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 Registered on: 01.01.2018
 Decided on : 07.07.2018
 Duration Yrs. Ms. Ds.
 00 06 06

IN THE DISTRICT COURT, CHANDRAPUR

(Presided over by Amit G. Joshi, District Judge-3)

Misc.Civil Appeal No.01/2018.
CNR:MHCH01-000023-2018

Exh.No.

Appellants : 1. Gayabai Shamrao Lanjewar,
 Aged about 60 years, Occ. Cultivation,
 R/o Nawargaon, Tah. Sindewahi, Distt.
 Chandrapur.

2. Kantabai Dadaji Zode,
 Aged about 57 years, Occ.Cultivation,
 R/o Rajoli, Tah. Mul, Distt. Chandrapur.

-Versus-

Respondent: Shrikant Jagdish Therkar,
 Aged about 21 years, Occ. Cultivation,
 R/o Dongargaon, Tah. Mul, Distt.
 Chandrapur.

 Shri S.W. Purankar, Advocate for Appellants.
 Shri P.C. Khajanchi, Advocate for Respondent.

J U D G M E N T

(Pronounced on 07.07.2018)

By this Misc. Civil Appeal under Order 43 Rule 1 (r) of the Code of Civil Procedure, challenge is to the order below Exh.24 dated 29.11.2017 by the learned Joint Civil Judge (Jr.Dn.), Mul in Reg. Civil Suit NO.15/2016. Vide the

impugned order the learned lower court has allowed the application for injunction partly and gave certain directions whereby the crop was directed to be cut jointly at joint expenses and division of income and further shifting of possession from one party to another at intervals to be witnessed by the villagers. In all, 13 directions have been passed. The application was preferred by the defendant who had filed counter claim also. Assailing the order, the appellant original plaintiffs are before this court. The respondent is the original defendant. There is cross objection under Order 41 Rule 22 r/w Order 43 Rule 2 filed by him also. Hence the appeal and cross objection is for adjudication. Vide order below Exh.9 status quo as to possession of the appellant was granted by this court.

2. Brief facts giving rise to the filing of the present appeal are summarised as under:

The appellants filed R.C.S.No.15/2016 seeking declaration against the will deed dated 4.7.2015 by deceased Tulshiram Therkar in favour of the respondent. Prayer was also made for partition, separate possession and injunction. The plaintiffs claimed as under:

The plaintiffs no.1 and 2 residents of Nawargaon, Tah. Sindewahi, Rajuli, Tah. Mul respectively are real sisters. The respondent is their nephew being son of their real brother Jagdish Therkar. Their father Tulshiram Kanhu Therkar

expired on 23.11.2015. He is said to have had ancestral property viz. land S.No.159 admeasuring 0.80 H.R. and land S.No.388 admeasuring 0.84 H.R. both at mouza Dongargaon. Apart from the same one house over S.No.356 of the same village is also claimed to be the ancestral property of Tulshiram. Plaintiffs claimed to be daughters out of the first marriage of the deceased. Their brother Jagdish is the issue from the second marriage of the deceased. They claimed that deceased at the time of death was around 90 years of age suffering from various ailments since 2-3 years and not in mental and physical condition being on bed since two years. They claimed that the will deed dated 4.7.2015 is fraudulent and illegal.

3. As regards the lands in dispute being the fields in question, the plaintiffs claimed that the same were given in their possession by deceased Tulshiram prior to his death as a share in partition. They filed objection on mutation before the Talathi on 23.2.2016, gave legal notice dated 30.3.2016, however the Naib Tahsildar, Mul vide order dated 29.7.2016 ordered for mutation in favour of the respondent. It is claimed that in collusion mutation is also carried out immediately on the next day before expiration of the appeal period. Plaintiffs claimed that they have 1/3rd share each. They claimed that the S.D.O., Mul vide order dated 6.4.2017 passed direction under section 145 (8) in favour of the respondent without

following legal provisions and the revision filed by the plaintiffs before this court vide Criminal Revision No.37/2017. Said order was set aside. They thus claimed declaration and separate possession.

