

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

940 WRIT PETITION NO. 9634 OF 2015
WITH
CIVIL APPLICATION NO. 2624 OF 2016
IN WP/9634/2015

INAYATKHAN GULABKHAN PATHAN
VERSUS
AKHTARBI ABDUL LATIF PATHAN AND OTHERS

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Advocate for Petitioner : Mr. A. V. Hon
Advocate for Respondent Nos. 1 to 4 : Mr. R. R. Sancheti
Advocate for Respondent Nos. 5 to 7 : Mr. B. A. Agrawal
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CORAM : V. K. JADHAV, J.

DATED : 02nd MARCH, 2016

PER COURT :-

1. Heard finally with consent of the learned counsel for the parties.
2. Respondents/original plaintiffs instituted a suit bearing R.C.S. No. 55 of 2006 for partition. In the said suit, the petitioner/original defendant No. 1 also preferred a counter claim for partition by addition of property bearing G.P. No. 5479 i.e. C.T.S. No. 2328. In view of the said counter claim, the petitioner filed application Exh.114 seeking interim orders against respondents/plaintiffs restraining them from creating any third party rights in the property. Learned Judge of the trial court, by order dated 17.10.2013 passed below Exh.114 in

R.C.S. No. 55 of 2006, has rejected the said application. Being aggrieved by the same, the petitioner-original defendant No.1 preferred Miscellaneous Civil Appeal No. 194 of 2013 before District Court, Ahmednagar and the learned District Judge-4, by judgment and order dated 16.04.2015, dismissed the appeal with costs. Hence this writ petition.

3. Learned counsel for the petitioner submits that the counter claim property is in the name of Kadir Khan Gulab Khan Pathan, but the said property is possessed by petitioner-defendant No.1 from his predecessors for last sixty to seventy years. Learned counsel submits that the said property is in possession of the petitioner and the same is a joint tenanted property. Learned counsel further submits that the same is also evident from the decree passed in R.C.S. No. 155 of 1982. Learned counsel submits that the decree passed in R.C.S. No. 155 of 1982, the electricity bill of the hotel known as Lokpriya Hotel and the photographs, unmistakably point out that the counter claim property is in possession of the petitioner. Learned counsel submits that both the courts below have erroneously rejected application Exh.144. Learned counsel submits that *status quo* order may be issued and trial court may be directed to expedite hearing of the suit.

4. Learned counsel for respondents-plaintiffs submits that the petitioner has no concern with the suit property as mentioned in the counter claim and it is the self acquired property of Kadir Khan Gulab Khan. Learned counsel submits that on the demise of Kadir Khan, the counter claim property is inherited by defendant No.2. Since the suit property is a separate and absolute property of Kadir Khan, after his demise, said property will go to his wife and children and not to the brother. Learned counsel submits that both the courts below have correctly taken a view and there is no substance in the writ petition and the writ petition is liable to be dismissed.

5. So far as the decree passed in R.C.S. No. 155 of 1982 is concerned, said suit was instituted by a bank for recovery of certain amount from the defendants, including the present petitioner. On perusal of said judgment and decree passed in R.C.S. No. 155 of 1982, there is no reference that the loan was availed for development of the counter claim property. Furthermore, petitioner has simply pleaded in the counter claim that the counter claim property was entered in the name of Kadir Khan and after his demise, the property is entered in the name of original defendant No.2. The petitioner has further come with a strange pleading that the entry of name of original defendant No.2 is only a paper entry and in fact, the counter

claim property is possessed by petitioner/defendant No.1. The trial court has rightly observed that there is no specific contention raised in the counter claim as to how the counter claim property is a joint tenanted property when entered in the name of defendant No.2 or her predecessor. Hence, only inclusion of the property by way of counter claim is not sufficient to seek the relief. Both the courts below have rightly come to the conclusion that there is no *prima facie* case in favour of the petitioner and the balance of convenience also does not lie in his favour. I do not find any fault in the impugned orders. There is no substance in the writ petition. Hence, the writ petition is hereby dismissed. In the circumstances, there shall be no order as to costs. In view of dismissal of writ petition, pending civil application No. 2624 of 2016 does not survive and the same is also disposed of.

(V. K. JADHAV, J.)

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