

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1308 OF 2019

Nagnath Dattatray Waghmode.

...Petitioner.

Versus

Sarubai Ambadas More

Since deceased through legal
representatives and Others.

..Respondents.

Mr. Ashok B. Tajane for the petitioner.

Coram : Sharmila U. Deshmukh, J.

Date : August 11, 2023.

P. C. :

1. The office noting shows that the notices issued to respondent nos. 1A to 1D have been duly served and the respondent nos.2 to 14 are also duly served. On 25th July 2023, considering that none had appeared for the respondents and that the matter had been called after Court working hours, the matter was adjourned to 31st July 2023. On 31st July 2023, the matter was adjourned to 4th August 2023 for the purpose of filing compilation of additional documents and the matter was heard. None appeared for the respondents on any of these dates.

2. The challenge in the petition is to the order of appellate

Court dated 11th October 2018 confirming the order of trial Court allowing Exhibit-31 which was filed by respondent nos.2 to 7 and 9 to 11 seeking restraining orders against the petitioner from interfering with the possession of respondents. For the sake of convenience, the parties are referred to by their status before the trial Court.

3. The facts of the case are that Regular Civil Suit No. 198 of 2016 was preferred by the plaintiff seeking declaration of title in respect of Gat No.780/2, admeasuring 1-Hectare 1-Are and for permanent injunction restraining the defendants from interfering with the possession of plaintiff. In this suit, an application below Exhibit-5 was filed by the plaintiff seeking restraining orders as against defendant nos.1 to 4 from creating third party rights in respect of the suit property, which came to be allowed. There is no appeal as against the said order. An application came to be filed below Exhibit-31 by defendant nos.2 to 7 and 9 to 11 seeking interim restraining orders against the plaintiff from interfering with the possession of defendants over the suit property. The trial Court by the order dated 14th June 2017 allowed both the applications and restrained defendant nos. 2 to 4 from alienating the suit land till the decision of suit and restrained the plaintiff from causing obstruction to the possession of defendant nos.2 to 11 till the decision of suit. As

against this, Civil Miscellaneous Application No.101 of 2017 was preferred by the plaintiff which came to be dismissed, giving rise to the present petition.

4. Heard Mr. Ashok Tajane, learned counsel appearing for the petitioner.

5. Mr. Tajane, learned counsel for the petitioner submits that Regular Civil Suit No. 198 of 2016 was filed in respect of Gat No. 780/2 for an area admeasuring 1-Hectare 1-Are. He would submit that on 1st February 1971, there was a sale deed executed between one Daulat Dada Vyavhare and Gopal Davari in respect of suit property earlier bearing Survey No.254/1(part) admeasuring 1-Hectare 38-Are. He would further submit that recitals in the sale deed indicates that the possession was handed over in the year 1971. He would further submit that by sale deed dated 3rd February 1995, the said Daulat Dada Vyavhare had sold the suit property to the plaintiff. The recitals in the sale deed also record that the possession had been handed over. He would further submit that as regards the property bearing Survey No. 254/1, there was a partition suit which was filed by Uttam Soudagar Davari, Babasaheb Soudagar Davari and Sarubai Soudagar Davari, being RCS No.17 of 1970, which came to be decreed and the

plaintiffs in that suit were declared to have 5/16th share in the suit land and a direction was given for partition and separate possession of the property. He would further submit that pursuant to the decree, execution proceedings were initiated, being Regular Darkhast No.13 of 1979 and in the revenue records the shares were given effect to being Mutation Entry No.6854. He would submit that the 5/16th share of the plaintiff in RCS No.17 of 1970 came to 1-Hectare 58-Are, which was given Gat No.780/1 and the balance area was given Gat No.780/2, which was 1-Hectare 1-Are. He would submit that it was during the execution proceedings, the revenue authorities while giving possession to the plaintiff in RCS No.17 of 1970, i.e., to the other branch of Davari family, have illegally entered the name of Janardhan Gopal Davari and two others in the 7/12 extract of Gat No. 780/2 for area admeasuring 1-Hectare 1-Are and illegally cancelled the name of plaintiff. He would further submit that as such an application came to be filed in the year 2009 with the Tahsildar seeking recording of his name in the 7/12 extract which was allowed but the said order was not executed by the revenue authorities. He has invited the attention of this Court to the order of trial Court and would contend that the trial Court after holding that the plaintiff will be certainly entitled to the share allotted to Janardhan, Gopal and Laxman to the extent of sale deed, has in respect of the possession

held that as per Mutation Entry No. 6854, the possession receipt as well as the panchnama is also prepared in respect of handing over possession which cannot be discarded *prima facie*. He would submit that the appellate Court while deciding the appeal has held that both the parties are claiming possession over Gat No.780/2 and after observing that both the sale deeds *prima facie* sufficiently hold the title of plaintiff, on the basis of mutation entry and the possession receipt, dismissed the appeal. In support of his contention, Mr. Tajane has invited the attention of this Court to the compilation of additional documents in which the mutation entry is annexed at page no. 227. He would urge that along with mutation entry, there is no possession receipt or panchnama which has been executed or produced by the defendants for the purpose of showing possession and on the basis of this mutation entry, the interim relief has been concurrently declined.