4. In the suit, upon appearance the respondent Srikanth filed his written statement and also preferred counter claim. He claimed that he is the owner in pursuance of the will deed. He claimed to be in possession of the land being its tiller and prior to him his father and thus claimed 30 years long possession taken note of by the Talathi and entered in 7/12 extract. He also preferred the application under Order 39 rule 1 and 2 r/w section 151 of the Civil Procedure Code claiming disturbance to possession and seeking injunction. He claimed that the plaintiff tried to illegally cut the crop sown by him, proceeding again under section 145 of Cr.P.C. was taken against the plaintiffs and the defendant both. He claimed damages of Rs.90,650/- towards crop damage. He thus claimed that during the pendency of this suit the plaintiffs tried to disturb his possession. The said application was filed in September, 2017. The learned lower court upon hearing both the parties has passed the order impugned as aforesaid. Both the parties are aggrieved by the said order. Common grounds are that the finding regarding prima facie possession has been arrived perversely. Ground is also raised that the S.D.O., Mul had held that the appellants are in possession and

the Revenue Officer had reported to that effect. The order of the S.D.O. under section 145 Cr. P.C. passed in favour of the respondent to have been set aside in the revision. Besides the same ground is raised that having observed that the appellants had sown the crops and also cut the crops the finding regarding possession should have been arrived at and the learned lower court has failed to exercise the jurisdiction in the correct manner.

5. The ground raised in the cross objection are some what similar to that of the appellants. It is however urged that the inability to decide who had sown the crops and who is in possession shows the non-application of mind. In all 9 grounds are further raised that admission of the plaintiff in amendment application falsifies the story their claim was restricted to the standing crops on the date of the suit, there is no prima facie material to show possession of the plaintiffs as per their pleading and the presumption of the revenue record was in favour of the defendant.

ARGUMENTS CANVASSED:

6. Shri Purankar, the learned counsel for the appellants contended that the will is forged, deceased was 90 years old at the time of death in 2015 and that the appellants had share in the ancestral property. He further invited my attention to the averments in the will deed regarding the ancestral nature

of the suit properties to contend that even otherwise the deceased was not entitled by law to transfer the suit properties to the defendant single-handedly, it being ancestral property. He further contended that the plaintiffs had objected before the Talathi for mutation. He invited my attention to the mouka panchanama to show that the possession is of the plaintiffs by drawing my attention to the 7/12 extracts. It is his contention that except the 7/12 extracts of 2016-17 in respect of both the suit lands none of the 7/12 extracts have the name of the defendant Srikant and contended that the 7/12 extracts show the name of Tulshiram. He invited my attention to the mouka panchanama which mentions that the crop was sown by the plaintiff and the yield was cut and the grain was chaffed. He contended that the mouka panchanama dated 15.12.2016 as also 9.12.2016 in fact support the plaintiffs' case of being in possession at the relevant date. He invited my attention to the mouka panchanama dated 11.11.2016 to contend that for the year 2015-16 the possession is of the plaintiffs and not Srikant. He further invited my attention to the certificates dated 23.10.2016 issued by the President Tanta Mukti Samiti also to similar effect as also the Police Patil. He contended that the order of the S.D.O. is subject to appeal and merely because the S.D.O. relies on the registered will deed the defendant does not become the owner.

7. Per contra, Shri Khajanchi, the learned counsel for the respondent has contended in his short arguments that there is no document in the nature of 7/12 extract showing possession at any point of time of the plaintiffs, the will deed in favour of the respondent is a registered deed and presumption thus lies in favour of the defendant. As regards possession, he contended that the relevant date would be the date of counter claim and not the suit as claimed by the counsel for the plaintiffs. He contends that the learned lower court has observed that the de jure possession is of the defendant, the material is short to decide the de facto possession and found that at various points of time the possession has shifted from one party to another. He contended that such a finding was not warranted at all. It is his contention that the mouka panchanama relied by the plaintiffs also show that the earlier possession was of the defendant. He contends that in the mouka panchanama relied by the defendant it is mentioned that earlier the crop was sowed by the defendant. The same was uprooted by the plaintiffs who again sowed their crops which thus shows that the possession of the plaintiffs on the said date is illegal. The date referred by him is 15.12.2016. He contends that the certificates of the President of Tanta Mukti Samiti or the Police Patil are not determinative of the fact of possession and cannot be relied. He contends that whether the plaintiffs have a share in the property or not is a matter of trial and possession cannot be sought by taking law in their

own hands. He thus contends that the plaintiffs have no case and are not entitled to any injunction and on the contrary the defendant being owner is entitled to the injunction.

8. In reply Shri Purankar has invited my attention to the application under section 145 (8) of Cr. P. C. filed by the defendant himself before the S.D.O., Mul wherein in paragraph no.4 it is mentioned that the respondents had tilled the land and raised the crops. He relied on the said averment to be an admission of the defendant. Both the counsels have invited my attention to the respective affidavits of neighbouring field owners.

