

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

WRIT PETITION NO. 3307 OF 2022

1. Ratanlal S/o Pannalal Nahar,
Age : 73 Years, Occu. : Trade & Agril.,
R/o Masrat nagar, Beed,
Tq. And Dist. Beed.
2. Gautam S/o Zumbarlal Khatod,
Age : 53 Years, Occu. : Trade & Agril.,
R/o MIDC, Beed,
Tq. And Dist. Beed. .. Petitioners

Versus

1. Ganesh S/o Vitthal Warekar,
Age : 39 Years, Occu. : Agril.,
R/o Jalna Road, Beed,
Tq. And Dist. Beed.
2. Shivaji S/o Madhav Taware,
Age : 68 Years, Occu. : Agril.,
R/o Ramteertha, MIDC, Beed,
Tq. And Dist. Beed.
3. Vitthal S/o Nagnath Shinde,
Age : 27 Years, Occu. : Agril.,
R/o Jawahar Colony, Nagar Road,
Beed, Tq. And Dist. Beed.
4. Ashok S/o Shivaji Taware,
Age : 43 Years, Occu. : Agril.,
R/o Ramteertha, MIDC, Beed,
Tq. And Dist. Beed. .. Respondents

Shri Hrishikesh V. Tungar, Advocate for the Petitioners.

Shri Sachin S. Deshmukh, Advocate for the Respondent Nos. 1 to

4.

**CORAM : SHARMILA U. DESHMUKH, J.
DATE : 30TH JANUARY, 2023.**

JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. The petitioners are aggrieved by the judgment and order dated 31st January, 2022 passed in Misc. Civil Appeal No. 93 of 2018 and the order dated 21st June, 2018 passed below Exhibit 49 in R.C.S. No 648 of 2012, whereby Appellate Court allowed the miscellaneous appeal filed by the original defendant No. 3 and rejected the application for temporary injunction below Exhibit 49.

3. Shorn off unnecessary details, the facts of the case are as under :

R.C.S. No. 648 of 2012 was instituted by the petitioners against the respondents Shivaji Madhav Taware, Vishal Nagnath Shinde, Ganesh Vitthal Warekar and Ashok Shivaji Taware. It is the case of the petitioners that the suit property admeasuring 1 Acres 34 Gunthas bearing land Sy. No. 218-E/3 was purchased by the petitioners along with another property bearing land Sy. No. 216/A-1 admeasuring 01 Acres 06 Gunthas by way of registered sale deeds from one Pravin Dayasagar Jain. To trace the title to the suit property i. e. Sy. No. 218-E/3, it is necessary to refer to previously instituted suit bearing R.C.S. No. 308 of 1977, which was instituted by Shivaji Madhav Taware against his brother Narayan and his mother Gangubai seeking partition and separate possession of properties which includes Sy. No. 218-E/3. During the pendency of the suit, Shivaji sold his 1/3rd undivided interest to one Ramrao Taware and his mother Gangugai also sold her 1/3rd undivided interest to one Bharat

Kishan Taware by way of registered sale deeds. The recitals in the sale deeds executed by Shivaji and Gangubai in favour of Ramrao and Bharat respectively mentions that after the decree of partition and upon execution thereof 1/3rd shares which would be allotted to the share of Shivaji and Gangubai would be handed over to the respective purchasers. R.C.S. No. 308 of 1977 came to be decreed on 25th April, 1983, wherein the following order was passed.

ORDER

- 1] The suit of the plaintiff is partly decreed without costs.
- 2] The plaintiff is entitled to get 1/3rd share in the suit lands S No. 5, 216/A/1 and 218/E/3 as described in suit claim in the plaint.
- 3] The suit lands S. No. 5, 216/A/1 and 218/E/3 be divided in to three equal part and the plaintiff be kept in possession of 1/3rd share thereon.
- 4] The decree be sent to the collector Beed for effecting the partition and separate possession u/s 54 of CPC.
- 5] The suit of the plaintiff in respect of land S No. 217/AA/2 for partition and for declaration of sale deed executed in favour of defendant No.6 being in operative is dismissed also the suit of the plaintiff restraining the deft No. 6 permanently from interfering in possession of the plaintiff over the suit land 217/AA/2 is dismissed.

Decree be drawn accordingly.

4. The remaining 1/3rd share which was allotted to Narayan Taware was sold by him in favour of one Jankabai Taware by registered sale deed dated 23.03.1990. Subsequently, Ramrao Taware and Bharat Kishan Taware sold 74R land, which was purchased by them from Shivaji and Gangubai to Pravin Dayasagar Jain by registered sale deed dated 23.06.2003. Said Pravin Dayasagar Jain was put in possession of the suit property

and a mutation entry No 4389 was sanctioned in the name of Pravin Jain in respect of area admeasuring 74R. Upon the purchase of the property by the petitioners from Pravin Jain area of 74R was mutated in favour of the petitioners by virtue of mutation entry No. 6012 dated 20th August, 2007. On 29th October, 2010, Shivaji made an application to the Tahsildar stating that Pravin Jain had sold 74R land to the petitioners and Shivaji and his mother sold about 20G land to one Rekha Pravin Jain and others and out of Sy. No. 218-E/3, there is 20 Guntha land remaining which needs to be entered in his name. To this application filed by Shivaji, the petitioners gave their no objection stating in their affidavit that the petitioners are owners of 74R suit land and 20 Guntha of land is found, they have no objection to enter the same in the name of Shivaji. On 20.06.2011, the Tahsildar Beed passed an order for recording name of Shivaji over 20 Guntha land.

