

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 161 OF 2006

APPELLANTS: 1] Baban S/o Tulshiram Yurade,
Org.Defts aged about 46 years, Occ. Service
R/o. Saniwari Ward, Ramtek, Nagpur.

2] Tulshiram s/o Kawdu Yurade (deceased)
through L.Rs.

2.a] Lahanbai Vyankatrao Bhute,
aged about 70 years, Occ. Housewife,
R/o. Khat Road, Bhandara,
Distt. Bhandara.

2.b] Kashiram Tulshiram Urade,
aged about 65 years, Occ. Labour
R/o. Bhagatsing Ward, Ramtek,
Distt. Nagpur.

2.c] Manubai w/o Dhekal Dokarimare,
aged about 60 years, Occ. Nil,
R/o. Bhagatsing Ward, Ramtek,
Distt. Nagpur.

2.d] Babibai w/o Ramesh Barai,
aged about 50 years, Occ. Housewife,
R/o. Kodamendhi, Tq. Mouda,
Distt. Nagpur.

2.e] Shobhabai w/o Giridhar Chaphale,
aged about 45 years, Occ. Housewife,
r/o. Nandpuri, Tq. Ramtek,
Distt. Nagpur.

2.f] Ashok Tulshiram Urade,
aged about 45 years, Occ. Service,
R/o. Armori Road, Near Water Tank,
Gadchiroli.

- 3] Smt. Kaushalyabai w/o Bhojraj Rahate,
aged about 61 years, Occ. Household,
R/o. Mangalwari Ward, Ramtek,
Dist. Nagpur.
- 4] Smt. Sumitrabai w/o Shriram Madankar,
aged about 56 years, Occ. Household,
R/o. Radhakrishna Ward, Ramtek,
Dist. Nagpur.
- 5] Smt. Subhadrabai Diwate,
aged about 58 years, R/o. Mohadi,
Tq. Mohadi, Dist. Bhandara.

...VERSUS...

- RESPONDENTS:**
- 1] Sadhuram s/o Shyamrao Bawankule,
Org.Pltfes aged about 57 years, Occ. Govt.Servant
R/o. Gondia, Dist. Gondia.
 - 2] Babura s/o Shyamrao Bawankule,
aged about 52 years, Occ. Govt. Servant,
R/o. Katol, Tq. Katol, Dist. Nagpur.
 - 3] Smt. Sumanbai w/o Damodar Bawankule,
aged about 59 years, R/o. Kodamendi,
Tq. Mouda, Dist. Nagpur.

Smt. S.W.Deshpande, Advocate for the appellants.
Shri A.N.Vastani, Advocate for respondent Nos. 1 and 2

CORAM : AVINASH G. GHAROTE, J.
DATE : 22/09/2022.

1] Heard Mrs. Deshpande, learned counsel for the
appellants and and Mr. Vastani, learned counsel for the respondent
Nos.1 & 2.

2] In a suit for perpetual injunction filed by the respondent Nos. 1 and 2 (original plaintiffs), being RCS No. 123/1991 against the present appellants, claiming entitlement to an area admeasuring 2 acres from and out of the land of Gat No. 92, village Kodamendhi, Tah Mouda, on the strength of a sale deed dated 10.4.1985 executed in their favour by one Abdul Majid, who had earlier in point of time purchased the said property from one Damodar under Sale deed dated 4.7.1980, the learned Trial Court by the judgment and decree dated 20.4.1999 dismissed the suit (pg 61). The learned Appellate Court in RCA No. 324/1999 by a judgment and decree dated 10.11.2005 allowed the appeal and decreed the suit, holding that the plaintiffs/Respondent Nos. 1 & 2 were in possession of the suit property.

3] The present appeal was admitted by this Court on 3.9.2007 on the following substantial quesiton of law.

Whether the first appellate Court was justified in reversing the finding recorded by the trial Court, without considering the facts and material considered by the trial Court while recording the findings?

4] Mrs. Deshpande, learned counsel for the appellant submits that since the Respondent Nos. 1 & 2 had no right to any property over and above what has been received by their predecessor viz. Damodar s/o Mahadeo in partition, which was around 1.01 hectare (2.4947 acres) of land from and out of Gat no. 92, the suit filed by the Respondent Nos. 1 and 2, could not have been decreed by the learned Appellate Court and therefore, seeks reversal of the same and restoration of the judgment and decree as passed by the learned trial Court.

5] Mr. Vastani, learned counsel for the respondent Nos. 1 and 2 submits that Damodar had sold a piece of 2 acres of land to Abul Majid by a sale deed dated 4.7.1980, as a result of which since title to the same stood transferred in favour of Respondent Nos. 1 and 2, they were entitled to protect their possession, unless otherwise dispossessed in law.