9. Having heard the respective counsel for the parties and upon perusal of the impugned order and the documents filed along with the memo of appeal and considering the grounds raised in the memo of appeal and the cross objection, following points emerged for my consideration and I have recorded my findings thereon for the reasons given thereunder:

Points:

Findings:

1.	Whether the defendant had made out a prima facie case for grant of injunction and whether balance of convenience lay in his favour and that irreparable loss would be caused to him if the injunction as prayed was not granted?	Affirmative.
2.	Whether the impugned order is legal and proper?	Negative.

3.	Whether the impugned order warrants interference in the appellate jurisdiction under Order 43 Rule 1 (r) of C.P.C.?	Affirmative.
4.	What order?	As per final order.

Reasons:

Point no.1:

10. The defendant having filed counter claim has preferred the application for grant of prohibitory injunction under Order 39 Rule 1 and 2 under section 151 of C.P.C. The defendant is thus bound to show existence of and legality of his possession. He has come up on the ground of possession since last 30 years along with his father on behalf of the grandfather Tulshiram and after death of Tulshiram on the basis of registered will deed the will deed is dated 4.7.2015. Tulshiram died on 23.11.2015 at mouza Dongargaon. Admittedly he was living along with son Jagdish and grandson Shrikant. The plaintiffs are married daughters residing in different villages. They have claimed to be in possession to have been given by Tulshiram prior to his death claiming that since then they have been tilling the land in question. The disputed land viz. field S.No.159 admeasuring 0.80 R.H. and field S.No.388 admeasuring 0.84 H.R. are described as suit properties 'A' and 'B' in the plaint paragraph no.1 besides house property over Bh.No.422 described as 'B-1'

which is also at mouza Dongargaon. Admittedly plaintiffs are daughters of deceased Tulshiram from his first wife and defendant's father Jagdish is the son from the second wife. All the dispute has arisen only after the death of Tulshiram. Both the parties have claimed to be in possession of the suit land.

11. The learned lower court has observed that both the parties were in possession at various points of time by taking law in their own hands and it therefore prompted it to pass the order in nature of the peculiar directions which are impugned herein. It has observed that exact possession of either party could also not be determined. As regards the said observation, I find substance in the contention of Shri Khajanchi, the learned counsel that such a finding could not be arrived at and it is incumbent on the court on the basis of the document placed before it to arrive at a prima facie finding regarding possession of the party on the date concerned. The documents thus need to be considered in light of the inter se pleadings. Having already referred to the pleadings of the defendant, his pleadings regarding temporary prohibitory injunction are also to be looked into.

12. The defendant has pleaded that since last 30 years he along with his father has been tilling the land, there is no question of partition and permanent injunction in favour of the plaintiffs and on the contrary the plaintiffs to disturb the possession have filed this false suit. In para 2 he has claimed

that the Talathi has given certificate regarding crop being sown in the Kharip season by the defendant and mouka panchanama was done and the Patwari had given the crops statement. He claimed that therefore the defendant is complete owner. Emphasis is laid by Shri Purankar on these averments to be insufficient for prima facie findings regarding possession and ownership. I find that solitary statement cannot be read. The pleadings have to be understood in entirety. The claim of the defendant is primarily on the basis of will deed and secondarily on the basis of continuous possession. Further in paragraph no.4 the defendant has claimed that mutation is effected in his favour which has not been challenged and by filing the suit on 19.8.2016 falsely the plaintiffs has caused disturbance to possession and rights. Conversely the plaintiffs' claim is that the possession has been given to them by Tulshiram prior to his death. The averments in vernacular need to be quoted for reference:

“तसेच दाव्यातील वादातील मालमत्ता परिच्छेद क्र.१ मधील मालमत्ता क्र.‘अ’ आणि ‘ब’ शेतजमीन ही मयत तुळशीराम यांनी मृत्युपूर्वी वादीच्या कब्जात व वहीवाटीत हिस्साची म्हणून दिलेली होती व तेव्हापासून सदरहु जमिनीवर वादीचा कब्जा व वहीवाट आहे.”

