



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4707 OF 2022

1) Tukaram S/o Parmeshwar Lavhale,
Age : 652 years, Occu. : Agril.,

2) Balasaheb S/o Parmeshwar Lavhale,
Age : 48 years, Occu. : Agril.,
R/o 72/B, Subhadra Nagar,

3) Laxman S/o Parmeshwar Lavhale,
Age : 46 Years, Occu. : Agril.,

All R/o Bhatkudgaon, Tq. Shevgaon,
District Ahmednagar.

4) Samindrabai W/o Parmeshwar Lavhale,
(Dead)
L.Rs. Are already on record as
Petitioner Nos. 1 to 3.

.. Petitioners

Versus

1) Digambar S/o Asaram @ Ashru Lavhale
Age : 74 years, Occu. : Agril.,

2) Sundarabai W/o Digambar Lavhale,
Age : 69 Years, Occu. : Agril.,

3) Sakharam S/o Digambar Lavhale,
Age : 53 years, Occu. : Agril.,

4) Meenakshi W/o Ramesh Dharam,
@ Meenakshi D/o Dattatraya Lavhale,
Age : 31 years, Occu. : Agril.,
R/o Behind Gramin Rugnalaya,
Bagde Wasti, Chari No. 14,
Rahata, Tq. Rahata, Dist. Ahmednagar.

- 5) Murlidhar S/o Asaram @ Ashru Lavhale,
Age : 69 years, Occu. : Agril.,
- 6) Ganesh S/o Murlidhar Lavhale,
Age : 39 years, Occu. : Agril.,
- 7) Shridhar S/o Asaram @ Ashru Lavhale,
Age : 62 years, Occu. : Agril.,
- 8) Bhimabai W/o Shridhar Lavhale,
Age : 56 years, Occu. : Private Service,
- 9) Balasaheb S/o Kacharu Shinde,
Age : 56 years, Occu. : Agril.,
- 10) Popatrao S/o Haribhau Rindhe,
Age : 49 years, Occu. : Agril.,
- 11) Rajabhau S/o Bapusaheb Londhe,
Age : 44 years, Occu. : Agril.,
R/o Majle Shahar, Tq. Shevgaon,
District : Ahmednagar.
- 12) Arun S/o Ram Vyawhare,
Age : 44 years, Occu. : Agril.,
- 13) Vilas S/o Kisan Jadhav,
Age : 45 Years, Occu. : Agril.,
- 14) Madan S/o Namdeo Jadhav,
Age : 54 Years, Occu. : Agril.,

All R/o Bhatkudgaon, Tq. Shevgaon,
District : Ahmednagar.
- 15) Ankush S/o Sakharam Mane,
Age : 39 Years, Occu. : Agril.,
- 16) Lahu S/o Sakharam Mane,
Age : 38 Years, Occu. : Agril.,

Both R/o Bhaktarpur Phata, Tq. Shevgaon,
District : Ahmednagar. .. Respondents

Shri L. V. Sangit, Advocate for the Petitioners.

Shri N. S. Jaju, Advocate for the Respondent Nos. 1 to 3 and 5 to 8.

CORAM : SHAILESH P. BRAHME, J.

CLOSED FOR JUDGMENT ON : 12.04.2024
JUDGMENT PRONOUNCED ON : 19.04.2024

JUDGMENT :

. Rule. Rule is made returnable forthwith. Heard finally at the admission stage with the consent of parties.

2. Petitioners are assailing concurrent findings of facts in rejecting their claim for temporary injunction. They are original plaintiffs in R.C.S. No. 240 of 2018 filed for declaration and injunction against the respondents.

3. Both the parties are related *intere se*. Controversy pertains to the immovable properties of their joint family. It is the case of the petitioners that there was partition in the year 1997, but it was not mutated in the record of rights. The lands were divided amongst four brothers to the extent of 1/4th share by metes and bounds. Subsequently, obstructions were caused by the respondents to the share allotted to the petitioners and suit was required to be filed. A separate application at Exhibit 21 was filed for temporary injunction.

