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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

WRIT PETITION NO. 6334 OF 2016

Smt. Kumudini Suryakant Patni and Ors. ... Petitioners.

V/s.

Shashikant Popatlal Patni. ... Respondent.

Mr. P.B. Shah a/w. K.P. Shah for the Petitioners.

Ms. Kiran Bhagalia i/b. Krishna Kelkar for the Respondent.

CORAM : N.M. Jamdar, J.

29 September, 2016.

Oral Order :-

Heard the learned Counsel for the parties.

2. The Petitioner has challenged the order passed by the learned District Judge, Niphad dated 28 April 2016 allowing the Appeal filed by the Respondent – Defendant and setting aside the order passed by the learned Civil Judge below Exhibit 5 in Special Civil Suit No. 28 of 2014 filed by the Petitioner dated 15 September 2014.

3. The Petitioner No.1 is the mother of the Petitioner Nos.2 to 5. Respondent No.1 is the brother in law of the Petitioner No.1. The Suit is filed by the Petitioner seeking partition of the properties which are three in number i.e. 1a, 1b and 1c. 1a and 1b are the open plots of land, 1c is the house property. The Petitioners have prayed for one and half share in the suit property. It is the contention of the Petitioners that the properties are joint family properties and there has been no partition of the said joint family properties and the Respondent has unilaterally started construction on property 1a and therefore, an order of injunction was necessary. Written statement was filed by the Respondent where the claim of the Petitioner was denied. It was contended that there was a partition in the year 1951 and various deeds were executed by the parties. It was also contended that as far as the property 1a is concerned, it came to the Respondent through tenancy proceedings and 32M certificate under the Bombay Tenancy and Agricultural Lands Act, 1948 was issued in favour of the Respondent. The learned Civil Judge after hearing both the sides granted an order of injunction against the Respondent. The Respondent challenged the order by way of a Miscellaneous Appeal, which was allowed by the impugned order.

4. The learned Counsel for the Petitioners firstly submitted that existence of joint family cannot be disputed and the version of the Respondent that there was a partition in the year 1951 cannot be believed as in the subsequent deeds, there is a reference to the joint family. He submitted that the Petitioner No.1 was an illiterate widow and her signatures are forged and the arrangement which led to issuance of 32M certificate was fraudulent. The learned Counsel submitted that there are serious issues that need to be adjudicated and the case that there has been a partition of the joint family is not believable and therefore, till the suit is disposed of and the share of the Petitioners is demarcated, it will be necessary to restrain the Respondent from going on with the construction of the property, otherwise the irreparable loss will be caused to the Petitioners. The learned Counsel for the Respondent supported the order submitting that property 1c is not a joint family and 32M certificate is filed.

5. I have considered these submissions. The question whether there exist a joint family and whether they were joint family properties is not strictly relevant at this stage for the relief in respect of property 1a. What is sought is a restraint on the Respondent in respect of property 1a primarily, wherein construction is being carried out. Therefore, the nature of the property 1a will have to be considered. The Respondent has placed on record a sale deed dated 12 July 1968 wherein seven members of joint family

including the Petitioner and her daughters who were minor, have sold this property to one Ratilal S. Patni. Ratilal is not a member of the joint family. It is informed that in fact Ratilal is the relative of the Petitioner No.1. After the property was sold to Ratilal, it is the case of the Respondent that Respondent No.1 took it on tenancy basis and thereafter purchased the property under tenancy proceedings and certificate 32M under Bombay Tenancy and Agricultural Lands Act, 1948 was issued in favour of the Respondent some time in the year 1980. Therefore, even assuming this property was earlier a joint family property, once it was sold to an outsider, cannot continue to remain a joint family property. There is no restraint in law for a joint family to sell the property to an outsider. As far as the signatures obtained by fraud, it cannot be prima-facie believed that the fact of a sale deed, tenancy proceedings and grant of 32M certificate will not be known for 40 years. Thereafter, the manner in which the property which went out of the joint family came back to the Respondent is of importance. The property was purchased by the Respondent in tenancy proceedings. The learned Counsel for the Respondent has relied upon the decisions of the learned Single Judges of this Court in the case of *Narendra Jagannath Joshi v/s. State of Maharashtra* reported in 2003(2) *Mh.L.J.* 168, in furtherance of the submission that the challenge to a certificate issued under 32M cannot be entertained by a Civil Court. It is by filing a suit in the year 2014 that the argument is being

advanced that the 32M certificate was obtained by fraud and the Petitioner No.1 was illiterate. This ignorance cannot continue for 25 years. Furthermore, by then the daughters had grown up and it is not the case that they were unaware or illiterate.

