

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6917 OF 2021

Balwant Krishna Thorat

Petitioner

.. (Org. Plaintiff)

Versus

Shankar Nivrutti Thorat and Ors.

Respondents

.. (Orig. Defendants)

.....

Mr. Dilip Bodake, Advocate for Petitioner.

Mr. Anilkumar K. Patil, Advocate for Respondents.

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CORAM : MILIND N. JADHAV, J.

RESERVED ON : FEBRUARY 03, 2023

PRONOUNCED ON : JUNE 05, 2023

JUDGMENT:

1. This Writ Petition is filed under Article 227 of Constitution of India to challenge the legality and validity of the impugned order dated 17.09.2021 passed by the District Judge-1, Karad, Satara in Miscellaneous Civil Appeal No.30 of 2021.

2. Petitioner is the Plaintiff in original Regular Civil Suit No.208 of 2020. Respondent No.1 is the original Defendant No.1 in the said suit. Parties shall be referred to as Plaintiff and Defendants for the sake of convenience.

3. Plaintiff filed Regular Civil Suit No.208 of 2020 on 18.02.2020 in the Trial Court seeking partition of Plaintiff's share in the suit property described in paragraph No.1 of the Plaint. Plaintiff

also sought injunction against Defendant No.1 to restrain him from entering upon the suit property and from taking forcible possession of the suit property.

4. Such of the relevant facts which are necessary for deciding the present controversy are outlined hereinunder. Suit property originally belonged to one Baburaoji Thorat. After Baburaoji's demise the suit property devolved upon his sons namely Defendant No.4 and Defendant No.5 and their late brother Vishnu. Defendant Nos.2 and 3 are the two sons of Vishnu. Thus, Defendant Nos.2 to 5 are blood relations who claimed entitlement in the suit property through their original ancestor late Baburaoji Thorat. Plaintiff is a distant relative of Defendant Nos.2 to 5. Defendant No.1 is not related to the Plaintiff or Defendant Nos.2 to 5. The present dispute is between Plaintiff and Defendant No.1 only.

5. Record shows that Plaintiff and Defendant No.1 both are cultivating their respective agricultural lands / property which is in the close vicinity of the suit property.

6. Admittedly, Defendant No.2 vide sale deed dated 10.01.2018 conveyed his share in the suit property to the Plaintiff. Accordingly Mutation Entry No.4954 was effected. Thereafter Defendant No.4 and Defendant No.5 also vide Consent Deeds dated 25.12.2019 and 26.12.2019 conveyed their share in the suit property

to the Plaintiff. During the same time, Defendant No.3 conveyed his share in the suit property vide Sale Deed dated 03.10.2019 to Defendant No.1. By virtue of the transactions noted above both Plaintiff and Defendant No.1 got proper access to their respective agricultural lands which were in the close vicinity of the suit property.

7. According to the Plaintiff he was put in possession of the entire suit property namely Gat No.40/4A since 2018 and he has cultivated and harvested sugar cane crop during the years 2018 – 2019 and 2019 – 2020 in the entirety of the suit property.

8. According to Plaintiff, in view of sale deed dated 03.10.2019 executed by Defendant No.3 in favour of Defendant No.1, Defendant No.1 attempted to dispossess the Plaintiff from the suit property. Therefore, Plaintiff was constrained to file Regular Civil Suit No.208 of 2020 in the Trial Court. Plaintiff also filed Application below Exhibit-5 alongwith the suit plaint seeking restraint on Defendant No.1 from disturbing his possession of the suit property.

9. By order dated 30.04.2021, the Trial Court allowed the Application filed below Exhibit-5 and passed an order of restraint against Defendant No.1. Defendant No.1 being aggrieved filed the statutory appeal against the order dated 30.04.2021 before the District Court. This Appeal was numbered as Miscellaneous Civil Appeal No. 30 of 2021. Before moving the Appeal, Defendant No.1 filed an

Application below Exhibit-15 seeking to refer to and rely upon additional evidence at the appellate stage which was in the nature of producing on record five additional documents. The District Court allowed Exhibit-15 and permitted the Defendant No.1 to refer to and rely upon the five documents i.e. additional evidence. After hearing the parties by order dated 17.09.2021, the District Court set aside the order of injunction dated 30.04.2021 passed below Exhibit-5 by the Trial Court on the principal ground that the Plaintiff and Defendant No.1 have both purchased an undivided interest of the co-parceners in the joint family property and the said property being undivided, none of the parties have acquired title to any definite share in the property as claimed and are therefore not entitled to joint possession and their dispute can only be adjudicated in an appropriate suit proceedings by the Civil Court. Hence, the Plaintiff has filed the present Writ Petition assailing the order dated 17.09.2021 and seeks restoration of the Trial Court's order dated 30.04.2021.

