

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1217 OF 2016

Shankar S/o Vithalrao Gatalwar,
Age : 41 years, Occupation : Agriculturist
and Service,
R/o. Lokmanya Nagar, Parbhani,
Taluka and District Parbhani.

... Petitioner

Versus

1. Kum Shreya D/o Shankar Gatalwar
Age : Minor, under guardianship of
her real mother i.e.
Sarika W/o Shankar Gatalwar
Age : 38 years, Occupation : Service,
R/o Parbhani, Now R/o Gangakhed,
Tq. : Gangakhed, District Parbhani.
2. Vinayak S/o Shankar Gatalwar
Age : Minor, under guardianship of
his real mother i.e.
Sarika W/o Shankar Gatalwar
Age : 38 years, Occupation : Service,
R/o Parbhani, Now R/o Gangakhed,
Tq. : Gangakhed, District Parbhani.
3. Sarika W/o Shankar Gatalwar
Age : 38 years, Occupation : Service,
R/o Parbhani, Now R/o Gangakhed,
Tq. : Gangakhed, District Parbhani.
4. Balaji S/o Vithalrao Gatalwar
5. Vijaya W/o Vithalrao Khoskewar
6. Mangal @ Pratibha W/o Krantikumar Karnewar
7. Shobha W/o chandrakant Sriramwar
8. Suvarna W/o Avinash Sangewar

9. Ravikiran S/o Vithalrao Gatalwar

10. Bebi W/o Balaji Sriramwar

Respondent Nos. 4 to 10 are deleted
as per permission granted vide order
dated 03.02.2016.

... Respondents

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Mr. Amit S. Deshpande, Advocate for the petitioner
D. P. Munde h/f Mr. V. D. Salunke, Advocate for respondent
Nos. 1 to 3
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CORAM : V. K. JADHAV, J.

DATED : 17th FEBRUARY, 2016

ORAL JUDGMENT :-

1. Rule. Rule returnable forthwith. By consent of parties, heard finally.

2. Being aggrieved by judgment and decree dated 07.11.2014 passed by Civil Judge Senior Division, Parbhani in Special Civil Suit No.77 of 2011, the petitioner/original defendant has preferred appeal bearing Regular Civil Appeal No.162 of 2014 before District Court Parbhani, which is pending. In the pending appeal, petitioner filed application Exh.5 for staying the effect of judgment and decree of partition and separate possession passed by the trial court as stated above. The District Judge initially, by order dated 19.10.2015 passed below Exh.5, directed the petitioner to make an arrangement to bring appearance of respondent Nos. 4 to 6 and further observed that

application Exh.5 thus requires to be decided along with the appeal. Thereafter, the petitioner filed another application Exh.24 before District Court to decide the application Exh.5. Learned District Judge-1, Parbhani, by impugned order dated 20.11.2015, has rejected the said application mainly on the ground that application Exh.5 is already decided by his predecessor. Hence this writ petition.

3. Learned counsel for the petitioner submits that though respondent Nos. 4 to 6 in the pending appeal are brothers of the petitioner, presently, he is not carrying good terms with them. Learned counsel submits that it is not possible for the petitioner to make arrangement for their appearance before the lower appellate court. Learned counsel submits that, even the petitioner would take steps for substitute service against said respondent Nos. 4 to 6. Learned counsel submits that Special Civil Suit No.77 of 2011 came to be decreed on 07.11.2014 and the proceedings were sent to the revenue authority on 18.11.2014, and accordingly, possession of the landed property shown to have been delivered on paper by order dated 23.11.2014. Learned counsel submits that the execution petition is pending in respect of the house property and if delivery of possession of house property is not stayed, then the very purpose of filing of appeal would be defeated.

4. Learned counsel for respondents submits that learned District Judge-1 has already decided application Exh.5 with the observations that the said application would be considered alongwith appeal. Learned counsel submits that respondents/original plaintiffs are ready for arguments on merits, however, the appeal cannot be taken up for final hearing for want of service against respondent Nos. 4 to 6. Learned counsel submits that respondent Nos. 1 and 2 are the minor children and they are entitled for their share as per decree passed by trial court. Learned counsel submits that the trial court has rightly rejected application Exh.24.

5. It appears from the order passed below Exh.5 dated 19.10.2015 that learned District Judge has observed that application Exh.5 is required to be decided along with appeal. However, the District Judge has not passed a specific order to that effect that the application Exh.5 shall be decided along with the appeal. Learned District Judge has merely expressed his opinion, however, has not passed any specific order in this regard. In view of this, order passed below Exh.24 does not stand because application Exh.24 came to be rejected mainly on the ground that application Exh.5 was decided by predecessor of the District Judge, who has passed the impugned order dated 20.11.2015. In view of this, order dated 20.11.2015 passed below Exh.24 requires to be quashed and set aside. Hence

the following order :

O R D E R

- I. The writ petition is hereby partly allowed.
- II. The order dated 20.11.2015 passed below Exh.24 in Regular Civil Appeal No. 162 of 2014 is hereby quashed and set aside.
- III. District Judge-1, Parbhani shall decide application Exh.5 on its own merits after extending opportunity of hearing to the parties.
- IV. Petitioner/original appellant shall take steps for substitute service against respondent Nos. 4 to 6.
- V. District Judge-1, Parbhani shall expedite hearing of Regular Civil Appeal No. 162 of 2014 and dispose of the same as expeditiously as possible, preferably within a period of one year from today.
- VI. Rule is made absolute in the above terms. Writ Petition is disposed of.
- VII. Parties to act on an authenticated copy of this judgment.

(V. K. JADHAV, J.)