13. I find that the pleading is vague. No dates are mentioned and merely possession given prior to death is pleaded. Neither there is any supporting document to show that any partition was effected nor, any document showing handing over of possession on any particular date. Before

adverting to the other documents, the affidavits relied by the plaintiff need to be seen. They are of Prabhakar Gowardhan and Vithhal Poreddiwar. Both affidavits are identical. Averments in both are that Tulshiram was tilling the land till his death himself and after his death both the plaintiffs have been tilling the said land. Further averment is that in the last year as also in the present year the crop has been sown by them. Both have claimed to be adjacent field owners. However the affidavit is contrary to the plaintiffs' own pleading who have claimed that the possession was given to them prior to the death by Tulshiram. The pleadings are thus falsified by the affidavits. Further documents are to be looked into prima facie.

14. The 7/12 extracts are called into question by Shri Purankar the learned counsel to contend that defendant's name is not to be seen and it refers to the name of Tulshiram. I have gone through the said document. In the 7/12 extract of both the fields for the year 2014-15 the name is of Tulshiram. There is mention of crop loan of Rs.32,000/- in respect of both the fields from the bank. In reference thereto if the 7/12 extract relied by the defendant Shrikant is seen it also refers to crop loan taken from Chandrapur District Central Co-operative Bank for the same amount. The name of the occupant is shown as Shrikant. Though this 7/12 extract is challenged on the ground of being recent and on the basis of

mutation relying on will deed only, fact remains that it shows that Shrikant had also taken the crop loan. It prima facie fortifies the contention of the defendant that he had earlier sown the crop. There is no document of continuous possession of the plaintiffs.

15. Further, the only attack on 7/12 extract is on the ground that they show the name of Tulshiram only and Shrikant's name is not to be seen. The same will in no manner help the plaintiffs unless they show that they were tilling the land continuously. It is the contention of Shri Purankar that the possession of the relevant date has to be seen. He contends that even as per the mouka panchanama dated 9.12.2016 and Circle officer's report relied by the defendant it refers that the crop is sown by the plaintiffs and they took the yield also and threshing was also done. The averments therein are that in both the fields earlier the crop was sown by Shrikant and after some days the plaintiffs destroyed it and sowed their own crops and there was police report by Shrikant. It refers that there is no government record and still forcibly the Gayabai and Kantabai (plaintiffs) have sown the crops. Rather the question arises whether the possession of the plaintiff on 15.12.2116 is settled possession. Further question which arises whether the possession is in consequence to any legal right.

16. As regards the first question i.e. possession the same has

to be determined in the light of the entire facts of the case. It has been consistently held by the Hon'ble Apex Court that a person not in settled possession cannot have any right against the true owner of the property. He cannot be granted injunction either. In the present case, the plaintiffs did not file any application for temporary injunction. If the plaint averment is seen in paragraph no.3 it is averred that the defendant and his father are in preparation of forcibly sowing crop. Question arises why if the plaintiffs were in possession of the lands and they had sown the crops in the previous year and pleaded that the defendants were in preparation to obstruct, the plaintiffs did not apply for temporary prohibitory injunction. There have been proceedings before the S.D.O., Mul under section 145 (8) of Cr.P.C. and order was passed in favour of the defendant. In revision the same was set aside by the Session Court. The said order has also been relied by the plaintiffs. It was observed therein that the order was passed without affording opportunity to the other side. The matter was remanded for hearing afresh. The said order is dated 6.10.2017. Further developments are not pointed out. There is an affidavit (Exh.31) dated 23.11.2017 referring to the matter being remanded and pending.

17. By way of amendment in the plaint the plaintiff by inserting paragraph 3-A to 3-C have claimed partition and separate possession. It is thus contended by Shri Khajanchi

that now by virtue of the amended plaint there is admission and it is thus crystal clear that the plaintiffs are not in possession and their case is false. It would be rather apt to see the plaintiffs' case. They having claimed to be in possession prior to death of Tulshiram not having any document in support to show their possession to be given on any particular date, there is no averment in the legal notice either regarding this aspect. Prima facie I find that if the plaintiffs were already in possession prior to the date of suit filed on 19.8.2016 the same could have reflected in the legal notice. Rather, no possession is pleaded in the legal notice dated 3.3.2016 and only partition and separate possession has been demanded. It thus falsifies the plaintiff's case further.

18. Furthermore as regards the legal rights, it is contended by Shri Purankar that the property in question is ancestral in nature, Tulshiram had no right to single handedly give away the entire property. He points out further that the will deed though registered appears to be fraudulent. He pointed out that at all the places mentioning the date there is over writing. Further he has pointed out that in the first paragraph itself it is averred as “माझे वडीलोपार्जित मालकीचे व माझे मालकी कब्जे व वहिवाटीतले.” I have gone through the same. On the second page the land has been referred as self acquired “स्वकष्टार्जित”. The same has to be read prima facie with the documents pointed out by Shri Purankar being Adhikar Abhilekh Panji which show the name

of Tulshiram's mother also in 1970-71.

19. Prima facie, the property if ancestral in nature Tulshiram was not entitled to create the will. This has to be seen with the rights of the plaintiff first. They are admittedly married daughters having married prior to 1984 as claimed by the defendant in the counter claim in reply to para 2. The same is not specifically denied. Even in the plaint there are no averments regarding the date of marriage and rather if the plaintiffs' reply to the counter claim is seen there is no specific denial at all. Their rights prima facie are to be determined in light of the law regarding section 6 of the Hindu Succession Act as amended. The new Central amendment however gives right to the living daughter of the living co-parcener.

20. So far as the Maharashtra Amendment of 1994 to section 6 is concerned, it is held in **Kishor Morarji Bhojraj & Anr. vs. Mrs. Jaya Hiranchand Tarani, 2017 SCC OnLine Bomby 3976: (2017) 3 Mh.L.J. 909**, by the Hon'ble Bombay High Court in paragraphs 4 and 5 that the Maharashtra Amendment made material changes to the law of Succession and Inheritance of female Hindu heirs and marriage did not end the right of survivorship and the married daughter continue in co-parcenary. In paragraph 8 it is observed that the Central Amendment did not materially change the Maharashtra Amendment which was then held not to be

applicable to the daughters married before the date when the Maharashtra Amendment came into force on 22.6.1994.

21. In the present case, the observations squarely apply. The plaintiffs who are aged 60 years and 57 years respectively having married prior to 1994 can have the right only in respect of the share of Tulshiram. That being so, the registered will deed will have to be prima facie considered in favour of the defendant. The possession of the plaintiffs on the date mentioned in the mouka panchanama dated 9.12.2016 cannot be said to be legal and settled possession. The case is thus prima facie made out by the defendant.

22. The question of possibility of irreparable loss in case of denial of injunction will have to be answered in favour of the defendant. The 7/12 extract filed by the plaintiffs themselves show the name of Tulshiram. The 7/12 extracts filed by defendant show that in place of name of Tulshiram the name of defendant is entered. Crop loan in 2015-16 is taken by him in respect of both the fields an entry is made on 29.7.2016 consistently since 2002-03 the possession was of Tulshiram. The crop statement shows that for 2017-18 crop is sown by the defendant. The balance of convenience thus lies in favour of the defendant. The learned lower court ought to have arrived at the finding regarding possession in consonance with prima facie legal right. The question whether the will deed is legal and bestows any right is a matter of evidence. The

defendant is thus entitled to the grant of injunction. I, therefore answer point no.1 in the affirmative.

Points no.2 & 3:

23. It is trite law that interference in appeal under Order 43 Rule (1) (r) of C.P.C. is limited to the extent of showing that the order passed by exercising discretion by the learned lower court is unreasonable, capricious or perverse. In view of my answer to point no. 1 that the learned lower court should have come to the finding regarding legal and settled possession of the particular party. The learned lower court failed to do so and issued the various directions regarding exchange of possession between the parties at intervals. The same is not warranted in the case. Hence to that extent as observed in **Mohd. Mehtab Vs. Khushnuma, (2013) 9 SCC 221** and **Vidyadhar Sitaram Mokal vs. Barkatullah Allhasan Shaikh, 2013 (4) Mh.L.J. 505**, the interference by this court under Order 43 Rule 1 (r) is essential. The order is required to be set aside. The defendant having succeeded to show entitlement for injunction the application (Exh.24) is required to be allowed and the impugned order is required to be set aside. I thus answer point no.2 in negative and point no. 3 as affirmative. Accordingly, in answer to point no.4 I proceed to pass the following order:

ORDER

1. The Misc. Civil Appeal is partly allowed.

2. The cross objection is allowed. The impugned order dated 29.11.2017 passed below Exh.24 in RCS No.15/2016 by the learned Joint Civil Judge (Jr.Dn.), Mul is hereby set aside. The application (Exh.24) is allowed and the plaintiffs are restrained from interfering with the possession of the defendant till disposal of the suit in respect of the suit properties 'A' and 'B' of Para 1 of the counter claim.
3. Parties to bear their own costs.

(Dictated and pronounced in open court)

Date :07.07.2018.

(Amit G. Joshi)
District Judge-3,
Chandrapur.