

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.7401 OF 2022
WITH
WRIT PETITION NO.7403 OF 2022**

Jaysing Jiva Bharwad

..... Petitioner

Vs.

Harshavardhan Navalchand Mehta

..... Respondent

Mr. Pratik B. Rahade for the Petitioner.

Mr. Vivek Walavalkar i/b Mr. Sameer Bhalekar for Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 7 JULY 2023.

P. C.

1. These two petitions arise out of two applications filed in the suit as well as counterclaim in the respondents suit for injunction. As Exhibit 5 application was rejected by the trial Court, Civil Misc. Appeal was filed which came to be allowed by the appellate Court. As far as the petitioner's counterclaim is concerned, application below Exhibit 20 was allowed by the trial Court which came to be rejected by the appellate Court. As common issues are raised, same are disposed of by the common order.

2. The challenge in the petition is to the order dated

16/4/2022 passed by the appellate court in Civil Miscellaneous Appeal No.155/2018 reversing the order of the trial Court allowing exhibit 20.

3. The facts of the case is that the petitioner is the original defendant in Regular Civil Suit No.97/2018 instituted by the respondent-plaintiff. The suit properties consisted of agricultural land except one room and tin shed. The case of the plaintiff is that the suit property is owned by the plaintiff and that the petitioner was put in position in the capacity of servant-cum-caretaker of the agriculture land of the plaintiff. The plaintiff has come with the case that when the plaintiff went to reside at Mumbai, the defendant-petitioner unauthorisedly constructed one room, a cattle shed and started dairy business. It is further the case of the plaintiff that upon becoming aware of the said activities, the plaintiff issued notice to the defendant terminating the *Nokarnama* and demanded vacant possession of the suit property. As there was no compliance, suit came to be filed against the defendant. In the suit counterclaim has been filed by the defendant claiming title by prescription stating that the defendant is in possession of the

premises since the year 1989. In the application seeking order of temporary injunction, the trial Court held that the suit property was given in actual possession of the defendant as per *Nokarnama*. The trial Court further held that even if the possession is in the capacity of servant, watchman or caretaker actual possession is *prima facie* with the defendant. With this observation the trial Court partly allowed the application with a direction to the plaintiff not to disturb possession of the defendant without following due procedure of law till final decision of the suit. Aggrieved by the order of temporary injunction passed by the trial Court the plaintiff filed Civil Miscellaneous Appeal No.155/2018 and by judgment dated 16/4/2022 the appellate Court reversed the findings of the trial Court giving rise to the present petition.

4. Heard Mr. Pratik Rahade, learned counsel for the petitioner and Mr. Vivek Walavalkar for the respondent.

5. Learned counsel appearing for the petitioner submits that the admitted position is that the defendant is in possession of the suit property. He would further contend that it is specific case

in the written statement that he is in possession and as such his possession being possession for a continuous period of 12 years, he has acquired title by prescription. He would further submit that he has disputed the *Nokarnama* which is said to be put forward by the plaintiff and at the stage of interim injunction his settled possession be looked into. He would further contend that it has come on record before the trial Court as well as the appellate Court that the defendant is in possession of the property and being so, evidence is required to be led as regards authenticity of the *Nokarnama* and his possession is required to be protected. Learned counsel for the petitioner invited attention of this Court to the *Nokarnama* and would contend that the same is not genuine for the reason that stamp paper is of 2/2/2005 and there appears to be signature on the *Nokarnama* which is not his signature. In support of his contention he seeks to rely on the decisions of the Apex Court *Rame Gowda (Dead) by Lrs. v. M. Varadappa Naidu (Dead) by LRS.,(2004) 1 Supreme Court Cases 769; Baban Anantrao Naik v. Pramila Uttamrao Yenare & Anr., 2011(6) ALL MR 15*. He would contend that even trespasser's possession is required to be protected.

6. *Per contra*, learned counsel for the plaintiff has pointed out that the defendant being a caretaker or servant in possession cannot be said to be in settled possession. He has drawn attention of this Court to the observations of the Apex Court in the case of *Maria Margarida Sequeira Fernandes & Ors. v. Erasmo Jack De Sequeira (Decd) thr Lrs, (2012) 5 Supreme Court Cases 370*, and contended that the defendant cannot be said to be in possession in law inasmuch as the possession of caretaker is in fact the possession of the owner and the caretaker will not construed to be in actual possession so as to entitle protection at the interim stage.

7. Considered the submission.

8. The plaintiff has come with the case that pursuant to the *Nokarnama* which was executed, the defendant has been put in possession of the property and as the defendant started conducting activities in his own right over the suit property. *Nokarnama* was terminated and possession was sought back. In the written statement, it is the case of the defendant that he is in possession

since December 1989. It is however pertinent to note that there is no averment as to the manner in which the defendant has come in possession of the suit property. During hearing of the application, there is no document which has been produced on record to show that he is in possession of the suit property in his own right. Learned counsel for the petitioner submits that there were some bills of the fertilizer shop which were produced as well as some affidavits of the adjacent owners that he was in possession. In my opinion, the affidavit of the adjacent owners cannot be taken to be the evidence of possession as an owner or occupant in his own right. It was required for the defendant to produce documentary evidence on record to show that property was in his possession in his own right which the defendant has *prima facie* failed to do. Apart from bare words that since 1989 he is in possession, there is no document produced on record. If it is the contention of the defendant that he has acquired title by prescription, there has to be some material to show as to when his title became hostile to the original owner. In the present case, the defendant appears to take a shifting stand inasmuch as on one hand he claims to be tenant and on the other hand he claims to acquire title by prescription. Be that

as it may. It is pertinent to note that the decision of the Apex Court in the case of *Maria Margarida Sequeira Fernandes (supra)* after considering the law on the subject has in paragraph No.97 laid down the principles of law and in particular paragraph No.97(2) of the Apex Court holds that caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

9. It is pleaded that even trespassers possession is required to be protected however the position in law is that possession of the caretaker or the servant is in fact possession of the owner. It is not disputed that the plaintiff is the owner of the property and that being so in view of the *Nokarnama* which is produced on record *prima facie* it appears that the defendant has been put in possession as a caretaker. Genuineness or otherwise of the *Nokarnama* as well as the issue of ownership of the petitioner either as a tenant or by way of title by prescription will be a matter of consideration at the time of evidence.

10. In light of above, no infirmity in the order of the

appellate Court. The Writ petition devoid of merits stands dismissed.

SHARMILA U. DESHMUKH, J.