6. The learned Counsel for the Respondent has also pointed out that Petitioner No.1 who was the signatory and major at that time of sale deed has avoided to file affidavit, and is the best person to depose whether the signatures were wrongly obtained. Therefore, position as on today as far as this property is concerned is that it no longer retains the character of the joint family property and it has been received by the Respondent under tenancy proceedings to which no challenge can be raised in a Civil Court. Prima-facie, the contentions that this arrangement is by way of fraud, due to passage of 40 years will have to be left to be decided in the trial, but this delay will have to be taken into consideration when equitable relief is sought.

7. The learned Counsel for the Petitioners then submitted that the District Court did not have jurisdiction since the valuation in the suit is higher than the pecuniary limits to which the District Court can entertain an Appeal. An Appeal from Order was filed earlier in this Court bearing No. 419 of 2015 wherein the learned Single Judge while disposing of the Appeal, on 29 September 2015

recorded thus : “Learned Counsel for the parties submit that the suit is valued below Rs.1 crore and hence, it is to be transferred to the District Court, Nashik in view of the recent notification issued by the Law and Judiciary Department, Government of Maharashtra under Maharashtra Civil Courts (Amendment) Act, 2015 bearing No. CCS.2014/C.R.25/D19.” Thereafter, the matter was transferred to the District Court. The pecuniary jurisdiction is not the same as inherent lack of jurisdiction. The contention of the learned Counsel for the Petitioners that this order was not by consent cannot be accepted as it is contrary to the Court record.

8. The learned Counsel for the Petitioners has placed on record the photographs of the construction, it is his contention that it is being carried out during the pendency of the suit. Be that as it may, once the property has come to the Respondent as far back as 1980 through tenancy proceedings, which have become final, the learned District Judge rightly refused to put restraint on the Respondent to utilize the said property. The learned Counsel for the Respondent contended that as long as this property remained unutilized and had little value no objection was raised and only when the Respondent No.1 converted the same to non-agriculture recently, only to pressure the Respondent No.1 are seeking an injunction. Prima-facie, this appears to be the position. Hardship will be caused to the Respondent, if at this stage entire construction

is stalled. The view taken by the learned District Judge therefore in granting injunction, cannot be stated to be an impossible view. It is not possible to substitute the view taken by the learned District Judge merely because another view is possible. I do not find any perversity in the impugned order.

9. As far as the properties 1b and 1c are concerned, 1c is a house property and 1b is as on today not constructed upon nor there is a Non Agricultural permission, therefore, there is no warrant for any apprehension that these properties will be constructed upon during the pendency of the suit. Even otherwise, it will be equitable, since there is no construction coming up on these properties to direct the Respondent No.1 not to deal with these properties without the leave of the learned Civil Judge. The learned Counsel for the Respondent has on instructions also submits that the Respondent has no intention to create third party rights in respect of property 1b and 1c. As regard the property 1a is concerned, any construction that is being carried out on this property will be subject to further orders to be passed in the suit. The Respondent will submit all the necessary details regarding creation of third party rights, the amount received and copies of the documents so executed shall be placed on the file of the learned Civil Judge, which the Petitioners will be entitled inspect and take copies thereof if necessary. The Writ Petition is accordingly disposed of with above directions.

10. Considering the fact that the construction has come up and that it is made subject to final outcome, the learned Counsel for the parties make a joint request for earlier disposal of the suit. The learned Civil Judge will consider taking up the suit for final disposal at an early date and make an endeavour to dispose of the same within six months, subject to earlier time bound commitments, from the date writ of this Court reaches it. The learned Counsel for the parties on instructions assure that the parties will co-operate with the learned Civil Judge for early disposal of the suit. It is clarified that the observations made in this order are in the context of an interlocutory arrangement between the parties and the suit will be tried on its own merits.

11. The learned Counsel for the Petitioners at this stage request for continuation of ad-interim order for period of four weeks. Request is opposed by the learned Counsel for the Respondent. Ad-interim relief was granted because the Petition was taken up on urgent basis upon mentioning. Considering the facts and circumstances, same is extended for period of three weeks from today.

(N.M. Jamdar, J.)