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**(2011) 11 BOM CK 0042**

**In the Bombay High Court**

**Case No : Civil Writ Petition No. 4255 of 2011**

Jairaj Devidas and others

APPELLANT

Vs

Hirabai Shinwar Jadhav and others

RESPONDENT

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**Date of Decision : 11-11-2011**

**Acts Referred:**

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 32(G), 32(M)  
Constitution of India, 1950 — Article 227

**Citation : (2012) 2 BomCR 386**

**Hon'ble Judges : R.M. Savant, J**

**Bench : Single Bench**

**Advocate :** A. Y. Sakhare, with Mr. Sudhir Prabhu, for the Appellant; A.A. Kumbhakoni, with Mr. Ramchandra Yadav for Respondent Nos. 1(1) to 1(3) and 3 to 20 and Mr. Owen Menezes instructed by y Mr. R. S. Tripathi for Respondent Nos. 21 and 22, for the Respondent

**Final Decision : Dismissed**

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## **Judgement**

R.M. Savant, J.—Rule made returnable forthwith. By consent, the Petition is taken up for hearing.

2. The above Petition takes exception to the order dated 9th March, 2011 passed by the learned Ad-hoc District Judge-1, Thane by which order the Appeal being Misc. Civil Appeal No. 142 of 2010, filed by Respondent Nos. 1 to 20 herein came to be allowed and resultantly, the order dated 31st July, 2010 passed by the 7th Joint Civil Judge, Junior Division, Thane below Exh.5 in Regular Civil Suit No. 144 of 2010, granting temporary injunction, is quashed and set aside.

3. The controversy in question relates to the land bearing Survey No. 10/1 at village Mira, District Thane to the extent of 6350 square meters. The genesis of the controversy brought to this Court lies in Regular Civil Suit No. 144 of 2010 which has been filed by the Petitioners herein, inter alia, for the following reliefs:

a) to be declared that the Plaintiffs are the Owners of the Suit Property and Def

Nos. 1 to 24 have no right over the same.

b) The Def Nos. 1 to 25 may be directed to hand over vacant possession of the Suit property by removing the piling work done over the Suit property to the Plaintiffs.

c) The Defendant Nos. 1 to 24 may be restrained by an order of permanent prohibitory injunction from carrying out the work of construction, creating third party interest in the proposed construction or over Suit property.

d) Interim injunction in terms of prayer clause "c" above.

e) Cost of the Suit may be awarded to the Plaintiff.

f) Any other just and proper order may be passed in favour of the Plaintiffs.

4. In the said Suit, an application Exh.5 for temporary injunction restraining Defendant Nos. 1 to 24 from carrying out construction and creating third party rights in respect of the Suit property came to be filed by the Plaintiffs-Petitioners. It was the case of the Plaintiffs-Petitioners herein, that Respondent Nos. 21 to 24 who claim through Respondent Nos. 1 to 20 cannot have any such right since Respondent Nos. 1 to 20 themselves have no right qua the property in question. Reliance was placed by the Plaintiffs on a copy of the order dated 29th May, 1963 passed by the Agricultural Land Tribunal by which the application u/s 32(G) of the Bombay Tenancy and Agricultural Lands Act, 1948, filed by the protected tenant-one Somwarya Kolya Jadhav, came to be rejected. The Plaintiffs also placed reliance on various orders passed by the revenue authorities whereby the mutation entries, effected in favour of Respondent Nos. 1 to 20 came to be set aside. It is significant to note that the averments in the plaint, in turn, disclose that the cause of action for filing of the said Suit arose some time in the year 2006 i.e. on the mutation entry being effected in favour of Defendant Nos. 21 to 24. The said Exh.5-application for temporary injunction-was replied by Defendant Nos. 21 to 24, by filing their written statement, in the said Suit which was their reply to the application for temporary injunction also. The Defendant Nos. 21 to 24, have referred to the agreement dated 6th February, 2006 in their favour which was executed by Respondent Nos. 1 to 20. In so far as the said documents dated 29th May, 1963 is concerned, the said Defendants have, in turn, stated that no such authenticated record of the said proceedings was filed on record and claim was based on a uncertified copy and that too having no signature of the concerned authority. The 7th Joint Civil Judge, Junior Division, Thane, by his order dated 31st July, 2010, allowed the said application Exh.5 for temporary injunction.

5. The gist of the reasonings of the learned Judge while allowing the said application Exh. 5 was that Defendant Nos. 1 to 20 could not have any right qua the property in question in view of the said order dated 29th May, 1963 passed by the Revenue Tribunal by which order the application of the protected tenant u/s 32(G) of the Bombay Tenancy and Agricultural Lands Act, 1948 came to be

rejected. The learned Judge also relied upon the orders of the revenue authorities setting aside the mutation entries, which were made in favour of Respondent Nos. 1 to 20 herein, whilst allowing the said application Exh.5.