6] The judgment of the learned trial Court indicates that the original owner of the entire property being Gat no. 92, admeasuring 14.90 acres (6.03238 HR) was one Mahadeo, who had passed away in 1977, leaving two sons and 4 daughters, the sons

being Damodar and Shrawan, whereas the daughters being Bainabai, Koushalyabai, Sumitrabai and Subhadrabai. The daughters had filed suit for partition being RCS No. 45/1982, which came to be decreed on 9.12.1983 by the learned Civil Judge, Junior Division, Ramtek, holding that the daughters had $1/6^{\text{th}}$ share each in the land of Gat no. 92. In pursuance to the same, a precept was sent to the Collector under Section 54 of the CPC and the Collector thereafter divided the land of Gat no. 92 into six parts, numbering them as Gat Nos. 92/1 to 92/6. It is also claimed that the respective parties were placed in possession of their respective shares, however, there is nothing on record to indicate the same having been done, for the reason that the map at Exh.88, merely records the demarcation of the entire land into 6 pieces from Gat no. 92/1 to 92/6 in which Gat no. 92/6 has been allotted to the share of Sumanbai wd/o Damodhar Bawankule. Though Exh.82 to 87, the 7/12 extracts recorded the names of the shareholders and also indicates them to be in cultivating possession however, the application Exh.27 filed by the defendants under Order 39 Rule 4 of the CPC which sought restoration of possession of the suit filed to them, filed on 6.3.1993, would indicate, that the defendants were not in possession of the

suit property on the date of the filing of the application dated 6.3.1993. This application at Exh. 27 was rejected by the learned trial Court on 3.5.1997 and no appeal therefrom has been preferred. This would indicate, that even during the pendency of the suit the defendants (appellants herein) were not in possession of the suit property admeasuring 2 acres, which admittedly as per the application below Exh.27 was with the plaintiffs (respondents herein). Since in the partition Damodhar was allotted Gat no.92/6 admeasuring 1.01 HR (Exh.87), it naturally follows that neither Abdul Majid under the sale deed dated 4.7.1980, nor the respondent under the sale deed dated 10.4.1985 can acquire title to anything more than what was allotted to the share of Damodhar, which was only 1.01 HR. In that light of the matter, the plaintiffs (respondents herein) could only claim adjustment of the their right vis-a-vis the share allotted to Sumanbai wd/o Damodhar vis-a-vis Gut no. 92/6.

7] Mr. Vastani learned counsel for the respondents submits that under the sale deed dated 10.4.1985, the respondents are in possession of the land bearing Gut no.92/4, as has been subsequently separated and demarcated in the final decree proceedings by the Collector under the precept under section 54 of

the CPC. In that view of the matter, the possession of the respondents, vis-a-vis the land of Gut no.92/4, would obviously be illegal. On a query made to Mr. Wastani learned counsel for the respondents, whether the respondents would be willing to shift to the land admeasuring 2 acres from and out of the land Gat no. 92/6 allotted to Sumanbai wd/o Damodhar, he submits that he has instructions to the negative from the respondents. This would clearly indicate that the possession of the respondents, over the land of Gat no. 92/4, is not legally warranted, as they have no title upon the same. In fact it was necessary for the respondents having acquired knowledge of the filing of RCS No.445 of 1982 and the decree passed therein on 9.12.1983, to have impleaded themselves in the final decree proceedings and sought adjustment of the land purchased by them vis-a-vis the land allotted to the share of Damodhar i.e. Gut no. 92/6, however that has not been done by them till date. This would clearly indicate the tendency on part of the respondents to continue in illegal possession in spite of being aware that such possession was illegal, which position has already been brought on record. Though it is contended that under the principle of possessory title or the principle of law that a person who

has been in long continuous possession of an immovable property can protect the same by seeking an injunction against any person in the world other than the true owner and the owner of the property can get back his possession only by resorting to the due process of law, the appellant No.4 Sumitrabai who has been allotted Gat No. 92/4, being the owner of the property, any claim against her by the plaintiffs to sustain their possession on the basis of the title under the sale-deed dated 10.04.1985, cannot be said to be legal, for the reason that such a claim would be contrary to the decree passed in RCS No. 45/1982, to which Damodar was a party. In the instant case, what has been claimed is protection of possession on the basis of title on the account of sale deed dated 4.7.1980 and 10.4.1985, which admittedly has been executed by Damodhar during his life time. In light of the position which has been brought on record that Damodhar, in fact, in view of the partition taken place in pursuance to the preliminary decree in RCS No. 45 of 1982 dated 9.12.1983 has no right to the land of Gat no. 92/4, the title claimed by the respondents, vis-a-vis the land of Gat no. 92/4, which they claimed to be in possession cannot become the basis of a claim to retain possession, which obviously is illegal, as Gat No. 92/4 is allotted to

Sumitrabai w/o Shriram Madankar (defendant No.5/appellant No.4.). All that the respondents, can claim is an adjustment, in respect of the land allotted to the share of Damodhar and nothing else. It is for this reason, that I am fortified in my observation that the possession of the respondents over the land of Gat no. 92/4, consequent to the position regarding the partition having been taken place pursuant to the decree passed in RCS No.45/1982, cannot be termed as legal, for the reason that the claim for possession, is flowing from the title and not otherwise.

8] However, since even the appellants do not dispute that the respondents are in possession under the sale deed dated 10.4.1985, which possession has been admitted, by virtue of the application below Exh. 27 filed by the appellants/defendants under Order 39 Rule 4 of CPC, seeking restoration of possession, which was filed on 6.3.1993, considering this admitted position, judgment of the learned first Appellate Court based upon the above admission and consequently, restraining the appellants/defendants from dispossessing the respondents/plaintiffs from the suit property except by the due process of law, cannot be faulted with [see **Prataprai N. Kothari vrs. John Braganza, (1994) 4 SCC 403**],

considering which the question framed on 3.9.2007 is answered in the affirmative. The second appeal therefore, is accordingly dismissed. No costs. It is however made clear that the defendant No.5 Sumitra Shriram Madankar would be fully entitled and justified in instituting appropriate proceedings against the appellants seeking possession of the land of Gat No. 92/4 and so also mense profit from the appellants/plaintiffs.

JUDGE

Rvjalit