

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

WRIT PETITION NO.7001 OF 2023

Madhukar Dadu Nigde

..... Petitioner

Vs.

Shamrao Dadu Nigde & Ors.

..... Respondents

Mr. Yuvraj Narvankar for the Petitioner.

Mr. Niranjana Bhavake i/b Bhavake & Associates for Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 21st JUNE 2023.

P. C.

1. Heard.

2. The petitioner who is the plaintiff in Special Civil Suit No.313/2021 questions the order dated 28/4/2023 passed by the District Judge-4 in M. C. A. No.9/2022 modifying the order of the trial Court dated 16/12/2021 and restraining the defendants from making any construction on the suit lane. The injunction granted by the trial Court restrained the defendant from carrying out any construction or alienating any part of the suit property i.e. Gat

No.174/2016. For sake of convenience parties are referred to by their status before the trial Court.

3. The Special Civil Suit No.313/2021 was filed for partition, separate possession and injunction. The case of the plaintiff is that the properties described in paragraph No.1 of the plaint are ancestral properties acquired by their common ancestor Rama Nigade. The case of plaintiff is that there was no partition by metes and bounds, and the legal heirs were possessing and cultivating their respective lands. It is case of plaintiff that towards southern side of plaintiff's house there is lane having width 8.2 sq. ft. and length 86 ft. which was used in common by plaintiff and defendant Nos. 1 to 3.

4. Perusal of the plaint indicates that it is a case of the plaintiff that on 24/5/2021 the defendant Nos. 1 to 3 therein demolished the old house and started construction by encroaching on vacant portion used in common by the parties. Notice came to be issued by the plaintiff to defendant No. 1 to 3. As defendant Nos. 1 to 3 did not honour the Deed of family arrangement, which

was entered into between the parties and carried out construction not as per the old assessment, the petitioner was constrained to approach the trial Court. It is also the case of the petitioner in the plaint that there was a mutation entry under 7/12 extract which shows 'reduction' in the area falling to the share of the plaintiff as regards the suit property.

5. Perusal of paragraph No.12 of the plaint as regards the cause of action shows that taking advantage of the mutation entry under 7/12 extract, the nature of the suit property is sought to be changed and the area which is in possession of the plaintiff is sought to be encroached upon and the construction is being carried out. Relief which was sought by the plaintiff is for declaration that in the suit property, the plaintiff has 1/4 share and also relief that the construction which has been carried out by defendant Nos. 1 to 3 by encroaching upon the share of the plaintiff is required to be demolished. The description of the suit property which is stated in paragraph No.1 of the plaint includes apart from the disputed Gat No.174/16, other properties.

6. In the written statement the defendant no.1 has set up a Deed of family arrangement which is also dated 28/4/2020. However there is discrepancy as far as the area is concerned inasmuch as the Deed put up by the plaintiff shows area of 0.06.50 R coming to the share of defendant Nos.1 to 3 under Gat No.174/16, whereas the Deed of family arrangement of the same date which is being put up by defendant No.1 shows the area of 0.21.50 R coming to the share of respondent No.1

7. Learned counsel appearing for the petitioner has invited attention of this Court to the Deed of arrangement which is being pressed into service by defendant Nos. 1 to 3 and would submit that bare perusal of it would indicate that there has been overwriting. It is further pointed out that in the Deed which is being canvassed by defendant No.1, there is a handwritten line which gives the area of 04.450 R out of survey No.174/16 to the plaintiff. He has pointed out that the second Deed which is canvassed by the defendant No.1 has been altered and is different from the original deed of family arrangement which was executed between the parties. He would further submit that it is not his case

that encroachment is being carried out in common land and the submission is that he has constructed upon Gat No.174/16 and as per the family arrangement only share 0.06.50 R falls to the share of defendant No.1 and the balance area belong to the plaintiff. As such construction which is being carried out by defendant No.1 encroaches upon the share of the plaintiff and therefore defendant Nos.1 to 3 has been rightly restrained by the order of trial Court from carrying out any construction work. He would further assail the order of the appellate Court by pointing out that the appellate Court has observed that it is difficult to ascertain that any portion of land recorded in the name of any one is in possession of the member. The appellate Court has modified the restraint order to the extent of not carrying out construction on common open lane. He would further point out that in spite of injunction being granted by the trial Court, defendant Nos. 1 to 3 carried out construction for which appropriate application has been preferred before the trial Court.