6. Aggrieved by the said order dated 31st July, 2010, passed by the 7th Joint Civil Judge, Junior Division, Thane allowing the said application Exh.5, the Respondent Nos. 1 to 24 i.e. Defendants to the said Suit filed Misc. Civil Appeal No. 142 of 2010. The learned Ad-hoc District Judge-1, Thane (the First Appellate Court), by the impugned order dated 9th March, 2011, set aside the said order dated 31st July, 2010. The First Appellate Court, whilst allowing the said Appeal, has, inter alia, held that the reliance placed by the trial Court on the order dated 29th May, 1963 was misplaced in view of the fact that no certified copy of the said order was placed on record by the Plaintiffs and what was placed on record was only a copy of the said order. The First Appellate Court was of the view that the trial Court, whilst granting application Exh.5 for temporary injunction, has not considered the material on record in its proper perspective. The First Appellate Court, inter alia, held that the Plaintiffs have not come to the Court with clean hands, inasmuch as the fact that the earlier Suit filed by the Plaintiffs being Regular Civil Suit No. 530 of 2004 claiming the same relief as claimed in the present Suit has not been disclosed. The First Appellate Court observed that the parties have sought to place reliance on the orders passed by the Revenue Authorities which were in favour of either of the parties, and applying the principle that the revenue entries only have presumptive value and do not decide the title of the property in question. The First Appellate Court was of the view that much reliance could not be placed on the setting aside of the revenue entries. In the said context, the trial Court made an observation that the title of the property need not be considered at the stage of consideration application Exh.5 for temporary injunction. The First Appellate Court also took into consideration the fact that a certificate u/s 32(M) of the B.T.A.L. Act was granted in favour of heirs of original protected tenant i.e. Defendants on 31st October, 2002. That certificate still holds good as no steps have been taken for setting aside the said certificate. In so far as the possession is concerned, the Appellate Court recorded a finding that since the plaintiffs have claimed possession, it implies that they have been dispossessed, however, the date of dispossession has not been mentioned in the Suit. The First Appellate Court, therefore, held that Defendant Nos. 21 to 24 were in possession of the property in question.

7. In so far as the balance of convenience is concerned, the First Appellate Court, taking into consideration various permissions obtained by Defendant Nos. 21 to 24 from the various authorities and considering the amounts expended by them towards development, has recorded a finding that the balance of convenience would also be in favour of Defendant Nos. 21 to 24. In the circumstances as indicated above, the First Appellate Court has set aside the order dated 31st July, 2010 passed by the 7th Joint Civil Judge, junior Division, Thane granting temporary injunction.

8. Learned Senior Counsel Mr. Sakhare, appearing for the Petitioners, submits that in the teeth of the order dated 29th May, 1963 of the Agricultural Lands Tribunal, and setting aside of the mutation entries in favour of Respondent Nos. 1 to 20, the Respondent Nos. 1 to 20 could not create any right in favour of the said Respondent Nos. 21 to 24. The learned senior counsel placed reliance on the orders of the revenue authorities, a compilation of which was submitted to this Court and contends that the First Appellate Court has totally grossed sight over the said material, inasmuch as the setting aside of the mutation entries confirmed right upto the Appellate authority and also this Court thereafter, has not been taken into consideration by the First Appellate Court.

9. Per contra, it is submitted by Mr. Menezes, the learned counsel, appearing for Respondent Nos. 21 and 22, that the Suit itself is not maintainable as, by formulating the prayers in the form in which they are, the Plaintiffs, in fact, are seeking setting aside the development agreement dated 6th February, 2006 executed by the Respondent Nos 1 to 20 in favour of the Respondent Nos. 21 and 22. In so far as the order dated 29th May, 1963 is concerned, the learned counsel Menezes submitted that no certified copy of the said order was produced and what was produced before the Court was only an ordinary copy of the order which fact has been reflected in the order passed by the First Appellate Court. The learned Counsel, relying upon the text of the Probate Petitions being Petition Nos. 571 of 1970 and 728 of 1970, would contend that the land in question which is the subject matter of the Suit has not been shown to be a part of property in respect of the original owner in respect of whom the probate petitions were filed. Mr. Menezes also placed reliance on the document i.e. Khateutara in Form No. 8A wherein the said land is not shown as the holding of the plaintiffs. Mr. Menezes also demonstrated as to how the prejudice would be caused to the said respondents if interim relief is granted, in view of the permissions that have been obtained by the said respondents from various authorities as also the amount that has been expended by them.

10. On behalf of Respondent Nos. 1 to 20, learned counsel Mr. Kumbkoni supported the submissions made by Mr. Menezes and submitted that the document in question i.e. order dated 29th May, 1963 is a highly suspicious document. The learned senior counsel drew my attention to the letter dated 13th February, 2010 of the Tahsildar by which letter the Tahsildar has informed one K. N. Joshi who is partner of Respondent no. 21, that records pertaining to the said proceedings in the order dated 29.5.1963 are not available in the office.

