



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.16102 OF 2024**

Gangadhar Waman Pawar and Ors. ... Petitioners
versus
Laxman Khandu Jamkar and Ors. ... Respondents

Mr. Abhishek Nandimath with Mr. Advait Vajaratkar, for Petitioners.
Mr. Pratik B. Rahade, for Respondent Nos.1 to 4.

CORAM: N.J.JAMADAR, J.

DATE : 18 MARCH 2025

P.C.

1. Heard the learned Counsel for the parties.
2. This Petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of a judgment and order dated 16 April 2024 passed by the learned District Judge, Niphad in Misc. Civil Appeal No.9 of 2024, whereby the appeal preferred by the Respondent Nos.1 to 8 – original Plaintiffs, came to be allowed by setting aside the order dated 23 January 2023 passed by the learned Civil Judge on an application for temporary injunction (Exhibit 5), thereby rejecting the said application.
3. The Plaintiffs instituted a suit seeking declaration that the Respondents have perfected title by way of adverse possession over an area admeasuring 37R out of Gat No.519 situated at Ramnagar, Niphad (the suit property) and the Defendant Nos.1 to 4 have no right to seek possession thereof by dispossessing the Plaintiffs therefrom and the consequential relief of

injunction. The substance of the Plaintiffs claim was that the Plaintiffs and their predecessor in title have been in open, hostile and continuous possession of the suit property to the knowledge of Defendant Nos.1 to 4. Yet Defendant Nos.1 to 4 have initiated proceedings to measure the land bearing Gat No.519 and, on the basis of the said measurement, sought removal of the encroachment by approaching the authorities under the Maharashtra Land Revenue Code, 1966. Referring to the proceedings that ensued before the revenue authorities, the Plaintiffs instituted the suit for declaration.

4. The Plaintiffs preferred an application for temporary injunction (Exhibit 5). By an order dated 23 January 2023, the trial Court rejected the application holding that the Plaintiffs failed to establish the essential requirements of perfection of title by prescription. Prima facie, it appears that the Plaintiffs have not specifically pleaded the time wherefrom their possession became adverse to the Defendants. Rather, it appeared that the Plaintiffs were in permissive possession. The elements of balance of convenience and irreparable loss were answered against the Plaintiffs holding that, if eventually the Plaintiffs succeed, the possession can be restored to the Plaintiffs.

5. Being aggrieved, the Plaintiffs preferred an appeal being Misc. Civil Appeal No.9 of 2024. By the impugned order, the learned District Judge interfered with the order passed by the trial Court. The learned District Judge was of the view that the Plaintiffs have been in possession of the alleged

encroached portion. Under Section 138(4) of the Maharashtra Land Revenue Code, 1966, the Plaintiffs were entitled to institute a suit to establish title to the land in respect of which a boundary dispute was raised. The correctness of the map on the basis of which the Plaintiffs were sought to be dispossessed by resorting to the proceedings under the Maharashtra Land Revenue Code, 1966, was yet to be established. Therefore, the possession of the Plaintiffs deserved to be protected.

6. Mr. Nandimath, learned Counsel for the Petitioners, strenuously submitted that the learned District Judge transgressed the limits of the jurisdiction in delving into the aspects of prima facie case as to possession in exercise of limited appellate jurisdiction. Under no circumstances, the order passed by the trial Court can be said to be perverse. Therefore, the impugned order deserves to be interfered with. A very strong reliance was placed by Mr. Nandimath on a judgment of the Supreme Court in the case of Ramakant Ambalal Choksi V/s. Harish Ambalal Choksi and Ors.¹.

7. In the said case, after adverting to the previous pronouncements on the nature of the jurisdiction under Order 43 of the Code against the discretionary order, including the judgment in the case of Wander Ltd. V/s. Antox India P. Ltd.², the Supreme Court observed that the principles of law explained by the Supreme Court in Wander's (supra), have been reiterated in a number of

1 2024 SCC Online SC 3538

2 1990 Supp SCC 727

subsequent decisions. However, over a period of time the test laid down by this Court as regards the scope of interference has been made more stringent. The emphasis is now more on perversity rather than a mere error of fact or law in the order granting injunction pending the final adjudication of the suit.

8. Laying emphasis on the aforesaid enunciation, the learned Counsel would urge that in the absence of perversity in the order of the trial Court, the learned District Judge was in error in overturning the order of the trial Court.

9. Mr. Rahade, learned Counsel for Respondent Nos.1 to 4 supported the impugned order. It was submitted that the trial Court had committed grave error in not appreciating the factum of possession and delving into the question as to whether the requirements of adverse possession were made out or not. Thus, the learned District Judge was within his rights in interfering with the order of the trial court. Reliance was placed on an order passed by this Court in the case of Baban Anantrao Naik V/s. Pramila Uttamrao Yenare and Ors.³, wherein it was observed that at the time of determination of an application for temporary injunction, the factum of possession would only be the relevant factor. Whether the possession is lawful possession or not would not be the subject matter of enquiry.

10. I have perused the material on record and given anxious consideration

3 AO No.31 of 2010 dated 12 October 2010

to the submissions canvassed across the bar. The nature of the dispute between the parties deserves to be kept in view. It is the allegation of the Defendants that the Plaintiffs have committed encroachment over a portion of their land. To this end, the Defendants got the suit land measured. On the basis of the purported encroachment, revealed after the measurement, the Defendants have initiated action under the Maharashtra Land Revenue Code, for the removal of the encroachment. This stand of the Defendants itself implies that the Plaintiffs are in prima facie possession of the alleged encroached portion.

11. In contrast, the Plaintiffs claimed that they have been in possession of the alleged encroached portion since time immemorial and they have perfected title by prescription. The trial Court was of the view that all the classical requirements of the adverse possession i.e. *nec vi nec calm nec precario* were not prima facie made out. The trial Court went on to hold that it appeared that the possession of the Plaintiffs was permissive.

12. The aforesaid findings of the trial Court indicate that the factum of possession prima facie favoured the Plaintiffs. Evidently, the Plaintiffs were in settled possession of the suit land. Whether the Plaintiffs would succeed in establishing that they have perfected the title by prescription, would be a matter for adjudication at the trial. Therefore, the learned District Judge was justified in holding that the aspect of prima facie possession was not correctly

appreciated by the trial Court.

13. To add to this, the observations of the trial Court that even if the Plaintiffs are dispossessed, they can be put in possession if they ultimately succeed in the suit, indicates that the trial Court did not apply the tests of balance of convenience and irreparable loss correctly. Thus, the learned District Judge was well within his rights in correcting the error in the exercise of discretion by the trial Court.

14. For the foregoing reasons, I am not inclined to interfere with the impugned order.

15. The Writ Petition stands dismissed.

16. No costs.

(N.J.JAMADAR, J.)