6. Considered the submissions and perused the papers.

7. In the present case, the challenge is limited to the orders passed by trial Court and appellate Court in respect of the injunction application filed by the defendants below Exhibit-31 seeking restraining order against the plaintiff from interfering with the possession of defendants over the suit property. So, the enquiry will

have to be limited to whether the defendants have been able to establish *prima facie* their possession over the suit property.

8. The plaintiff has come with a case that by sale deed of the year 1971, the suit property was purchased by Daulat Vyavhare from Gopal Davari and that the defendants are the sons and other legal heirs of Gopal Davari. The recital in the sale deed of 1971 is that the possession has been handed over at the time of execution of sale deed and also the recitals in the subsequent sale deed of the plaintiff which is executed on 3rd February 1995 is about handing over possession by Daulat Vyavhare to the plaintiff. These sale deeds of the year 1971 and 1995 have not been challenged at least till the year 2016 when the suit was filed for a declaration by the plaintiff that Gat No. 780/2 admeasuring 1-Hectare 1-Are is owned by the plaintiff. It appears that by virtue of a decree which has been passed in the year 1975, the name of Janardhan, i.e., son of Gopal and other defendants came to be mutated in the revenue records. It is no doubt true that RCS No.17 of 1970 was instituted prior in point of time before the execution of sale deed on 1st February 1971 in favour of Daulat Vyavhare, however, the fact remains that the plaintiff in RCS No.17 of 1970 had received their 5/16th share in the suit property which was bearing Gat No. 780/1 and the remaining land was bearing Gat No.

780/2 and the plaintiffs restricted their claim to Gat No. 780/2 admeasuring 1-Hectare 1-Are. The sale deeds not having been set aside by any Court of law, are *prima facie* valid and subsisting. The trial Court as well as the appellate Court have accepted that the plaintiff will be entitled to the share allotted to Janaradhan, Gopal and Laxman to the extent of his sale deed. The trial Court appears to have swayed by the mutation entry No. 6854 which was effected after the decree in RCS No.17 of 1970. It is not disputed that prior thereto, the name of Daulat Vyavhare and plaintiff came to be recorded in the 7/12 extract on the basis of Mutation Entry Nos. 679 and 4048. Mutation Entry No. 6854 was effected in the year 2000 when the suit land came to be recorded in the name of Janardhan and others pursuant to decree which was passed in RCS No.17 of 1970 and the plaintiff's name was deleted from the 7/12 extract. The fact remains that the plaintiff was not a party to RCS No.17 of 1970 and also while effecting the mutation entry in the year 2000, no notice was given to the plaintiff. The aspect of possession has been decided in favour of Janardhan and others on the basis of their names being recorded in the 7/12 extract and the mutation entry which notes that the possession receipt as well as panchnama was prepared in respect of handing over possession. The trial Court as well as the appellate Court failed to notice that no such panchnama or possession receipt was

produced by the defendants in support of their application at Exhibit-31. That being so, merely because mutation entry No. 6854 records that such a document was prepared cannot be the basis for grant of injunction particularly in view of the fact that there are registered sale deeds of the year 1971 and 1995. In my opinion, the defendants have failed to produce any document which will *prima facie* indicate their possession over the suit property , i.e., Gat No.780/2 admeasuring 1-Hectare 1-Are. Even if it is accepted that in the partition suit, Gat No. 780/2 came to the share of Janardhan and others, the fact cannot be lost sight of that by the sale deed, their father, Gopal had alienated the property in favour of Daulat Vyavhare and subsequently in favour of the plaintiff and possession is parted with by Gopal. In my opinion, in the absence of any document being produced to show possession of the defendants, mere reliance on the contents of mutation entry in the face of registered sale deeds, cannot be accepted. In the absence of any document showing otherwise, the settled position is that possession follows title. The registered sale deeds being subsisting as on date, the order restraining the plaintiff from causing obstruction to the possession of defendants till the decision of suit is unsustainable.

9. Apart from reliance on the mutation entry, the orders under challenge do not refer to any other document. The burden was upon

the defendants to show possession, which in my opinion, the defendants have *prima facie* failed to prove. Considering that the plaintiff is claiming title under a registered sale deed, the balance of convenience tilts in favour of the plaintiff and in event the restraining orders are passed against the plaintiff, irreparable loss will be caused to the plaintiff especially considering that the sale deeds are of the years 1971 and 1995, which specifically record that the possession has been handed over to the plaintiff and the mutation entry sanctioned is of the year 2000.

10. In view of the above, the impugned order is unsustainable and is hereby quashed and set aside. As a consequence, the application filed by the defendants below Exhibit-31 stands rejected. The petition succeeds and stands allowed.

[Sharmila U. Deshmukh, J.]