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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3953 OF 2015

Dawood Khan s/o Habib Khan Pathan
Age - 55 years, Occ - Agriculturist
R/o Ohar, Taluka and District - Aurangabad

PETITIONER

VERSUS

- | | |
|---|-------------|
| 1. Shaheen Begum w/o Mujahed Patel
Age - 36 years, Occ - Household
R/o Patel Planet, B-1,
Jatwada Road,
Aurangabad | RESPONDENTS |
| 2. Seema Parvin w/o Abdul Wahed Patel,
Age - 30 years, Occ - Household
R/o Patel Planet, B-1,
Jatwada Road,
Aurangabad | |
| 3. Shaikh Azruddin s/o Aktaruddin,
Age - 38 years, Occ - Agriculture & Business,
R/o Nutan Colony, Baba Takiya,
Aurangabad | |
| 4. Shaikh Mujtaba Maz s/o Shaikh Mujtaba Rafiq
Age - 22 years, Occ - Business
R/o Times Colony, Aurangabad | |

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Mr. Milind M. Joshi, Advocate for the petitioner
Mr. H. I. Pathan, Advocate for respondents No.1 to 4

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 27th AUGUST, 2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with

consent of learned advocates for the parties.

2. Learned advocate for the petitioner contends that the impugned orders are untenable, for, the petitioner did not get any opportunity to contest application Exhibit-5 in Regular Civil Suit No. 411 of 2014 filed by plaintiffs - present respondents. The suit is for injunction restraining the defendant from causing obstruction to plaintiffs' possession over suit property and for demarcation and fixation of boundaries of suit land. The plaintiffs are purchasers of said property from one of the sharers of the ancestral property.

3. Learned advocate for the petitioner has taken me through various documents annexed to the petition, including the impugned orders as well as the proceeding sheet and he has adverted to many aspects. He submits that the petitioner did not get an opportunity to have his case addressed on merits. Application Exhibit-5 had been decided by the trial court in haste in May, 2014 during vacation when the petitioner was under impression that the matter is likely to be taken up in the month of June, after reopening of the court.

4. Learned advocate for the respondents - plaintiffs submits that though it is the contention of the petitioner that the matter

was adjourned to June, 2015, the record depicts otherwise and under the circumstances, it was the duty of the petitioner to make arrangement for appearance in the matter, when the matter was being considered on Exhibit-5 on 21st May, 2014. He submits that apart from that having regard to that the parties are Muslims by religion, there is no prohibition on alienation before partition. He submits that since date of purchase the plaintiffs are in possession of the property. He, therefore, supports the impugned orders.

5. Perusal of the impugned orders shows that the petitioner contends that he had no proper opportunity to deal with Exhibit-5 having regard to circumstances narrated herein above. Further it appears that the appellate court has considered that the fact of pendency of the suit for partition had not been brought before the trial court and thus the appellate court considered that no mistake can be said to have been committed by the trial court in allowing the application.

6. However, perusal of both the orders, the one passed by the trial court and the other by the appellate court does not reflect upon the factum of possession on the date of the suit, which shall be a matter germane for consideration while the application

is being decided, on the basis of relevant material made available for consideration.

7. Thus, both the impugned orders miss out on this important aspect involved in the matter. In the circumstances, when the petitioner feels that he did not get sufficient opportunity and to consider aforesaid aspect, I deem it appropriate that the matter be remitted to the trial court for re-consideration of application Exhibit-5. As such, both the impugned orders dated 21st May, 2014 passed by Civil Judge, Junior Division, Aurangabad on application Exhibit-5 in Regular Civil Suit No. 411 of 2014 and dated 8th December, 2014 in Miscellaneous Civil Appeal No. 110 of 2014 passed by District Judge – 4 Aurangabad are set aside. However, having regard to that the impugned order passed by the trial court had been in operation since May, 2014 and that its effect and operation had not been stayed during pendency of the appeal, the operative part of the order passed on Exhibit-5 shall continue to operate until final decision is rendered by the trial court on Exhibit-5, after granting proper opportunity to the plaintiffs and the defendant.

8. The trial court shall decide application Exhibit-5 as expeditiously as possible, preferably within a period of six weeks

from the date of receipt of writ of this order. The trial court to pass order without getting influenced by observations made in this judgment.

9. Writ petition stands allowed in aforesaid terms. Rule is made absolute accordingly.

[SUNIL P. DESHMUKH, J.]

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