10. Mr. Bodake, learned Advocate appearing for the Plaintiff (Petitioner) has taken me through the gamut of the pleadings and would submit that the findings returned by the District Court that neither the Plaintiff nor the Defendant No.1 have acquired any title to any definite share in the property and are therefore not entitled to joint possession and in view thereof no injunction can be granted in

favour of either of the parties is totally incorrect. He would submit that Plaintiff is a blood relative of Defendant Nos.2 to 5. He would submit that except Defendant No.3, the rest of Defendants have admittedly transferred their share in the suit property to the Plaintiff. He would further submit that Defendant No.3 has however transferred his share to the Defendant No.1 who is a complete stranger and outsider. He would submit that if the Defendant No.1 is aggrieved he can seek redressal from the Civil Court by seeking partition of the suit property and seek allotment of his share in the same. He would submit that the undivided share of the co-parceners which has been transferred and conveyed to the Plaintiff and the Defendant No.1 can certainly be the subject matter of sale and transfer but without the same having been partitioned by metes and bounds, possession cannot be handed over to Defendant No.1. He would submit that in that view of the matter, even though Defendant No.1 may have purchased the share of Defendant No.3 vide sale deed dated 03.10.2019, he still cannot claim possession of the suit property since partition and demarcation of Defendant No.3's share has not taken place. He would submit that it is only Defendant No.1 who has obstructed the Plaintiff whereas the other Defendants have not created any hurdle. Hence the injunctive relief in the Trial Court was sought against Defendant No.1. He would submit that the finding of the District Court in Appeal that Defendant No.1 is equally in possession of

a portion of the suit property and his possession over the suit land stands proven from the sketch map and the 7/12 extract is incorrect, perverse and contrary to the evidence on record. He would next submit that during the years 2018-2019 and 2019-2020, Plaintiff cultivated and harvested sugarcane crop in the suit property which would go to prove that Plaintiff is in possession of the suit property. He would further submit that there is evidence on record that the sugar factory had supplied and provided water for sugarcane harvesting to the suit property which would *prima facie* prove possession of the Plaintiff. This documentary evidence which has found favour with the Trial Court has not been considered by the District Court in Appeal. He would submit that once the Trial Court has appreciated the evidence the District Court ought not to have re-appreciated the evidence and substituted its own findings which are infact contrary to the material on record. He has taken strong objection to the findings returned by the District Court in paragraph Nos.5 and 6 of the impugned order. On the basis of the above submissions he would submit that the impugned order dated 17.09.2021 deserves to be set aside and the Trial Court's order dated 30.04.2021 be restored.

11. ***PER CONTRA*** Mr. Patil, learned Advocate appearing for the contesting Defendant No.1 (Respondent No.1 herein) has vehemently

opposed the submissions made by Mr. Bodake, learned Advocate for Plaintiff (Petitioner) and at the outset would submit that after the present Writ Petition was filed in this Court, the Petitioner has taken undue advantage of Defendant No.1's injured health and obtained the ad-interim *ex-parte* order dated 22.12.2021 from this Court. He would submit that Respondent No.1 could not remain present on 22.12.2021 to instruct the Advocate as he was assaulted by the Petitioner before that date and for which the Petitioner is facing prosecution. He would submit that it is therefore necessary to vacate the ad-interim order in view of the following submissions. He would submit that in so far as the facts relating to entitlement are concerned the same are governed by the rights between the parties. He would submit that Defendant No.1 has acquired the share of Defendant No.3 whereas Plaintiff has acquired the share of Defendant Nos.2, 4 and 5 in the suit property. The shares are undivided and not effected by metes and bounds. This is the admitted position. He would submit that the injunction granted by the Trial Court on 30.04.2021 was incorrectly granted in the view of the fact that having adherence to the aforementioned position both Plaintiff and Defendant No.1 were using the suit property to access their existing agricultural lands in the near vicinity of the suit property. He would submit that the Police Authorities have recorded the statement of Plaintiff and Defendant No.1 separately wherein both parties have admittedly agreed to their

respective demarcated purchased portions of land out of the suit property. He would submit that both Plaintiff and Defendant No.1 infact purchased the suit property / portions is the suit property in order to get a proper access to their already existing agricultural lands in the vicinity of the suit property. He would submit that the District Court in Appeal has specifically returned the finding that as per the separate statements given by the Plaintiff and Defendant No.1 to the Police Authorities it is seen that cultivation of the lands of both parties are separate. He would submit that as per the Certificate dated 16.12.2020 issued by the Sahyadri Cooperative Sakhar Karkhana which is at page No.160 of the Petition it can be deduced that the cultivable land of the Petitioner is only to the extent of 4R of sugarcane which is not disputed by Defendant No.1. He would next submit that submission of the Plaintiff that he is cultivating the suit land is therefore incorrect as there is no documentary material placed on record to show that the suit property has been cultivated by the Plaintiff. He would submit that out of the suit property small portions of lands were respectively purchased by the Plaintiff and the Defendant No.1 only with the intention to get a proper access to their already existing agricultural lands. He would submit that the extract at page No.160 of the Writ Petition referred to and relied upon by the Plaintiff does not pertain to the suit property whereas it is the separate property of the Plaintiff. He would therefore urge that the order dated

17.09.2021 be upheld.