5. In R.C.S. No. 648 of 2012, it is the case of the petitioners that inspite of taking possession over the balance 20 Guntha land which was to the extreme Eastern portion of Sy. No. 218-E/10, Shivaji encroached upon 20R land belonging to the petitioners and hurriedly constructed compound wall on three sides of 20 Guntha of land out of the suit property. It is further case of the petitioners that, after forceably occupying this 20 Guntha land, same was sold by Shivaji to Vishal Nagnath Shinde (defendant No. 2), who in turn sold it to Ganesh Vitthal Warekar (defendant No. 3). The petitioners were therefore constrained to seek a declaration that the petitioners are owners of suit land i. e. Sy. No. 218-E/3 adm. 74R and for direction to the defendants to demolish the construction of the compound wall which was

raised by Shivaji over around 20 Guntha and for recovery of possession of 20G of land. Issues came to be framed in R.C.S. No. 648 of 2012 and an application came to be filed by the petitioners on 07th May, 2018 seeking restrain orders against the defendants from alienating the suit land. On the application of the petitioners, an order came to be passed on 21.06.2018 by the Trial Court restraining the defendants from alienating the suit land in any way till the final adjudication of the suit.

6. Aggrieved by the order of the Trial Court dated 21.06.2018, the respondent No. 1/Ganesh Vitthal Warekar preferred Misc. Civil Appeal No. 94 of 2018, which came to be allowed and the order dated 21.06.2018 was set aside and the application below Exhibit 49 came to be rejected.

7. Heard Mr. Tungar, learned counsel appearing for the petitioners and Mr. Deshmukh, learned counsel appearing for the respondents.

8. Mr. Tungar, learned counsel appearing for the petitioners has taken this Court through various sale deeds tracing the title of the petitioners in respect of the suit land and the judgment and decree of the Civil Court in R.C.S. No. 308 of 1977. He would submit that it is evident from the registered sale deeds which have been executed firstly by Shivaji and Gangubai in favour of Ramrao and Bharat and subsequent transfers which thereafter been effected have resulted in petitioners occupying the area of 74R of land of Sy. No. 218-E/3 as owners. He would point out that the Appellate Court has erred by placing reliance on the sale deeds of 04th May, 1982, which was executed by

Shivaji and Gangubai prior to decree for partition in suit R.C.S. No. 308 of 1977. He would further submit that although in the sale deeds of 04th May, 1982 the area is mentioned as 29R, it is required to be appreciated that the said sale deeds were in respect of undivided 1/3rd share of Shivaji and Gangubai, which upon passing of the judgment and decree dated 25th April, 1983 in R.C.S. No. 308 of 1977 was crystallized as 74R. He would further submit that the Appellate Court has failed to consider the subsequent documents in the form of possession letter which has been executed by Ramrao Taware and Bharat Taware in which possession of 74R land has been handed over to the petitioners. He would further submit that Shivaji in his application to the Tahsildar on 29th October, 2010 has specifically stated that 74R land of Sy. No. 218-E/3 has been sold by Shivaji and his mother Gangubai to Ramrao Taware and Bharat Taware. He would further urge that considering the documentary evidence, which has been placed on record a *prima facie* case was made out and the Appellate Court has erred by observing that the petitioners have been placed in possession of excessive area, whereas they are entitled to only 50R of Sy. No. 218-E/3.

9. *Per contra* Mr. Deshmukh, learned counsel appearing for respondents has submitted that it is evident from the sale deeds dated 04th May, 1982 that Shivaji and Gangubai had respectively sold 29R land each to Ramrao Taware and Bharat Taware and the execution of the sale deeds not having been disputed by the petitioners, it is evident that the petitioners are claiming an excessive area to which they are not able to establish their title. He would further submit that after execution of the decree in

R.C.S. No. 308 of 1977, there has been an alteration of maps, for which FIR has been registered. He would further submit that it is evident from the map at page 75, which has been prepared after execution of the decree in R.C.S. No. 308 of 1977 as compared to the subsequent maps at page Nos. 82 and 100, which are the survey maps that the location of the property is shifted. He would therefore submit that the petitioners have failed to show their title in respect of land to the extent of 74R and their right is limited only to 58R.

10. In support of his submissions, the learned counsel for the respondents has relied upon the decision of the Apex Court in the case of **S. Bhaskaran Vs. Sebastian (Dead) by legal representatives and others** reported in **(2019) 9 SCC 161**, in the case of **K. D. Sharma Vs. Steel Authority of India Limited and others** reported in **(2008) 12 SCC 481** and in the case of **Dalpat Kumar and another Vs. Pralhad Singh and others** reported in **(1992) 1 SCC 719**.

