

WRIT PETITION NO. 3321 OF 2022

Versus

Shri Pravin S. Dighe, Advocate for the Petitioners.
Shri S. P. Katneshwarkar, Advocate for the Respondent Nos. 1
and 2.

CORAM : SHARMILA U. DESHMUKH, J.

CLOSED FOR ORDER ON : 08.02.2023
ORDER PRONOUNCED ON : 15.02.2023

FINAL ORDER :

. The impugned judgment and order dated 16.02.2022 is passed by the District Judge – 4, Beed in Misc. Civil Appeal No. 20 of 2021 thereby allowing the application below Exhibit 05 in R.C.S. No. 457 of 2019.

2. Before adverting to the facts of the case, it is necessary to refer to the previous litigation between the parties. One Rama Shinde had two sons namely Mahadev and Natha. In the year 1987, the property of Rama was divided equally between Mahadev and Natha, which is evident from mutation entry No. 98 sanctioned on 26th September, 1987. Land gut No. 54 admeasuring 2H 20R and land gut No. 48 admeasuring 0H 66R came to the shares of Mahadev and Natha each. On 30th April, 1992, Mahadev executed registered sale deed in favour of the

respondent No. 2 i. e. Ravindra Kalyan Sapkal through his guardian respondent No. 1-Kalyan Malharrao Sapkal.

03. In the year 1992, R.C.S. No. 174 of 1992 was instituted by Natha against the respondents seeking cancellation of sale deed and for an order of injunction. It was the case of Natha that Gut No 54 and Gut No 48 was joint family property and he was in possession and was cultivating the entire Gut No 54 and Gut No 48. It was denied that there was partition of the joint family property. The Trial Court granted temporary injunction on 29.06.1992 restraining the respondents herein from obstructing possession of Natha over the disputed land. Respondents preferred an Appeal being M.C.A No 42/92 which came to be compromised and the withdrawal pursis filed by the Respondents records that in view of compromise possession receipt has been executed on 05.03.1993. The possession receipt was executed in favour of the Petitioners by the Respondents, wherein it is recorded that the land purchased vide sale deed 30.04.1992 is agreed to be sold to the Petitioners and after obtaining permission for sale, the property standing in the name of the minor, Sale Deed will be executed.

04. R.C.S. No. 429 of 1993 was instituted by Mahadev against the respondents herein seeking avoidance of sale deed. R.C.S. No. 576 of 2000 was filed by the petitioners seeking decree of specific performance of contract on the basis of possession receipt executed in their favour by Ravindra and Kalyan. R.C.S. No. 378 of 2006 was instituted by Ravindra under guardianship of his mother against his father Kalyan for the possession and mesne profit on the basis of the registered sale deed dated 30.04.1992.

All these four suits came to be decided by a common judgment dated 19th January, 2015. R.C.S. No. 174 of 1992 was partly decreed and the respondents were restrained from interfering in the peaceful possession of Natha to the extent of Natha's share i.e. 2H 60R land out of gut No. 54 and 66R land out of gut No. 48. R.C.S. No. 429 of 1993, R.C.S. No. 576 of 2000 and R.C.S. No. 378 of 2006 came to be dismissed. Against the judgment and decree dated 19.01.2015, appeals came to be filed before the District Judge – 2. By judgment and order dated 28th September, 2017, all the four appeals came to be dismissed. As far as the possession of Natha over the entire Gut No 54 and Gut No 48 is concerned, the Appellate Court held that Natha has failed to prove possession over share of Mahadeo and was entitled for possession of his property to his extent and not share of Mahadeo. As against the judgment of the Appellate Court, the Petitioners have preferred Second Appeals which are pending before this Court.

05. In the year 2019 Kalyan and Ravindra filed R.C.S. No. 457 of 2019 against the petitioners herein for an order of perpetual injunction restraining the petitioners from interfering with the possession of the suit property. It is the case of the Respondents that in the earlier round of litigation the sale deed executed on 30.04.1992 has been confirmed and Mutation Entry No 179 has been effected in favour of the Respondents. On 20.09.2019 as the Petitioners tried to disturb the possession, the cause of action has arisen to file the suit.

06. By order dated 04th February, 2021, the Trial Court rejected the application for temporary injunction as against

which Misc. Civil Appeal No. 20 of 2021 was preferred by the respondents, which came to be allowed by the impugned judgment and order dated 16th February, 2022, whereby the application Exhibit 05 in R.C.S. No. 457 of 2019 came to be allowed.

07. Heard Mr. Dighe, learned counsel appearing for the petitioners and Mr. S. P. Katneshwarkar, learned counsel appearing for respondent Nos. 1 and 2.