11. Having heard learned counsel for the parties and having given my anxious consideration to the rival contentions, in my view, there is no merit in the above Petition. The First Appellate Court considered the material on record and has rightly set aside the order dated 31st July, 2010 passed by the 7th Joint Civil Judge, Junior Division, Thane below Exh.5 in Regular Civil Suit No.144 of 2010. Since much store has been laid by the Petitioners/Plaintiffs on the order dated 29th May, 1963, purportedly passed in the 32(G) proceedings, it would be gainful

to refer to and rely upon the text of said order. Text of the said order discloses a statement which has been recorded namely of the said Somawarya who claimed to be the protected tenant the said statement is to the effect, that the land was never cultivated by him or by his father and the entry in revenue record is incorrect. It defies logic how such a statement could be made by a person claiming to be a protected tenant who himself has applied u/s 32(G). The statement itself raises doubt and suspicion as regards the said order dated 29th May, 1963 is concerned. Though the trial Court has recorded a finding that a copy of the said order was produced, the First Appellate Court has held that the said order could not be relied upon as no certified copy was produced by the Plaintiffs. In my view, the observation has been rightly made by the First Appellate Court as it appears that only a certified copy was produced without any signature. In my view in the light of the contents of the said document and the letter of the Tahsildar dated 13th February, 2010, the said document could not be relied upon at the prima facie stage.

12. It is well settled that for the grant of injunction which is a equitable relief, a party who claims such relief has to come to the Court with clean hands and that there should be no suppression of facts. In the instant case, it is significant to note that the Petitioners/ Plaintiffs had already filed Civil Suit No.530 of 2004 admittedly for the same relief as prayed in the present Suit and for some inexplicable reason, application for injunction has not been filed in the said Suit and the said Suit was pending, The instant suit being Regular Civil Suit No. 144 of 2010 has been filed without disclosing the fact that earlier Suit No. 530 of 2004 for the same relief is yet pending. The First Appellate Court, in the said factual position, has rightly commented adversely against the conduct of the Plaintiffs, in qua their entitlement to the grant of the said equitable relief.

13. In so far as the orders passed by the revenue authorities are concerned, no doubt the orders passed by the authorities effecting mutation entries in favour of Defendant nos 1 to 20 were set aside. However, in some cases, the matter was remanded back to the revenue authorities for de-novo consideration. As rightly observed by the First Appellate Court, the revenue entries do not decide the title to the property and are only of presumptive value. However, the fact remains that the certificate u/s 32(M) has been issued in favour of the heirs of the protected tenant on 31st October, 2002 and the record discloses that the said certificate has not been challenged and therefore holds the field as on date. The contention of the learned senior counsel for the Petitioners that the said certificate u/s 32(M) cannot stand in the eyes of law in view of the order dated 29th May, 1963 passed on the application u/s 32(G) cannot be accepted, in view of what has been stated hereinabove in respect of the said order dated 29th May, 1963. The First Appellate Court was, therefore, right in my view in placing reliance on the said 32(M) certificate.

14. It would be relevant to note that the averments in the plaint discloses that the cause for filing the Suit has arisen in the year 2006. It is pertinent to note

that by way of prayer clause (b), the Plaintiffs have sought a relief that the Defendants 1 to 25 may be directed to hand over the vacant possession by removing the piling work done over the said property. What is implied in this prayer is acceptance of the fact by the Plaintiffs that they are aware that Respondent Nos. 21 and 22 are carrying out the work pursuant to some agreement. Knowledge of the said development agreement dated 6th February, 2006 would, therefore, have to be attributed to the Plaintiffs/Petitioners. The Plaintiffs sought the said relief by prayer clause (b) without seeking the setting aside of the said development agreement dated 6th February, 2006 in favour of Defendants 21 and 22. This is obviously done with a view to bring the Suit within limitation as the agreement dated 6th February 2006 could not have been challenged by filing a suit in the year 2010 as by that time, the period of limitation was over, and therefore, it appears that by skillful drafting no such prayer/reference has been made in the Suit. Learned counsel Mr. Menezes, therefore, contends that the Suit itself is not maintainable. However, the question as to maintainability of the suit can be considered at the appropriate time.

15. In so far as the probate petitions are concerned though the said material was not before the Courts below the fact of the matter is that in the probate petitions the property which is the subject matter of the suit is not the property shown of the original owner through whom the plaintiffs claim. The mention of the suit property also does not find place in form 8-A which is revenue record. The learned trial Court was therefore, right in recording a finding by relying upon the said form 8-A.

16. Having considered the impugned order dated 9th March, 2011 and in the light of the above discussion, no case for interdiction in the writ jurisdiction of this Court under Article 227 of the Constitution is made out. Writ Petition is accordingly dismissed.

17. However, it is made clear that the respondent Nos 1 to 22 may proceed to develop the property in question. No further third party rights from today would be created by them. The third party rights already created would be subject to the result of the said Regular Civil Suit no.144 of 2010.

18. With the aforesaid observations, the petition is dismissed. Rule discharged.