8. To counter the submission of learned counsel for the plaintiffs, learned counsel for defendant Nos.1 to 3 submits that

there are two Deeds of family arrangements. He would further point out that although the first and last page of both these Deeds are the same, the properties distributed between the parties are different. He would further submit that it is evident from the Deed which is being canvassed by defendant No.1 that sufficient share has been allotted to the plaintiff and as such it cannot be said that the said Deed is fabricated. He has further pointed out that it was always the case of the plaintiff that construction was being carried out in the common lane, which according to the defendant Nos.1 to 3 was not so. He would further point out that the said fact is borne out from the notices which were issued by the advocates on behalf of the plaintiff in which it is stated that construction has been carried out by encroaching upon the common lane.

9. Considered the submission of Mr. Yuvraj Narvankar for the petitioner and Mr. Niranjana Bhavake for the respondents.

10. *Vide* order dated 16/12/2012 the trial Court has restrained the defendants from doing any construction work or alienating any part in Gat No.174/16 till disposal of the Suit. The

trial Court has taken into consideration the old extract of Form 8-A which clearly shows that 0.14R area in Gat No.174/16 is recorded in the name of petitioner-plaintiff and also considered the recent 7/12 extract which shows area of 0.21.50R mutated in the name of the plaintiff. The trial Court after taking into consideration that there is an overwriting in the date and area of the property as also family partition Deed holds that the documents create doubt on the part of the Defendants and gram panchayat has not given any permission under Gat No.174/16 to the defendants and as such restrained the defendants from carrying out any construction in Gat No.174/16. What is to be noted is that the trial Court has failed to take into consideration that it is not as if defendant No.1 was stranger to the property and has carried out construction on the property belonging to the plaintiff. Even if Deed of family arrangement which is canvassed is taken into consideration it is apparent that defendant No.1 was entitled to portion of Gat No.174/16 and as to what portion defendant No.1 was entitled to, will be a question which will have to be decided at the time of trial after leading evidence. In as much as the dispute appears to be in respect of share of defendant No.1 it is not the plaintiff's case that

the entire Gat No.174/16 falls to the share of the plaintiff and as such defendant No.1 has no right in the suit property and could not have carried out construction. For the purpose of grant of injunction restraining the defendant from carrying out construction in Gat No.174/16, it was necessary for the plaintiff to *prima facie* show his possession over the entire Gat. From the perusal of material on record, the plaintiff has failed to do. The plaintiff seeks to place reliance on the old Form No.8 A which shows area of 0.14R in the name of the plaintiff. However, it cannot be lost sight that there are mutation entries in favour of defendant No.1 which shows area of 0.21.50 R. It will be a matter of evidence as to which of the entries have been obtained by fraud as alleged by the plaintiff. At this stage the revenue entry will have to be taken into consideration. On the basis of said entries, it cannot be said that defendant No.1 had no right to carry out any construction in Gat No.174/16.

11. Another area of dispute between the parties is whether construction is carried out on common lane or in respect of property over which the plaintiff claims exclusive possession. Upon

perusal of the plaint it appears that the plaintiff has come with a case that defendant No.1 has encroached upon common lane and has carried out construction. In the advocate's notice, it is stated that defendant No.1 should not encroach upon the common lane and carry out construction and should restrict its construction to the area which is recorded in the old assessment records. What is required to be noted is that in the advocate's notice dated 29/6/2021 which is issued on behalf of the plaintiff it is stated that there has been oral partition between the parties and based on oral partition, the parties are in possession of respective shares. Be that as it may. The fact remains that defendant No.1 is *prima facie* entitled to portion of Gat No.174/16.

12. The appellate Court after taking into consideration the photographs had arrived at *prima facie* finding that the parties have carried out construction on their part on Gat No.174/16. For the purpose of obtaining restraint order as indicated above, it was necessary for the plaintiff to show that he was in possession of particular portion of Gat No.174/16 upon which the defendant No.1 has encroached and carried out construction. Considering

that there appears to be a dispute as regards the possession, in my opinion defendant No.1 is required to be restrained only to the extent of not carrying out construction on the suit lane.

13. During the hearing this Court has been informed by learned counsel for defendant No.1 that construction has been completed, which fact is being disputed by learned counsel for the petitioner. It is stated that construction work is still going on.

14. Considering the dispute, at the outset this Court had expressed a view that defendant No.1 could be restrained from carrying out any further construction and be permitted only to carry out internal plastering and painting. However, the learned counsels appearing for the parties could not arrive at consensus and as such matter was argued.

15. Considering the above, this Court is not inclined to pass any further order modifying the order of the appellate Court. This Court does not find any case for indulgence as the impugned order does not suffer from any illegality.

16. The writ petition stands dismissed.

SHARMILA U. DESHMUKH, J.