

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11736 OF 2015

M/s. Victory Infra ... Petitioner
Vs.
Shalik Chander Patil and others ... Respondents

Mr. Akhilesh S. Dubey a/w. Mr. A. A. Khan, Mr. Rahul R. Sharma and
Ms Ritika Gupta i/b. Law Counsellors for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 10, 2015

P.C. :

Not on Board. At the request of Mr. Dubey, learned Counsel for petitioner, taken up in the production board.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and decree dated 11.09.2015 passed by the learned Joint Civil Judge, Senior Division, Panvel in Special Civil Suit No.250 of 2015. By that order, the learned trial Judge decreed the Suit instituted by respondents No.1 to 4, hereinafter referred to as plaintiffs and declared that the heir-ship certificate granted by the Civil Judge, Junior Division, Panvel to respondent No.8 (defendant No.4) on 21.02.2008 is null and void. The learned trial Judge issued injunction restraining defendants from creating third party interest on the suit plot No.43, admeasuring about 600 sq.mtrs., Sector -19, Ulwe-1A Node, Tal. Panvel, Dist. Raigad.suit plot No.43, admeasuring about 600 sq.mtrs., Sector -19, Ulwe-1A Node, Tal. Panvel, Dist. Raigad. (for short 'suit property'). Respondent No.7 (defendant No.3) is restrained from issuing occupancy certificate to the respondent No.8 (defendant No.4) and M/s. Victory Infra (petitioner herein) in respect of the suit property.

3. Mr. Dubey submitted that in the first place, petitioner herein is not impleaded in the Suit. Secondly, the learned trial Judge has also granted reliefs which were not claimed by the plaintiffs. Plaintiffs have played fraud upon the Court and obtained the decree and the learned trial Judge has passed the decree only on the basis of the statements made by P.W.3 – Pramod Shinde, API, N.R.I., Sagari police station in his affidavit at exhibit-46. He submitted that since the decree is obtained by fraud, petitioner is entitled to invoke Article 227 of the Constitution of India and this Court will not relegate the petitioner to institute the Appeal.

4. Operative part of the impugned order reads thus,

“

ORDER

- 1) Suit is decreed with cost.
- 2) It is hereby declared that the heir ship certificate granted by the Civil Judge Jr. Divn., Panvel to the defendant No.4 in M.A.No.282/2006 on 21/02/08 is null and void.
- 3) Defendants, their officers, servants, agents or on behalf of them any person are hereby permanently restrained not to create third party interest on suit plot No.43, admeasuring about 600 sq.mtrs., Sector -19, Ulwe-1A Node, Tal. Panvel, Dist. Raigad.
- 4) The defendant No.3 is hereby restrained not to issue occupancy certificate to the defendant No.4 Narayan Ambo Patil, M/s. Sairam Developers and M/s. Victory Infra regarding the suit plot No.43, admeasuring about 600 sq.mtrs., Sector -19, Ulwe-1A Node, Tal. Panvel, Dist. Raigad.
- 5) Decree be drawn up accordingly. ”

5. Perusal of clause 4 extracted hereinabove shows that the learned trial Judge has issued injunction restraining respondent No.7 (defendant No.3) from issuing occupancy certificate to respondent No.8 (defendant No.4) and M/s. Victory Infra (petitioner herein). It is evident that petitioner is not made party in the Suit. Nonetheless as the learned trial Judge has issued injunction affecting the petitioner, obviously it is an

aggrieved party. Section 96 C.P.C. provides that save and otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court. As the petitioner is affected by the decree passed by the trial Court, it can file application for leave to appeal and upon such application, can institute appeal before the appellate Court.

6. It is the case of the petitioner that plaintiffs have obtained decree by playing fraud upon the Court. It is settled principle of law that the fraud is to be pleaded and proved. Thus the question whether plaintiffs have played fraud upon the Court while obtaining the decree can effectively be gone into by the appellate Court. In my opinion, petitioner has to invoke Section 96 C.P.C. and file appeal before the District Court. I, therefore, refuse to exercise power under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is expressly made clear that I have not examined merits of the case in the Petition. All contentions on merits are expressly kept open. In the event, petitioner files substantive first appeal before the District Court along with the application for leave to appeal and interim order, the learned District Judge is expected to dispose of the applications at the earliest. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab