



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

9 WRIT PETITION NO. 2900 OF 2024

**MANIK RAMRAO BHATANE AND OTHERS
VERSUS
PANDHARI GAHINAJI KAMBLE AND OTHERS**

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Advocate for the Petitioner : Mr.Kedar Balbhim R.
Advocate for all Respondents : Mr. Sandip C.Swami Chakurkar

...

CORAM : SHAILESH P. BRAHME, J.

DATE : 17th FEBRUARY 2025

PER COURT :

1. Heard both sides finally at the admission stage.
2. The petitioners/original plaintiffs have preferred this petition against order dated 04.01.2024 passed by learned District Judge,3,Latur in M.C.A.No.99 of 2022. They have filed R.C.S No. 189 of 2022 for declaration and injunction. The application for temporary injunction at Exhibit-5 was partly allowed granting only order of status quo on 20.08.2022 by the trial court. Being aggrieved, appeal was preferred by them. The impugned judgment and order was passed not only dismissing the appeal but also rejecting application at Exhibit-5.
3. The controversy between the parties is in respect of old Survey Nos. 34/1 @ 34/A and 34/G. Under the consolidation scheme, Survey No. 34/1 @ 34/A, was formulated into gut no. 188

measuring 26R. On the basis of khasara patrak, village map, 7/12 extract and extract of the consolidation proceedings, the petitioners claims to be owner and in possession of the said land. It is their case that since beginning they are actually cultivating it which is not the property either included in Gavthan or belonging to the government. The respondents obstructed their possession under the pretext that they have right to usage over the graveyard, earmarked in old survey no. 34/G to the extent of 5R which is part and parcel of the gut no. 188.

4. Learned counsel Mr.Kedar for the petitioners submits that the lower appellate court committed error of jurisdiction in dismissing his appeal as well as rejecting application below Exhibit-5. There was no appeal at the instance of respondents against the order of status-quo passed by the trial court. He would submit that after considering revenue record, order of status-quo was passed in favour of his clients. It is further contended that respondents already had alternate land for the graveyard which was subject matter of acquisition and the respondents are not using alleged 5R of the land for the said purpose. The findings recorded by the lower Judge in respect of consolidation proceedings are perverse. Though petitioners names are recorded in others right column, it cannot be concluded at this stage that they are not in possession. He relies on the judgment of Supreme Court in the matter of **Wander Ltd. and Ors. Vs. Antox India P. Ltd.** reported in **1990 Supp(1)SCC727** to buttress that lower appellate court exceeded its jurisdiction.

5. *Per contra*, learned counsel Mr.Swami appearing for the respondents would support impugned judgment and order. He would submit that there is absolutely no prima-facie material on record to indicate that petitioners are in possession of 26 R of gut no. 188. The lower appellate court is justified in drawing correct inference from documents of consolidation proceedings wherein petitioners have been recorded in others right column. It is vehemently submitted that subject matter is gavthan land and the petitioners have not taken any steps to correct the revenue record. It is further submitted that they have alternate remedy if they are aggrieved by the record of right and the consolidation proceedings. To file a suit is not the remedy. For that purpose reliance is placed on the judgment of this Court in the matter of **Mrs. Geetabai Mahagulal Panchbudhe and another vs. Kailash Prakashchandra Makkad** in Writ Petition No. 5746 of 2017.

6. I have considered rival submissions of the parties. Undisputedly, application Exhibit-5 filed by the petitioners was allowed to the extent of order of status-quo. Being aggrieved, petitioners preferred M.C.A No. 99 of 2022 before the lower appellate court. There was no contemporary appeal filed by the respondents. The lower appellate court not only dismissed the appeal of the petitioners but vacated order of status-quo by rejecting application at Exhibit-5. This type of exercise is strongly objected by the petitioners on the basis of law laid down by Hon'ble Supreme Court in the matter of **Wander Ltd. and Ors.** (supra).

7. It is relevant to refer to paragraph no. 9 of judgment of Apex Court in the matter of **Wander Ltd. and Ors.** (supra) which is as follows :

9. The appeals before the Division Bench were against the exercise of discretion by the Single Judge.

In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph* [1960]3SCR713 said :

... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseption & Co. v. Johnston* the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.

The appellate judgment does not seem to defer to this principle.

8. The jurisdiction of lower appellate court under Order 43 of C.P.C is that of principle in nature. Re-appreciation is not permissible. When a view taken by the trial court is found to be reasonable and probable, it is not permissible to interfere with the findings unless there is perversity or arbitrariness. These principles laid down by Apex Court in respect of above referred judgment are totally

overlooked by lower appellate court. After considering entire order below Exh.5 and entire impugned judgment and order, I am of the considered view that lower appellate court indulged into re-appreciation of evidence. There are contentious issues between the parties which can be resolved by full-fledged trial.

9. Merely because there is entry of petitioners' names in others right column and reference of Gavthan in ownership column would not lead to the conclusion that petitioners are not in possession of the subject matter. Petitioners have placed on record khasara patrak, village map and 7/12 extract and the extracts of the consolidation proceedings to make out a case that they are actually cultivating the suit land. It is upto the trial court to adjudicate as to the nature of the possession and as to the title of the petitioners. But at this juncture it reveals that while partly allowing application exhibit-5, the trial court referred to the material produced by the parties and granted order of status-quo. A reasonable view has been taken by the trial court. It should not have been interfered with by the lower appellate court.

10. The statement of the respondents that the state government is not a party to the proceedings as the suit land is shown to be of gavthan land cannot be entertained at this juncture. It would be open for the respondents to agitate this ground before the trial court. The petitioners are not seeking correction of the revenue record or soliciting any orders in respect of consolidation proceedings. They have filed suit for declaration, injunction on the basis of title and

possession. Therefore, plea of alternate remedy has no substance.

11. Learned counsel for the respondents submitted that the respondents are entitled to use part of gut no. 188 as graveyard at least to the extent of 5R. This being one of the contentious issues, needs to be adjudicated and can not be decided at this juncture. There is prima-facie material to show that petitioners are in possession of the suit land. It is desirable to protect their possession till final adjudication of the suit.

12. The respondents relied on the judgment of this court in **Mrs. Geetabai Mahagulal Panchbudhe** (supra), that case is distinguishable on the facts. In that case, the petitioners who are defendants were challenging order of the trial court for rejection of their application preferred under Section 36B of Maharashtra Prevention of the Fragmentation and Consolidation of Holdings Act, 1947. In that context, the observations are recorded in paragraph no.15. We have already made it clear that petitioners are not challenging the revenue record or order passed by any revenue authority. The judgment cited by the respondents is of little help to them.

13. I am of the considered view that lower appellate court committed error of jurisdiction and the findings are against the ratio laid down by Hon'ble Supreme Court in the matter of **Wander Ltd. and Ors.** (supra). I therefore pass following order :

ORDER

- a) Writ petition is allowed.
- b) The judgment and order dated 04.01.2024 passed by learned District Judge, Latur in Misc.Civil Appeal No.99 of 2022 is quashed and set-aside and order passed by the trial court below Exhibit-5 of 20.08.2022 is restored.
- c) There shall be no order as to costs.

[SHAILESH P. BRAHME, J.]

vsj..