12. I have perused the order dated 30.04.2021, passed by the Trial Court which is at Exhibit-H (Page No.194) of the Petition and the impugned order dated 17.09.2021 passed by the District Court which is at Exhibit-K which is at Page No.231 of the Petition. It is seen that admittedly, Plaintiff and Defendant No.1 purchased their respective portions from the Defendant Nos.2 to 5 as stated hereinabove. This is an undisputed position. It is seen that Defendant No.1 purchased area admeasuring 1.16R out of the block no.40-4A i.e. the suit property. The total area of the suit property is 7R. Plaintiff claims to be in possession of the entire area of 7R. The District Court in Appeal while looking into the evidence which was produced before the Trial Court at the *prima facie* stage has reversed the finding of the Trial Court with respect to possession. The Trial Court held that the Defendant No.1 could not prove his possession as his claim is supported by way of sketch map only. But this is not the case. The District Court in Appeal has also referred to the 7X12 extract of the suit property which shows that the Defendant No.1 is in possession as owner thereof. This relevant and important piece of documentary evidence is supported and corroborated by the statement dated 09.02.2020 of the Plaintiff and Defendant No.1 to the Police Authorities wherein both the parties have admitted their respective possession over the suit properties and

have decided not to interfere with each others' possession. The District Court after referring to this material evidence concluded that the said documents were *prima facie* sufficient to hold that the Defendant No.1 was also in possession of some portion of the suit property. In that view of the matter and considering that no partition has admittedly been effected between the co-sharers, injunction could never have been granted in favour of the one of the parties. I am inclined to accept this finding of the District Court as it is not only well reasoned but supported with evidence at the *prima facie* stage. Considering that both Plaintiff and Defendant No.1 are in joint possession of the suit property the Trial Court could not have granted injunction in favour of the Plaintiff. I am in complete agreement with the findings returned by District Court in paragraph Nos.10, 11 and 13 of the order dated 17.09.2021 which are reproduced hereinunder :-

“10) While setting aside the findings of Ld. Trial Court, it needs to observe that, the Ld. Trial Court has overlooked the fact that Appellant is equally in possession of 1.16-R of land. The observation of Ld. Trial Court that there is no document in support of the contention of Appellant regarding his possession over the suit land cannot be sustained for the reason that besides the sketch map, the 7X12 extract of Block No.40-4A shows that, the Appellant is in possession as owner thereof. Moreover, the statement dated 09/02/2020 of the Appellant and the Respondent No. 1 recorded by Police in complaint dated 03/10/2020 disclosed that, both the parties have admitted their respective possession over the disputed land and further decided not to interfere with each others possession. These documents *prima-facie* sufficient to hold that Appellant is also in possession of some portion of the suit land. Therefore when both the Appellant and Respondent No. 1 are in possession of the suit land to the extent of their shares as co-owners and further fact that admittedly there is no partition between the co-sharers, then injunction cannot be granted in favour of either of the party as they are in joint possession.

11) *It is settled law that, co-sharer cannot give possession of his undivided share to vendee unless and until the land has been partitioned by metes and bounds. The proposition has been laid down by the Hon'ble Apex Court in case of **Ramdas Vs. Sitabai reported in MANU/SC/0910/2009** wherein it is held that, there cannot be any dispute with regard to the fact that an undivided share of a co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendor unless the property is partitioned by metes and bounds amicably through a mutual settlement or by a decree of the Court. In absence of division by metes and bounds, no undivided interest can be given in possession of a stranger unless there is decree of partition or there is an arrangement already reached amongst the parties which divides the property by metes and bounds."*

13) *Admittedly, the Respondent No. 1 has purchased his undivided share from Respondent No. 2. Further admittedly, there is no partition between Respondents No. 2 and 3 by metes and bounds. Therefore as held in the case of **Siddheshwar Mookharjee (Supra)**, Respondent No. 1 and the Appellant have purchased an undivided interest of co-parcener in the joint property. Neither the Respondent No. 1 nor the Appellant have acquired any title to any definite share in the property and are not entitled to joint possession from the date of their purchase. They can work out their rights only by a suit for partition and their right to possession would be from the period when a specific allotment is made in their favour i.e. after the decision of suit before the Ld. Trial Court. Therefore at present, no right accrues to either of the party and no injunction can be dealt with in favour of either of the party as being co-owners. It needs to observe that the Ld. Trial Court has failed to appreciate this legal aspect."*

13. In that view of the matter, the impugned order does not call for any interference by this Court. The order dated 17.09.2021 is sustained.

14. In view of the above observations and findings, Writ Petition is dismissed. Ad-interim order dated 22.12.2021 stands vacated.

15. Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

16. After the judgment is pronounced, Mr. Bodake has made an

oral Application seeking stay of the order in view of the standing crops having been harvested by the Petitioner on the suit land. He would submit that the Petitioner desires to test this judgment/order.

17. I am inclined to accept the request of Mr. Bodake. The present judgment/order shall stand stayed for a period of ten weeks from today.

H. H. SAWANT

[MILIND N. JADHAV, J.]