4. Respondents contested the suit as well as the application Exhibit 21. Factum of partition and separation by metes and bounds have not been disputed. However, claim of the petitioners was denied. It is contended that respondents are exclusive owners of few properties.

5. Petitioners claim temporary injunction from obstructing their peaceful possession of suit lands mentioned in clause No. 1-C, 1-D, 1-E and 1-F. They claim further relief to the extent of receiving 1/4th share of water from the wells located in gut Nos. 118, 85 and 118/3. It is contention of the petitioners that petitioner No. 3/Laxman Lavhale is running a shop in the name of Swami Samarth Krushi Seva Kendra in land gut No. 389/1/1A, which is being obstructed by respondents.

6. Application Exhibit 21 was rejected by order dated 24.06.2019 by the learned Civil Judge Junior Division, Shevgaon. Being aggrieved, petitioners preferred Misc. Civil Appeal No. 77 of 2019, which was dismissed by order dated 13.01.2022.

7. Learned counsel Mr. Sangit for the petitioners submits that there was cogent evidence on record to indicate possession of the petitioner No. 3/Laxman over shop in land gut No. 389/1/1A. He is running business which has been overlooked. It is further submitted that plea of the respondent No. 1 that part of land gut No. 389 was self acquired property purchased in the year 1995 is misconceived. It is further submitted that there is strong *prima facie* case and possession over shop which needs to be protected.

It is further submitted that possession over the shop has been protected by interim orders passed by this Court on 27.04.2022, which needs to be continued till final disposal of the suit.

8. Per contra, learned counsel Mr. Jaju for the respondents submits that having accepted factum of partition and separation by metes and bounds, petitioners are estopped from claiming possession over land gut No. 389. He would submit that there is no tangible material on record to indicate that suit lands were allotted to the petitioners. He would submit that there is title document in favour of the respondent No. 1 in respect of land gut No. 389. Other two brothers are supporting the respondent No. 1. Learned counsel submits that both the Courts below have concurrently decided in favour of the respondents. No case is made out to cause interference in the impugned orders.

9. Learned counsel has placed on record order dated 25.11.2022 passed by the Block Development Officer. It is further contended that no permission is secured by the petitioners for construction of shop and no procedure was followed while securing licence.

10. I have considered rival submissions of the litigating sides. Both the Courts below have recorded that petitioners failed to make out that they are in possession of 1/4th share in the suit properties and the petitioner No. 3 is running shop in land gut No. 389/1/1A. Both the Courts below have discarded documents placed on record to show that petitioner No. 3 is in possession of

shop and runs business in land gut No. 389/1/1A. Both the parties are *ad-idem* that partition was effected in the year 1997 or 1998.

11. The claim of the petitioners for temporary injunction is restricted to possession and running business of the petitioner No. 3 in land gut No. 389/1/1A. No submissions have been advanced to the extent of 1/4th share of water from the wells. Factum of partition has not been disputed by the respondents. The claim of the petitioners is for 1/4th share in the suit lands. Their entitlement for declaration and injunction can be decided after full-fledged trial. The respondent No. 1 claims to have purchased 14R of land from gut No. 389 in the year 1995. According to him it is self acquired property. The status of the land purchased by the respondent No. 1 can be gone into during the course of the trial of the suit.

12. Both the parties are related to each other. There was joint family having immovable properties. There was partition in the family resulting into allotment of shares. Petitioners claim to have received share in the land gut No. 389. In part of land gut No. 389, the petitioner No. 3 is running his business. There is *prima facie* case to protect his possession and business from the obstruction.

13. The petitioner No. 3 runs a shop under name and style as Swami Samarth Krushi Seva Kendra in land gut No. 389/1/1A. The certificates issued by Gram Panchayat, Bhatkudgaon show

that he runs shop at Gram Panchayat property No. 1400. His name is entered in the Gram Panchayat record. Form No. 8 of village record shows that he is occupying the land and paying taxes. A tax receipt is also produced on record. A photograph of the shop and the bills of the business, being run therein, support factum of occupation of the petitioner No. 3. Additionally, licence to run the business, renewal thereof are placed on record to show that there is running business.

14. Above referred documents produced by the petitioners disclose possession of the petitioner No. 3 over part of land gut No. 389/1/1A. Whether the possession is lawful or as a tress passer or permissive would be decided at the conclusion in the suit on merits. At this stage of the proceedings a case is made out for protecting the possession. This Court has also granted protection vide order dated 27.04.2022, which is still in operation.

15. Both the Courts below committed perversity in appreciating the documents of Gram Panchayat record, licence, bills and the revenue record. Learned counsel for the respondents during the course of submissions tendered on record order dated 25.11.2020 passed by the Block Development Officer, Panchayat Samiti, Shevgaon. The respondent No. 1 had objected Gram Panchayat record of Form No. 8 showing name of the petitioner No. 3. It has been ordered that name of the petitioner No. 3 be substituted by the name of the respondent No. 1. The proposed correction in the Gram Panchayat record is inconsequential. It would not change factum of possession.

16. A careful perusal of the judgment and order passed by the lower Appellate Court shows that Gram Panchayat record, tax receipt and licence have not been considered at all by the learned Judge, which is arbitrary. Lower Appellate Court failed to exercise jurisdiction vested in it. Learned counsel for the respondents relies on the judgment of the Supreme Court in the matter of Wander Limited Vs. Antox India Private Limited reported in *1990 STPL 2453 SC*. In paragraph No. 14 of the judgment, the Apex Court laid down the scope and the principles for exercising jurisdiction U/O XLIII of the Code of Civil Procedure. I am of the considered opinion that the parameters have not been followed by the lower appellate Court. Therefore, though there are concurrent findings of facts, the petitioners have made out a case to cause interference.

17. Learned counsel for the respondents further relies upon the judgment of the Apex Court in the matter of Kesharbai @ Pushpabai Eknathrao Nalawade (D) by LRs. and another Vs. Tarabai Prabhakarrao Nalawade and others reported in *2014 AIR SC (S.C.) 1830*. My attention is invited to paragraph No. 19 of the judgment. In that matter the Supreme Court was dealing with a case which was finally decided by the Trial Court and thereafter by High Court in first appeal. After full-fledged trial the claims were adjudicated. However, case in hand pertains to interlocutory injunction and trial is yet to take place. The ratio laid down cannot be made applicable to the present case.

18. A useful reference can be made to the judgment of the Supreme Court in the matter of Rame Gowda Vs. M. Varadappa Naidu reported in *AIR 2004 SC 4609*, wherein it is laid down as follows :

(10) It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

(11) It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions.

19. The petitioner No. 3 is in settled possession and is entitled to the protection as per the ratio of Supreme Court, cited supra. For the reasons stated above, I find that both the impugned orders are unsustainable. I, therefore, pass following order.

O R D E R

(i) The writ petition is partly allowed.

(ii) Impugned order dated 24.06.2019 passed below Exhibit 21 in R.C.S. No. 240 of 2018 by the learned Civil Judge Junior Division, Shevgaon and the judgment and order dated 13.01.2022 passed by the learned District Judge – 4,, Ahmednagar in Misc. Civil Appeal No. 77 of 2019 are quashed and set aside.

(iii) The respondents, their agents, servants or anybody claiming through them are temporarily restrained from obstructing to the possession and business of the petitioner No. 3/Laxman Parmeshwar Lavhale over land gut No. 389/1/1A situated at village Bhatkudgaon, Tq. Shevgaon till final disposal of the suit.

- (iv) Rule is made absolute in above terms.
- (v) There shall be no order as to costs.

[SHAILESH P. BRAHME, J.]

bsb / April 24