

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10334 OF 2014**

Shri Dnyanoba Dagadu Bankar & Ors. ...Petitioners
V/s.
Shri Ramdas Sopan Bankar & Ors. ...Respondents

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Mr. Dilip Bodake for the petitioners.
Ms. Gauri Jadhav i/b. Mr. Tushar Jadhav for the respondent Nos.1 to 3.

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**CORAM : R. G. KETKAR J.
DATE : 11th DECEMBER, 2015.**

P.C.:

1. Heard Mr. Dilip Bodake for the petitioners and Ms. Gauri Jadhav for the respondents No.1 to 3 at length. On the oral application made by Mr. Bodake, leave to delete respondents Nos.4 to 17 is granted. Amendment shall be carried out forthwith.

2. By this petition under Article 227 of the Constitution of India, the original plaintiffs have challenged the judgment and order dated 20/09/2014 passed by the learned District Judge-1, Khed-Rajgurunagar in Misc. Civil Appeal No.119 of 2014. By that order, the learned District Judge allowed the appeal preferred by respondents No.1 to 3 and set aside the judgment and order dated 2/4/2012 passed below Exh-64 and 81 in RCS No.110/2008. The learned District Judge rejected the applications below Exh.64 and 81 made by the petitioners, hereinafter the plaintiffs. Rule. Ms. Jadhav waives service for respondent Nos.1 to 3. At the request and by consent of the parties, rule is made

returnable forthwith and the petition is taken up for final hearing.

3. Mr. Bodake strenuously contended that earlier Gorakhnath Sopan Bankar (respondent No.2 herein) had instituted Special Civil Suit No.39/2002 and Dnyanoba (petitioner No.1/plaintiff) was impleaded as defendant No.5. Gorakhnath had instituted the suit for declaration, damages and perpetual injunction. Defendant No.5 did not appear though suit summons were served. Ex-parte order was passed against defendant No.5 and defendant Nos.1 and 3 on 24/4/2002. The suit was partly decreed on 12/12/2006 and the learned Trial Judge issued injunction restraining defendants No.1 and 2 (Maruti and Nivrutti) from causing obstruction into the plaintiff's possession over suit property. He submitted that plaintiffs thereafter instituted RCS No.110/2008 for declaration that they have half share in the properties more particularly described in 1(a)(b). In paragraph 1b of the plaint, Gut 444 is one of the properties. The plaintiff's also claimed partition of their half share in the suit property. Pending the suit, application Exh.5 for injunction restraining the defendants from creating third party interest and carrying out construction in Gut No.444 was filed. By order dated 2/4/2012, defendant No.2 was restrained from raising any construction on the land Gat No. 444 till the decision of the suit. Defendant Nos. 1 to 3 and 12 were also restrained from alienating land Gat Nos.671 and 673 to any third party.

4. Aggrieved by the decision the defendants preferred appeal. By the impugned order the learned District Judge has allowed the appeal setting aside the order dated 2/4/2012. He submitted that, the defendants have filed say wherein they asserted that the defendants will

not create third party interest in land Gat Nos.671 and 673 as they are their source of income. Despite that learned District Judge did not accept their statement thereby issuing injunction against the defendants restraining them from creating third party interest in respect of land Gat No.671 and 673.

5. As far as injunction restraining defendant No.2 from constructing house in Gat No.444 is concerned, the learned Trial Judge observed in paragraph 8 that as the defendant No.2 is constructing house on Gat No. 444, the plaintiffs have made out prima facie case and balance of convenience lies in their favour for granting injunction. He submitted that the learned District Judge was not justified in interfering with the discretionary order passed by the learned Trial Judge. He submitted that in paragraph 5 of the impugned order the learned District Judge observed that the defendant No.2 has carried out construction up to slab level and that in case plaintiff succeeds they have half share in the suit properties including the land Gat No.444, then the portion on which the defendant No.2 has constructed a house can be adjusted. He submitted that the impugned order needs to be set aside.

6. On the other hand, Ms. Jadhav submitted that in the say filed by the defendants they have specifically asserted that they will not create third party interest in land Gat Nos.671 and 673. As far as construction of house in Gat No.444 is concerned she submitted that the learned Trial Judge did not record any finding as regards stage of construction. As against this after perusing the photographs, the learned District Judge has recorded a finding that the defendants have carried out construction upto slab level. In these circumstances no case is made

out for interference in respect of construction of house in Gat No.444.

7. The learned Trial Judge has issued two fold injunction viz., (a) Defendant No.2 is restrained from raising any type of construction in Gat No.444 till the decision of the suit; (b) Defendant Nos.1 to 3 and 12 are temporarily restrained from alienating Gat No.671 and 673 to third parties till the decision of the Suit. It is also not in dispute that the defendants have specifically contended that they do not intend to create third party interest in Gat Nos.671 and 673. In view thereof the learned District Judge ought to have passed injunction order restraining the defendants from creating third party interest in Gat Nos.671 & 673 or the learned District Judge ought to have accepted the statement made in their say to that effect. In view thereof, that part of the order is required to be modified.

8. As far as injunction restraining the defendants from carrying out construction in Gat No.444 is concerned perusal of trial Court's order shows that the Learned Trial Judge has not recorded any finding as regards stage of construction in Gat No.444. As against this in paragraph 5 District Judge after perusing photographs recorded a categorical finding that defendant has raised construction upto slab level. In view thereof, I do not find that any case is made out for disturbing this part of the order. It appears that plaintiff have approached the Court belatedly. Hence petition partly succeeds and is disposed of in the following terms:

- i) Order dated 2/9/2014 is modified and the statement of defendants that they will not create third party rights in Gut No.671 and 673 is accepted.

- ii) As far as order of construction activity carried out by the defendant in Gut No.444 is concerned, I do not think it appropriate to interfere with that order in view of finding recorded in paragraph 5 of the impugned order.
- iii) Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)