

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

WRIT PETITION NO.3482 OF 2015

1. Baburao Bhiku Yadav & anr. ... Petitioners

Vs.

1. Khasubai Govind Yadav & Ors. ... Respondents

Mr.M.N. Dhamal for the Petitioners
Mr.N.V. Pawar for Resp. Nos.1 to 5
Mr.V.R. Gaikwad for Resp. No.6

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 18, 2017**

P.C. :

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

2. This petition is directed against the judgment and order dated 12.9.2014 passed by the learned District Judge 3, Satara, in Miscellaneous Civil Appeal No.39 of 2013 below exhibit 23, thereby allowing the said appeal and setting aside the order dated 16.2.2013 passed by the learned Civil Judge, Junior Division, Khandala in Regular Civil Suit No.4 of 2013 below exhibit 5. The petitioners are the original plaintiffs, who are the father and son

claiming their right, title and interest in the suit lands through one Anusaya, the mother of plaintiff No.1 and grandmother of plaintiff No.2. It was also claimed that Anusaya became the owner of the suit lands due to the bequeath which was made in her favour by her sister Chingubai, who was the predecessor in title. The petitioners are the original plaintiffs, who filed the Suit No.4 of 2012 for declaration that the conveyance dated 9.9.2011 which was executed between defendant Nos.1 to 5 and defendant Nos.10 to 17 is void, non-est and not binding on him to the extent of his undivided shares in the suit property. The petitioners have also prayed for injunction against the defendants. The application for interim relief was allowed by the trial Court and the trial Court directed the defendant Nos.1 to 5 not to create third party right, title or interest in the suit property i.e., gat No.96/1 as shown in para 1b of the plaint. The said order was challenged before the learned District Judge in Miscellaneous Civil Appeal No.35 of 2013. The learned District Judge set aside the said order and hence, this petition is filed.

3. The learned Counsel for the petitioners has submitted that the petitioners have undivided right, title and interest in the suit

lands. Defendant Nos.1 to 5 have sold some of the portion of the suit properties to defendant Nos.10 to 17. The plaintiffs claim their right in the suit lands through a photocopy of the will of Chingubai which was in favour of Anusaya, the mother of plaintiff No.1, which was produced alongwith the plaint. It was further submitted that defendant Nos.1 to 5 have no right to either sell the said property or deal with the suit property in any manner. Their claim in the suit property is bogus and false. He prays that the petition is to be allowed.

4. The learned Counsel for the respondents/defendant Nos.1 to 5 and defendant Nos.10 to 17, the contesting defendants, has submitted that the order passed by the trial Court was illegal and the order passed by the learned District Judge is to be maintained. He submitted that in the plaint, no whole claim is made which is required under Order 2 Rule 1 of the Civil Procedure Code. The plaintiffs claim their undivided share in the suit property and seeks declaration against the defendants. He submits that it was necessary for the plaintiffs to file a suit for partition and to get his share divided and fixed and thereafter only he can seek relief of declaration and injunction against the present defendants. It is

further submitted that the plaint is incomplete and the learned District Judge has rightly considered that the plaint fails for want of non-joinder of parties. He further submitted that at the outset, the he challenges the will of Chingubai through which the plaintiffs claim their right title and interest in the suit property. The said will is a bogus and sham document and no claim can be made through the will. He further submitted that Chingubai died a day earlier to the execution of the will which is on 22.3.1974. He submitted that the defendants are the adopted children of Chingubai, who died issueless. He further submitted that during the lifetime of Chingubai, the suit property was transferred in the name of Ananda and Govinda, the adopted sons of Chingubai. He further submitted that in the mutation entry which is not disputed by the plaintiffs and in fact which is produced and relied on by the plaintiffs, discloses that Chingubai died on 21.3.1974. He submitted on this point alone, *prima facie*, the will is to be disbelieved.

5. Heard. Read the orders of the Courts below and the documents produced i.e., the photocopy of the will, the revenue entry, etc. the petitioners/plaintiffs claim their right, title and

interest in the suit property which consists of various lands as described in the plaint. Defendant Nos.10 to 17 have purchased only one portion of the suit property i.e., gat No.96/1 admeasuring 3 hectares 87 ares situate at village Sukhed, Taluka Khandala, District Satara. On the other hand, the defendants claim their right and ownership in the suit properties on the basis of their claim that they are adopted sons of Chingubai. The family tree and the genealogy of one Govind Manoj Bhosale, the original owner, is produced and relied on by the petitioners. The said genealogy discloses that Chingubai was the real sister of Anusaya and Vithabai. Chingubai was issueless and, therefore, -she bequeathed the property in favour of Anusaya. Baburao is the Plaintiff No.1. He is the brother who is made as defendant No.7. However, he has not made his two sisters as parties to the suit. It is to be considered that it is not a suit for partition. No relief is claimed *inter se* between the legal representatives of Anusaya from whom the plaintiffs and defendant No.7 claim right, title and interest in the suit properties. As per the pleadings in the plaint, the suit is filed against the third parties i.e., Ananda and Govind, who are not claiming any property through will but their claim is altogether different as they are the adopted sons of Chingubai. Hence, at this

stage, the submissions of the learned Counsel for the respondents that the claim in the suit is incomplete under Order II Rule 1 of the Civil Procedure Code, cannot be appreciated. The findings given by the learned Distirct Judge on this point is also found to be out of place and not required.

6. Secondly, whether the will is a false and bogus document or not, will necessarily be considered at the stage of the trial. The plaintiffs have produced the photocopy of the will and the genealogy explaining the relationship of the plaintiffs with Anusaya with Chingubai and with the original owner Govind Manoj Bhosale. These documents are sufficient to prove case, *prima facie*. A Tenancy receipt bearing No.2044/1993 for the purpose of showing the date of death of Chingubai as 21.3.1974 is produced. However, whether Chingubai died on 22.3.1974 or 21.3.1974 is a matter of proof and it can be established on the basis of the death certificate issued by the appropriate authority. It is a matter of proof of the documents if produced and marshalling of evidence. Thus, by applying the three principles of granting interim relief i.e., *prima facie* case, irreparable loss and balance of convenience, the order passed passed by the trial Judge is found legal and correct

and hence, the order of the learned District Judge, Satara needs interference.

7. Rule is accordingly made absolute in terms of prayer clauses (a) and (b).

(MRIDULA BHATKAR, J.)