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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7582 OF 2015

Tukaram Vithu Mardhekar

Since deceased through his heirs & legal representatives

1. Savitribai Tularam Mardhekar and others .. Petitioners

Vs.

Kondiba Vithu Mardhekar

Since deceased through his heirs & legal representatives

1(a) Ramchandra Kondiba Mardhekar and others .. Respondents

Mr.Dilip Bodke i/b Mr.Ganesh.S.Shelar, for the Petitioners.

Mr.Ramchandra N.Jawal, for Respondent No. 4.

CORAM : R.G.KETKAR, J.

DATED : 22nd MARCH, 2016

P.C.

. Heard Mr.Dilip Bodke, learned Counsel for the Petitioners and Mr.Ramchandra Jawal, learned Counsel for respondent No.4 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 07/07/2015 passed by the learned District Judge-5, Satara in Misc.Civil Appeal No. 39 of 2015 By this order, the learned District Judge allowed the appeal preferred by respondent No.4, hereinafter referred to as defendant No.4, and quashed and set aside the judgment and order dated 13/01/2015 passed by the learned Civil

Judge, Junior Division, Medha below Exhibit 107 in Regular Civil Suit No. 16 of 2005. By order dated 13/01/2015, the learned trial Judge allowed the application made by the petitioners, hereinafter referred to as plaintiffs and issued injunction restraining the defendant No.4 from carrying out construction in survey No. 3 admeasuring 0.30 R situate at Mauze Ritkawli, Taluka – Jawli, Dist – Satara (for short 'suit land').

3. The plaintiffs have instituted Suit on or about 02/04/2005 inter alia praying for partition and separate possession of their 1/4th share; for cancellation of sale deed dated 21/05/2002 executed by defendant No.1 in favour of defendant No.4 and for declaration that the sale deed is not binding on the share of the plaintiffs; in the alternate, exercising right of preemption by plaintiffs in respect of survey No.3; for perpetual injunction restraining the defendants from causing obstruction to the plaintiff's possession over the properties described in paragraph 7 of the plaint. During the pendency of the Suit, plaintiffs took out application Exhibit 107 for injunction restraining defendant No.4 from carrying out any construction in survey No.3. That was allowed by the learned trial Judge. Aggrieved by that decision, defendant No.4 preferred appeal. The appeal was allowed against which the plaintiffs have instituted present Petition.

4. Mr.Bodke strenuously contended that though defendant

No.4 came out with a case that on the basis of the family arrangement arrived at among the brothers i) Kondiba Vithoba Mardhekar (defendant No.1) ii) Tukaram Vithoba Mardhekar iii) Genu Vithoba Mardhekar and iv) Sakharam Vithoba Mardhekar, mutation entry No. 647 was made and survey No.3 was allotted to defendant No.1. He submitted that till date partition by metes and bounds is not effected. He further submitted that in fact perusal of paragraph 6 of the plaint clearly shows that in the year 1978, plaintiffs and defendants No. 1 & 3, wife of defendant No.2 entered into family arrangement and to that effect writing was executed on 23/05/1978. It is specifically asserted therein that though mutation entry No. 647 recorded that partition was effected 5 years prior to 1975, plaintiffs and defendants are not actually cultivating the land as per that partition. The partition is not acted upon. In other words, it was only a paper entry. He submitted that after considering the material on record, the learned trial Judge allowed the application. The learned District Judge was not justified in interfering discretionary order passed by the learned trial Judge.

5. On the other hand, Mr.Jawal supported the impugned order. He submitted that mutation entry No. 647 was certified on the basis of the partition deed dated 24/12/1975 which recorded that 5 years back, the partition was effected among 4 brothers. As far as survey No.3 is concerned that was allotted exclusively to the

share of defendant No.1. Defendant No.1 is father of defendant No.4. He executed sale deed in respect of 2 gunthas in favour of defendant No.4 on 21/05/2002 and accordingly, defendant No.4 has commenced construction. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, mutation entry No. 647 was certified on the basis of the partition deed dated 24/12/1975. The mutation entry recorded that 5 years prior thereto, partition was effected among 4 brothers. Perusal of mutation entry No. 647 shows that survey No.3 admeasuring 30 R was exclusively allotted to the share of defendant No.1. It is not the case of the plaintiffs that survey No.3 was allotted to the share of defendant No.1 and other sharers. The submission that so long as partition by metes and bounds is not effected, defendant No.1 cannot claim possession of specific portion is unacceptable. As survey No.3 was allotted to the share of defendants No. 1 exclusively, there is no question of partition by metes and bounds as far as survey No. 3 is concerned. That apart, Suit is instituted almost after 30 years. They did not challenge mutation entry No. 647. The learned trial Judge failed to appreciate this aspect. As against this, perusal of paragraphs 12 to

15 of the Appellate Court's judgment shows that the learned District Judge after considering the mutation entry No. 647 observed that the said survey no.3 stands in the name of defendant No.1 Kondiba and name of defendant No.4 is entered to the extent of 2 R. In paragraph 14, the learned District Judge noted that none of the parties had made complaint against the mutation entry No. 647.

7. In view thereof, no case is made out for invocation of powers under article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)