

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 672 OF 2016**

Shri Shashikant Babaso Barwade	Petitioner
Vs	
Shantaram Bharmut Barwade, since deceased, through LRs and Ors	.. Respondents

Mr. S.R.Ganbavale, Advocate for Petitioner.
Mr. Kedar Prahad Lad, Advocate for Respondents no.1(a) to (c).

CORAM : R.G.KETKAR,J.
DATE : 18/02/2016

PC:

1. Heard Mr. S.R.Ganbavale, learned counsel for the petitioner and Mr. Kedar Lad, learned counsel for respondents no.1(a) to (c) at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 8.7.2014 passed by the learned Civil Judge, Jr Dn., Kurundwad below Exhibit 67 in Final Decree Application No.2 of 2008 as also the judgment and order dated 10.4.2015 passed by the learned District Judge-1, Jaisingpur in Misc. Civil Appeal No.72 of 2014. By these orders, the Courts below allowed the application made by respondents no. 1(a) to (c) under Order XXI, Rule 97 of C.P.C. for removal of obstruction caused by the petitioner.

3. Mr. Lad raised preliminary objection on the ground of maintainability of this petition. He submitted that the petitioner

raised objections and obstructed the execution of commission of work for suggesting partition by metes and bounds. Respondents no.1(a) to 1(c), therefore, took out application under Order XXI, Rule 97 of C.P.C. for removal of obstruction. By order dated 8.7.2014, the learned trial Judge allowed the application and issued injunction restraining the petitioner from causing obstruction in any manner whatsoever. He submitted that having regard to the provisions of Order XXI, Rules 97, 98, 101 and 103, the order dated 8.7.2014 amounts to a decree. In fact, perusal of the Appeal Memo filed by the petitioner shows that he has also treated order dated 8.7.2014 as deemed judgment and decree and accordingly filed Appeal under section 96 read with Order 41, Rule 1 of C.P.C. He, therefore, submitted that the petitioner has to file substantive Second Appeal and this petition under Article 227 is not maintainable.

4. On the other hand, Mr. Ganbavale submitted that the learned District Judge dismissed appeal on the ground of maintainability as the petitioner was not a party to Final Decree proceedings. The learned District Judge held that the petitioner had purchased the disputed property during the pendency of the litigation. He has no locus standi and no legal right to file appeal. He submitted that as Appeal is dismissed on the ground of maintainability, the petitioner has challenged order dated 8.7.2014 passed by the learned trial Judge as also order dated

10.4.2015 passed by the learned District Judge by filing Petition under Article 227 of the Constitution of India. He, therefore, submitted that there is no merit in the preliminary objection raised by respondents no.1(a) to 1(c).

5. I have considered the rival submissions advanced by the learned counsel appearing for the parties. It is not in dispute that respondents no.1(a) to 1(c) have filed application under Order XXI, Rule 97 of C.P.C. That application was allowed on 8.7.2014. Having regard to the provisions of Order XXI, Rules 97, 98, 101 and 103, the order dated 8.7.2014 amounts to a decree. In fact, even the petitioner proceeded on the footing that the said order is a decree and accordingly filed Appeal under Section 96 read with Order 41, Rule 1 of C.P.C. I, therefore, find merit in the objection raised by Mr. Lad that petition under Article 227 of the Constitution of India is not maintainable and the petitioner has to file substantive Second Appeal.

6. The matter was kept back to enable Mr. Ganbavale to take instructions as to whether the petitioner wishes to withdraw the petition and file substantive Second Appeal. He reported that the petitioner is not inclined to file substantive Second Appeal. In view thereof, the petition is dismissed on the ground that the petitioner has an equally efficacious alternate statutory remedy of filing Second Appeal.

7. Mr. Ganbavale submitted that the petitioner also instituted

Writ Petition No.669 of 2015 in this Court challenging the order dated 2.12.1914 passed by the learned Civil Judge, Jr. Dn., Kurundwad, below Exh.88 in Final Decree Application No.2 of 2008. By that order, the learned trial Judge rejected the application made by the petitioner under Order I, Rule 10 of C.P.C. for impleading him as a party in Final Decree proceedings. By a separate order passed by me in that petition today, I have dismissed that petition.

8. In the light of the aforesaid discussion, Petition is dismissed reserving liberty to file substantive Second Appeal, if so advised.

(R.G.KETKAR, J.)