

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6829 OF 2023

Gulabrao Krushna Mardhekar (Deceased)

Through his legal heirs

Sopan Gulabrao Mardhekar

...Petitioner

Versus

Mr. Jagannath Bajirao Mardhekar & Ors.

...Respondents

—————
*Mr. Sachin J. Kadam, Mr. Siddharth Khedekar i/b Mr. Omkar R. More for
the Petitioner.*

Mr. Prithviraj S. Gole for the Respondents.
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Coram : Sharmila U. Deshmukh, J.

Date : July 20, 2023.

P. C. :

1. Heard.

2. The challenge in the Petition is to the order dated 15th April 2023 passed by the Appellate court reversing the finding of the Trial court below Exhibit-5.

3. Regular Civil Suit No. 2 of 2023 was instituted by the Petitioner seeking perpetual injunction restraining the respondents from encroaching upon the Petitioner's property being portion of Gat No 103/1A from the

western side. The case in the plaint is that the Petitioner's father was the owner of the suit property and by registered sale deed of the year 1991, 2.50R of the said Gat No. 103/1A was sold to the Defendants. It is stated that recently the Defendant Nos. 1 to 3 started construction of their house and while constructing the house is attempting to encroach upon the Plaintiff's property to the extent of 1.5 gunthas. In spite of request, the Defendants did not curtail the encroachment and hence, the suit in question came to be filed in January, 2023. To this, the defence is that at the time of execution of the sale deed of the year 1991, the Defendants have taken possession of 4R land of Gat No. 103/1A and that they were in possession since the year 1991 and had constructed their house in the said area which construction was completed in the year 1993. It is further their case, then subsequently the house constructed was demolished and the present construction is being carried out in the area which is in possession of the Defendants since the year 1991.

4. The Trial Court while deciding the Exhibit-5 Application considered the decision of the Apex court in the case of ***Anathula Sudhakar v. P. Bacchi Reddy (dead) By Lrs. And Ors.***¹ which laid down the circumstances in which the suit simpliciter for injunction would lie. The

¹ (2008) 4 Supreme Court cases 594

Trial Court observed that the admitted position was that the Plaintiffs are the owners of the suit property and that the Defendants claim title by adverse possession in respect of the said 1.5 gunthas. The Trial court considered the Gram Panchayat property records and came to the conclusion that the area which is mentioned in the Gram Panchayat record would indicate that the Defendants are possessing only 2.5R. The Trial court came to the *prima facie* finding that the Defendants are not in possession of 1.5 gunthas land out of 7.49R land of the plaintiff and as such allowed the Application restraining the Defendant Nos. 1 to 3 to not construct in the encroached portion mentioned in paragraph No. 1 in the plaint.

5. The Appellate Court while reversing the finding of the Trial Court held that upon a reading of paragraph No. 7 of the plaint, it is the case of the Plaintiff that the Defendants have already committed encroachment on 1.5 gunthas land and without obtaining the relief of possession the suit simpliciter for injunction would not lie. The Appellate Court based on the photographs which are produced on record, came to *prima facie* conclusion that the Defendants are constructing their house in the area where the old house was situated. On these two grounds the Appellate Court has reversed the finding of the Trial Court.

6. Learned counsel for the Petitioner submits that the admitted position is that the Plaintiff is the owner of the balance area of 7.49R out of the Gat No. 103/1A and a specific case is put forward that while constructing their house, the Defendants are attempting to encroach upon the land of the Plaintiff. As such he would urge that the Defendants cannot be construed to be in possession of that area. He would further point out the Gram Panchayat records as regards the old house property which annexed at page No. 57 to 59 of the Petition and would contend that even if the areas of the house properties mentioned in the Gram Panchayat records are added, the same would around 2500 sq. ft. and as such, the claim of the Defendants that they are in possession of 4R of land is not sustainable. He would further submit that the construction commenced in the month of December, 2022 and as attempt was made to encroach upon the Plaintiff's land the suit has been filed to restrain the Defendants from carrying out the construction by encroaching upon the property of the Plaintiff.

7. *Per contra*, learned counsel appearing for the Respondents-Defendants support the impugned order and would submit that the Appellate court has rightly come to a finding, on reading of paragraph No. 7 of the plaint, that the Defendants are in possession of the Plaintiffs land

to the extent of 1.5 gunthas. He would further submit that the photographs on record indicate that the construction is being carried out on the land which was bounded by the pink color compound wall and as such, the possession is proved. He does not dispute the title of the Plaintiff over the remaining portion of Gat No. 103/1A but claims title by adverse possession.