11. I have considered the rival submissions of the respective parties.

12. At the stage of grant of interim injunction restraining the defendants from alienating the suit property the sole defined parameters are *prima facie* case, balance of convenience and irreparable injury. As far as aspect of *prima facie* case is concerned, the documentary evidence which has been produced by the petitioners on record will have to be considered in order to the Court to be *prima facie* satisfied that the petitioners are entitled to the suit property in respect of which an order of

injunction is claimed. The sale deeds which have been executed on 04th May, 1982 by Shivaji and Gangubai in favour of Ramrao Taware and Bharat Taware were admittedly executed during the pendency of partition suit bearing R.C.S. No. 308 of 1977 and were in respect of undivided share of the joint family properties. Perusal of the sale deeds show that in respect of Sy. No. 218-E/3, 1/3rd share of Shivaji and Gangubai was sold to Ramrao Taware and Bharat Taware. This 1/3rd undivided share was quantified as 24R in the sale deeds. The sale deeds recite pendency of R.C.S. No. 308 of 1977 and states that after the partition is effected as declared in R.C.S. No. 308 of 1977 and the shares are allotted, the purchasers will be put in possession of the properties. From the perusal of the sale deeds *prima facie* it appears that what was sought to be sold by Shivaji and Gangubai was their 1/3rd undivided share. As the suit for partition was pending, the shares were not determined and tentatively an area of 29R has been recorded amounting to 1/3rd share of Shivaji and Gangubai. It will be a question of trial upon leading of the evidence as to the intention of the parties as regards area which was sought to be sold and whether the parties intended to sell of an area of 29R or sell of 1/3rd undivided share. At the stage of interim relief a *prima facie* case is required to be considered and it will be a question of trial as to whether excessive area has been handed over by Shivaji and Gangubai. After the partition by decree dated 25th April, 1983, which was put into execution, the map which is annexed at page 75 at the time of execution shows an area of 85R given to the share of Gangubai Shivaji Taware. The subsequent sell which has taken place between Ramrao and Bharat Taware in favour of

Pravin Dayasagar Jain by way of registered sale deed dated 23.06.2003 clearly mentions an area of 74R as the subject matter of the sale deed. The subsequent sale by Pravin Dayasagar Jain in favour of the petitioners by way of registered sale deed dated 31.07.2007 also records sell of an area of 74R land bearing Sy. No. 218-E/3.

13. The sale deeds which are placed on record right from the sell by Ramrao Taware and Bharat Taware to the present petitioners record the sell of an area of 74R and the possession receipt which has been executed by Shivaji in favour of Ramrao Taware and Bharat Taware dated 31.01.2001 also records handing over of the possession of 74R. This *lends credence* to the *prima facie* observation that what was intended to be sold by the sale deeds of 04th May, 1982 was 1/3rd share which was likely to come to the share of Shivaji and Gangubai and that the area of 29R mentioned therein was merely a tentative figure. The possession receipt of 31.01.2001, which does not appear to be disputed clearly mentions handing over of possession of an area of 74R.

14. On consideration of material which has been produced on record by the petitioners, I am of the opinion that, *prima facie* case has been made out by the petitioners. The issue as to whether an excessive area is claimed by the petitioners by manipulating the proceedings at the time of execution of decree in R.C.S. No. 308 of 1977 is a matter, which will have to be dealt with after consideration of evidence. For the purpose of temporary injunction restraining the respondents from interfering with the possession of suit property, there is enough

material on record to show that atleast from 2001 possession of 74R land was handed over to Ramrao Taware and Bharat Taware and thereafter the possession is transferred to Pravin Jain and from Pravin Jain to present petitioners atleast from 31.01.2001 the position which is born out from the possession receipt executed by Shivaji.

15. The Appellate Court appears to be swayed by the fact that in the sale deeds of 04th May, 1982 an area of 29 Guntha has been stated, however, has failed to consider the subsequent sale deeds and the possession receipt, which show that an area of 74R came to be transferred. As far as discrepancy in the maps drawn on 07th September, 2000 while executing partition decree and the survey maps which were subsequently prepared, the said issue can be resolved only during the trial. Application was preferred for protecting the possession, which *prima faice* appears to be with the petitioners considering the documents on record pertinently the respondents have not been able to place any material on record to show that the respondents were in possession of the area forming part of the suit property.

16. As far as balance of convenience is concerned, petitioners and their predecessors were in possession of the suit property since the year 1982 and hence the balance of convenience is in favour of the petitioners and aspect which is also required to be considered is that before the Trial Court while considering application for temporary injunction there was no contest by the respondents and it is only at the appellate stage that subsequent transferee Shivaji i. e. respondent No. 1 herein has preferred an appeal.

17. Considering the above, the writ petition succeeds. The order of the Appellate Court dated 31st January, 2022 passed in Misc. Civil Appeal No. 93 of 2018 is quashed and set aside and the order of the Trial Court dated 21st June, 2018 passed below Exhibit 49 in R.C.S. No. 648 of 2012 is restored. Rule is made absolute in above terms. There shall be no order as to costs.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23