08. Mr. Dighe submits that it is clear from the findings in the earlier proceedings that possession of the suit property was with the petitioners. He has invited attention of this Court to the order of temporary injunction passed in R.C.S. No. 174 of 1992, whereby the Trial Court had held that the lands were still joint and the plaintiff therein i. e. Natha is in possession on behalf of the members having share therein. He would further submit that in the month of March 1993 possession receipt was issued by Ravindra in favour of petitioners herein handing over possession of the land adm. 2H 20R out of gut No. 54 and 66R land out of gut No. 48 in favour of the petitioners. He would further submit that R.C.S. No. 378 of 2006 was filed by Ravindra seeking recovery of possession of the suit land along with past mesne profit. On the basis of previous litigation, he would submit that it is evident that the possession of the property was with Natha as otherwise R.C.S. No. 378 of 2006 would not have been instituted by Ravindra seeking recovery of possession. He has invited the attention of this Court to the averments made in paragraph No. 7 of R.C.S. No. 451 of 2019, in which the respondents have admitted the fact that the suit was instituted

for recovery of the possession. He has invited attention of this Court to the to the order of the Tahsildar passed on 07th October, 1996 and would submit that subsequent thereto, the entry was taken in the cultivation column in the 7/12 extract and which is continued. In support of his contentions, he relies on the following decisions of the Apex Court and this Court.

- A. *Rame Gowda (Dead) By L.Rs. Vs. M. Varadappa Naidu (Dead) by L.Rs. and another reported in (2004) 1 SCC 769.*
- B. *Wander Ltd. and another Vs. Antox India P. Ltd. reported in 1990 (Supp) SCC 727.*
- C. *Baban Anantrao Naik Vs. Sau. Pramila Uttamrao Yenare and another reported in 211(6) All MR 15.*

09. *Per contra* Mr. Katneshwarkar, submits that the respondents are claiming through Mahadev and Rama had partitioned the property i. e. land gut No. 54 and gut No. 48 in equal shares in favour of Natha and Mahadev. He would further submit that in R.C.S. No. 174 of 1992, the decree was passed by the Trial Court only in respect of the possession of Natha to the extent of his share i. e. 2H 60R out of gut No 54 and 66R out of land gut No. 48. He has invited attention of this Court to the issues which were framed by the Trial Court while deciding the previous four suits and in particular to the issues in R.C.S. No. 174 of 1992 as regards the possession of the suit land which has been answered partly in affirmative and also the issue as regards the ownership and possession of the suit lands of the respondents on the basis of sale deed dated 30th April, 1992, which had also been answered partly in the affirmative. On the basis of these findings on the issues in R.C.S. No. 174 of 1992, he would submit

that the Respondents are in possession of the suit land belonging to Mahadev. He would further submit that as far as the possession receipt is concerned, it was only paper possession. As regards the entry in the cultivation column, he would submit that the name of the petitioner is reflected in the ownership column and the entry in the cultivation column is merely an entry. He has invited attention of this Court to the findings of the Appellate Court in the appeals filed against the judgment and decree dated 19.01.2015, wherein the Appellate Court has held that Natha was entitled to possession only to the extent of his share. He would further submit that one of the points which were framed by the Appellate Court was whether there was partition between Natha and Mahadev and whether they were having any separate share in the suit properties, which has been answered in affirmative by the Appellate Court. He has invited the attention of this Court to the findings of the Appellate Court upholding the genuineness of the suit transaction and the inference which has been drawn by the Appellate Court from the partition which has been executed by Natha on 05th February, 2019 in favour of the petitioners which shows that entire property was partitioned by Rama in favour of Natha and Mahadev, which further came to be partitioned by Natha in favour of his two sons i. e. petitioners. In support of his contentions, Mr. Katneshwarkar relies upon the following decisions :

- a. ***Judgment dated 25th March, 2022 in Civil Appeal No. 2417 of 2022 in the case of State of U.P. Through Secretary and others Vs. Prem Chopra.***
- b. ***Gwaldas Shivkisanji Lakhotia Vs. Bapurao Arjunji***

Bandabuche reported in 2007(3) All MR 544.

10. The question to be determined is one of possession as the proceedings arise out of the application seeking temporary injunction. The facts narrated above show that the matter has a chequered history. RCS No 174 of 1992 was instituted by Natha seeking perpetual injunction in respect of suit property i.e. the property which formed the subject matter of sale deed dated 30.04.1992. The findings of the Trial Court as well as Appellate Court reflect restraining order was passed against the Respondent only to the extent of share of Natha. RCS No 429 of 1993 instituted by Mahadev for cancellation of the registered sale deed dated 30.04.1993 came to be dismissed. RCS No 576 of 2000 instituted by Petitioners for specific performance of sale on basis of possession receipt dated 05.03.1993 came to be dismissed.

