged originally to Devasthan Samiti Paschaim Maharashtra, Kolhapur, and which was managed by the Government of Maharashtra.

5. It is further the plaintiff's case that he and original Defendant No.1 are real brothers and that their father received the suit property for cultivation in the year 1945. After their father died on 30.08.1987, the plaintiff made an application to the Collector, Kolhapur, demanded the suit property be put in his possession for cultivation. The Collector by order dated 01.12.2004 has allotted the suit property to the plaintiff.

6. It is alleged that the suit property has been cultivated with consent of Defendant No.1 and accordingly, the plaintiff's name was entered into the, Revenue Record of the suit property by mutation entry in the cultivators column. It is further the plaintiff's case that Defendant No.1, in collusion with Defendant No.2 was trying to grab the suit property and in pursuance thereof, made an application to Defendant No.3 and 4 demanding half share in the suit property. On this premise, the plaintiff/petitioner herein filed the suit for perpetual injunction against Defendant No.1 from interfering in the suit property. In the said suit, an application for temporary injunction was moved by the plaintiff seeking restraint order during pendency of the suit against Defendant No.1 from interfering and obstructing the plaintiff in relation to the suit property.

7. From the record, it is seen that Defendant No.1 appeared before the Trial Court and filed his written statement at Exh.14 opposing the suit. He

admitted that the suit property was in possession of their father for cultivation. He denied that after the death of his father, the plaintiff, with consent of Defendant No.1 was allotted the suit property for cultivation, and that the suit property is in exclusive possession of the plaintiff. Defendant No.1 claims that he is in joint possession of the suit property with the plaintiff.

8. With these facts on record, the Trial Court proceeded to decide the application for temporary injunction at Exh.5 of its file and dismissed the application filed at the behest of the plaintiff with an order dated 28.02.2019. While dismissing the application, the Trial Court has concluded that the order dated 03.07.1989 of the Tahsildar, which held that the possession of the suit property claimed to be exclusively with the plaintiff and consequent revenue entries were made in the name of the plaintiff, was passed by the Tahsildar without giving notice to Defendant No.1, and notice was served on Defendant No.1 on 13.07.1989 calling for his objections, after passing such order. The Trial Court proceeded not to give any weightage to the said order of the Tahsildar because the same appears to have been obtained without notice to Defendant No.1.

9. The Trial Court thereafter considered various certificates of the Police Patil, Talathi, Sarpanch, amongst other documents produced by Defendant No.1 as *prima facie* proof of being in possession of the suit property.

After considering the documents on record, the Trial Court arrived at a finding that the plaintiff had not, *prima facie* shown his possession over the suit property to the exclusion of the Defendant No.1. Further, the Trial Court concluded that since Defendant No.1 was a co-holder of the suit

property with the plaintiff, an order of temporary injunction would not be issued to Defendant No.1.

10. It is further seen from the record that in an appeal, the District Court, by the impugned order has refused to interfere with the order of the Trial Court mainly on the ground that the plaintiff was not in exclusive possession of the suit property.

Thus, there are concurrent findings on the question of possession by both Courts below which have concluded that the plaintiff has not made out a *prima facie* case. The Courts below have also concurrently concluded that for *prima facie* consideration, the balance of convenience lies in favour of Defendant No.1.

11. It is vehemently argued by learned counsel for the petitioner that the Courts below have not considered the Panchanama drawn by the concerned revenue authorities produced in the suit which was drawn in the presence of Defendant No.1 and wherein the crop is stated to belong to the plaintiff. He further argued that for the purpose of *prima facie* conclusion as to who would be in possession of the suit property, the Trial Court ought to have given due credence to the order dated 03.07.1989 passed by the concerned Tahsildar, and it was not proper for the Trial Court to go behind the order to assess the evidentiary value of the said order at this stage. He further submits that if the said order is taken on its face value, it would *prima facie* be evidence of possession of the plaintiff over the suit property and on that count, the Courts below ought to have held that the possession lies with the petitioner and granted an order of temporary injunction.

12. After considering the submissions of learned counsel for the petitioner, I am of the considered view that the Trial Court has considered all the material before it and arrived at the conclusion that the plaintiff is not in exclusive possession of the suit property. It is further concluded by the Courts below that Defendant No.1, who is admittedly the plaintiff's real brother, was also the co-holder of the suit property and an order of temporary injunction would not be issued by the Court to the co-holder of the suit property.

13. A *prima facie* case as is required to be made out for the purpose of issuance of the temporary injunction is a matter of discretion that has been exercised by the Trial Court in a manner which cannot be held to be improper or without having considered the record. The view taken by the Trial Court appears to be well-balanced and on the consideration of the record.

14. The Appellate Court, in my opinion, has correctly exercised its jurisdiction under Order 43 of CPC by refusing to interfere in the discretion exercised by the Trial Court and has refused to come to a conclusion different from the one arrived at by the Civil Court. The Appellate Court has infact considered all the material on record and has specifically held that the plaintiff has not made out a *prima-facie* case by showing his exclusive possession to the suit property, it has proceeded on the basis that was admitted by the plaintiff, that Defendant No.1 was his real brother and that they both derived their title from a common ancestor/their father.

15. Considering that the Courts below have exercised their respective jurisdictions within the bounds of law applicable to the grant of temporary

injunctions and within the bounds of Order 43 of CPC, which is the power vested in the Appellate Court, I do not find that this is a fit case for interference in supervisory jurisdiction under Article 227 of the Constitution of India. The petition is therefore, dismissed at the threshold.

16. Learned counsel for the petitioner seeks indulgence of this Court for a direction to the Trial Court for a time bound disposal of the suit. In my opinion, such a direction is uncalled for considering that the suit has been pending since the year 2016 and evidence has yet not been led by the plaintiffs. However, the plaintiffs are at liberty to move the Trial Court for an expeditious disposal of the suit if they are so advised.

17. Rule is discharged. Writ Petition is disposed of accordingly.

**[VALMIKI SA MENEZES, J.]**