8. Considered the submissions of learned counsel appearing for the parties and perused the papers.

9. The ownership of the Plaintiff over the balance area of Gat No. 103/1A is admitted. The Defendants claim to have acquired prescriptive title by adverse possession in respect of area admeasuring 1.5 gunthas. In the written statement, it is admitted that the registered sale deed of the year 1991 was in respect of land admeasuring 2.5 gunthas out of Gat No. 103/1A. In paragraph No. 9 of the written statement it is contended that at the time of accepting possession upon execution of the sale deed of the year 1991, the possession has been taken in respect of 4R land instead of 2.5R land and that the same is continuing. In paragraph 10 it is contended that in the year 1991 in the 4R land the Defendant Nos. 1 to 3 started construction of house admeasuring East West “9 khan” and south north “4 ghai” and the same was completed in the year 1993. The portion situated

on eastern side of the house was used for the purpose of keeping wooden logs, tying of cattle etc. Subsequently in the year 1994 a shed came to be constructed on the portion situated on the southern side of the house in east west direction and on the eastern portion shed came to be constructed in north south direction which was used for keeping wooden logs, tying of cattle etc. As regards the eastern portion shed there is no Gram Panchayat record. It is admitted that the Plaintiff is the owner of 7.49R land, however, it is contended out of the said area only 6R land was in use of the Plaintiff. There is also a map annexed at Page No. 52 of the Petition from which it appears that the encroachment is from the eastern side of the house property, on which it is contended that a shed had been erected for the purpose of keeping wooden logs, tying cattle etc , for which there is no Gram Panchayat record.

10. If we consider the written statement, the case put forward by the Defendant is that admittedly 2.5R land was sold. However the claim is that possession of 4R land was taken in the year 1991 i.e. excess of 1.5R land and house was constructed in the year 1993. There is no sanctioned plan produced on record to demonstrate the measurements of the previously constructed house to show the exact area on which the old house was constructed. The possession of the excess area is sought to be

justified on the footing that the same was used for the purpose of keeping wooden logs, tying cattle etc. Such use of the open spaces around the house is a common phenomenon, however, in my view, the same cannot be equated with possession and much less settled possession. From the map produced at Page No. 52 of the Petition, the excess area appears to be on the eastern side of the house. The shed stated to be constructed thereon is not recorded in the Gram Panchayat records and there is nothing to show that any such shed was in fact constructed.

11. To *prima facie* establish their contention of possession of area of 4R land from Gat No 103/1A, the Defendants seek to rely on the Gram Panchayat records which are annexed on page Nos. 57 and 59 and on the photographs. If we peruse the Gram Panchayat records, the submission of the learned counsel for the Petitioner is correct that the area of the house properties mentioned in the Gram Panchayat records are about 2.5R. The photographs which are produced on record do not show whether the area is 2.5R or 4R. A part of the compound appears to have been demolished and as such, on the basis of photographs it is impossible to come to a *prima facie* conclusion that the Defendants are in possession of 4R of land. On the contrary the case of the Defendants is not that in the entire 4R land their previous house is constructed. The contention is that the area

around the house was used by the Defendants for the purpose of keeping wooden logs, tying cattle etc. and on this ground possession is claimed since the year 1991. In the background of this assertion, the Appellate Court could not have arrived at a *prima facie* finding on the basis of the photographs of the old house, that the photographs demonstrate that the Defendants are in possession of 4 R land.

12. The Appellate Court while reversing the finding construed in paragraph No. 7 of the plaint as an admission that the Defendants are in possession of 1.5 gunthas of land out of the Gat No. 103/1A. A careful reading of paragraph No. 7 of the plaint would indicate that the case of the Plaintiff is that the Defendants while carrying out the construction of their house are attempting to encroach upon the property of the Plaintiff to the extent of 1.5 gunthas and with this case the Plaintiff has come before the Trial Court. The case of the Defendants that the said 4R is in possession since the year 1991 has not been demonstrated apart from the photographs. On the other hand, the admitted position is that the Plaintiffs are the owners of the property and specific averment is made in the plaint that while carrying out the present construction there is an attempt of encroachment by the Defendants.

13. As indicated above, the Defendants have not been able to

demonstrate their possession of 4R of land since the year 1991 or that they had constructed their house on the land admeasuring 4R and in fact the Gram Panchayat records demonstrate otherwise. Considering the admitted position being the Plaintiffs are owners of 7.49R of Gat No. 103/1A with no material to demonstrate the settled possession of the Defendants hostile to the owner, *prima facie* case is made out by the Plaintiffs. The purpose of grant of interim relief is to protect the status quo. If the Defendants are permitted to carry out the construction, irreparable loss will be caused to the Plaintiff. The Plaintiffs have no objection to the construction of the house by the Defendants in their area of 2.5R and the relief is restricted to encroaching upon the property admeasuring 1.5R admittedly belonging to the Plaintiff.

14. In that view of the matter, the impugned order is unsustainable and is hereby quashed and set aside and as such the order of the Trial Court allowing the Exhibit-5 Application stand revived. Writ Petition stands dismissed.

15. At this stage request is made by learned counsel appearing for the Respondents seeking stay of the impugned order for the period of three weeks. This request is opposed by the learned counsel appearing for the Petitioner by submit that under the guise of stay, the Respondents would

continue with the construction. Learned counsel appearing for the Respondents submit that no construction will be carried out. In view thereof, the order is stayed for a period of three weeks from the date of uploading of the order.

[Sharmila U. Deshmukh, J.]