11. In RCS No 378 of 2006 instituted by Respondent No 2 through his mother seeking recovery of possession of the suit land on the basis of registered sale deed dated 30.04.1992, it is contended that without protecting the right of the minor, the Respondent No 1 has entered into an agreement by way of possession receipt and as he was dispossessed from the suit land and it was prayed that he put in possession of the suit properties by evicting the Defendants.

12. The judgment of the Appellate Court dated 28.09.2017 did not disturb the findings of the Trial Court and are now the subject matter of Second Appeal before this Court. From the material on record, it appears that there are no orders passed in

favour of either party in the Second Appeal. As such as of date, the findings stated above have not been disturbed. RCS No 457 of 2019 is instituted by the Respondents seeking perpetual injunction restraining the Petitioners from disturbing the possession of the Respondents in respect of the suit property purchased by virtue of sale deed dated 30.04.1992 i.e. the property of Mahadeo. As far as the issue of partition of the Gut No 54 and Gut No 48 is concerned, the subsequent partition between Natha and his sons *prima facie* supports the position that the property was partitioned by Rama in favour of his two sons Natha and Mahadev in equal share. Mahadev had sold his share to the respondents herein in the year 1992, which sale deed has not been cancelled as of date. By virtue of the registered sale deed, *prima facie* the Respondents appears to be the owners of the suit suit property.

13. For the purpose of considering the application for temporary injunction, the factum of possession is relevant. Rival claims of possession are raised. Petitioners claim to be in possession of the entire Gut No 54 and 48 and to prove their possession seek to rely upon the pleadings in RCS No 378 of 2006, the mutation entry effected in the cultivation column, and the possession receipt issued on 05.03.1993. On the other hand the Respondents base their claim for possession on the registered sale deed dated 30.04.1992.

14. From the judicial pronouncements in the earlier round of litigation, which has not been disturbed in Second Appeal pending before this Court, the ownership of the Respondents by virtue of the sale deed dated 30.04.1992 cannot be doubted. But

the question is whether the Respondents are in possession of the suit property. The sale deed was executed by Mahadev in favour of the Respondents on 30.04.1992 and the recital in the sale deed showed that possession had been handed over. However, the possession receipt dated 05.03.1993 executed by the Respondents records that the possession of the property was handed over to the Petitioners. Although the suit for specific performance of the agreement by way of possession receipt instituted by the Petitioners stands dismissed, there is no material produced by the Respondents to show that the possession was taken back. I do not find any merit in the contention of the learned Counsel for Respondent that the possession receipt was only on paper. If the possession was never parted with, there was no occasion for the Respondents to institute RCS No 378 of 2006 seeking recovery of possession. In the pleadings it is the specific case of the Respondents that Respondent No 2 was dispossessed of the suit land. The order of the Tahsildar of the year 1996 and 7/12 extract reveals the entry of the Petitioners in the cultivation column. The above stated *prima facie* reveals the actual physical possession of the Petitioners of the suit property. On the other hand apart from the registered sale deed, the Respondents have not been able to produce any material to demonstrate their actual possession of the suit property. No doubt the sale deed shows the title of the Respondents over the suit property, however, considering that the Petitioners are in settled possession atleast from the year 1993, when the possession receipt was issued in their favour, no restraining orders can be passed at the interlocutory stage. At this stage it would be apposite to refer to the decision of the Apex Court in the case of ***Rame Gowda (supra)***, wherein the Apex Court has held that it is

the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner.

15. The Appellate Court considered the sale deed and held that there is valid sale deed on the basis of which the respondents claim title and possession and is prior to the claim of the petitioners on the basis of the revenue entries. The Appellate Court, in my opinion, erred in not taking into consideration the material produced to show the possession of the Petitioners over the suit property. As far as the decisions relied upon by the learned counsel for Respondents is concerned, there is no quarrel with the proposition laid down that interim orders merge into final order. In my view, the decisions relied upon do not assist the case of the Respondents as there is no material to demonstrate the actual physical possession of the Respondents, which is relevant to decide the issue of temporary injunction.

16. For the reasons above, the Petition succeeds. The impugned order dated 16.02.2022 passed in M.C.A No 20/2021 is hereby quashed and set aside and the order of the Trial Court dated 04.02.2021 rejecting the application below Exh “5” stands restored.

[SHARMILA U. DESHMUKH, J.]

bsb/Feb. 23