

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

WRIT PETITION NO. 4844 OF 2017

Sambhaji Dinkar Pawar

.. Petitioner

v/s.

Sampat Nivruti Pawar & Ors.

.. Respondents

Mr. D.D. Ranaware for the petitioner

Mr. Ashok Tajane for respondent nos. 1 and 2

CORAM : M.S. SANKLECHA, J.

DATED : 9th AUGUST, 2017

PC.

1. At the request of the Counsel, the petition is being disposed of finally at the stage of admission.

2. This petition under Article 227 of the Constitution of India challenges order dated 10th April, 2017 passed by the District Judge, Karad, Dist. Satara. By the impugned order, the appeal of the respondents herein, from the order of injunction of the trial Court dated 1st September, 2016 restraining the respondents herein from continuing the construction of the house on the common property, till the final disposal of the suit was allowed. Therefore, the

respondent continued with the construction of the house.

3. The petitioner herein filed a suit for permanent injunction to restrain the respondents herein from constructing a house on the joint family property. Both the respondents herein and the petitioner are the joint owners of the suit property along with their other siblings and cousins. A separate suit for partition being RCS No. 22 of 2011 between the family members is pending disposal.

4. In this suit for permanent injunction, the petitioner took out an application for interim injunction in terms of Order 39, Rule 1 and 2 of the Civil Procedure Code (CPC). The Trial Court by order dated 10th September, 2016 held that the petitioner and the respondents are co-owners in the suit property along with others and, therefore, restrained the respondents from continuing with construction. This for the reason that it was being done without the consent of the other co-owners even before the partition has taken place. This construction, the Court held would lead, to a change in the nature of property and, therefore, cause irreparable loss to the petitioner. Thus, by order dated 1st September, 2016 the trial Court

granted a temporary injunction in favour of the petitioner herein.

5. Being aggrieved with the order dated 1st September, 2016, the respondents herein filed an appeal to the District Judge, Karad. By the impugned order dated 10th April, 2017, the District Judge, Karad while allowing the appeal of the respondent held that the injunction was not warranted on account of the fact that the petitioner's cousin had filed the suit for identical relief and an interim application came to be dismissed. This fact was suppressed by the petitioner while filing this suit for permanent injunction. Besides, the impugned order holds that there was a delay on the part of petitioner in moving the Court as the construction of the building had been substantially done as seen from the photographs. It placed reliance upon the decision of the Apex Court in a case of ***Mandali Ranganna & Ors. Vs. T. Ramachandra & Ors. (2008) 11 SCC 1*** to hold that temporary injunction under Order 39 Rule 1 and 2 of the CPC need not be granted, where there is a delay on the part of the parties seeking an injunction in moving the Court. It was observed that the interest of the petitioner could be protected by allowing the respondents therein to continue the construction of the building,

subject to the ultimate decision of the suit. The impugned order records the fact that the photographs of the construction done was produced by the respondents and it was found that substantial amount of construction had already been carried out. Thus, the order of the trial Court was reversed and injunction was vacated. However, it was clarified that the construction carried out by the respondents herein would be subject to the final decision in this suit for permanent injunction and the result of partition suit being RCS No.22 of 2011.

6. Mr. Rananaware, learned Counsel appearing for the petitioner submits that the appellate Court ought not to have interfered with the order passed by the trial Court, granting an interim injunction as on facts, it was a possible view. It is also submitted that the petitioner was not a party to the suit filed by his cousin against the respondents. Further, the petitioner had filed the suit in 24th August, 2016 when the construction of the house had commenced only in March, 2016. Thus, there was no delay in filing the suit. Further The decision of the Apex Court in the case of *Mandali Ranganna & Ors.* (*supra*) is distinguishable as it had allowed the respondents therein

to continue with construction in view the fact that an amount of Rs.3 crores had already been spent. The party in possession of the suit land was, therefore, allowed to complete the construction, subject to the final result in the suit.

7. As against the above, Mr. Tajane, learned Counsel appearing for the respondents supported the order and invited my attention to the photographs of the construction of house, which have been annexed by the respondents in their reply to the petition. It is further submitted by Mr. Tajane, on instructions, that the respondents will not create any third party rights, if he is allowed to complete the construction of the house as directed by the impugned order. It is stated on instructions that construction of the house by him would be subject to the result of this suit as well as the partition suit.

8. The jurisdiction under Article 227 of the Constitution of India is a supervisory jurisdiction. Therefore, the jurisdiction is to be exercised to ensure that the authorities should act within the boundaries of the law and not arbitrarily. It is not exercised when the view taken in the order of the judicial authority is on the basis of

fact and/or in law is a possible / likely view. As laid down by the various decisions of Apex Court, the supervisory power is to be exercised where there is gross absence of jurisdiction or assumption of jurisdiction not vested in law or ignoring the elementary principles of law or the order gives rise to grave miscarriage of justice. Article 227 of the Constitution is exercised to ensure the upholding of Rule of law by judicial and quasi judicial authorities, functioning within the statute of Maharashtra.

9. Therefore, keeping the above test in mind, I examine this case in the context of the submissions made. The submission on behalf of the petitioner that the decision of the Apex Court in the case of *Mandali Ranganna & Ors. (supra)* would have no application as in present case, there is no delay as the construction of the offending house started only in March, 2016 and the petitioner herein filed the suit in August, 2016 may not be appropriate. The delay *per se* is not the measure / yardstick to reject an interim application but the test, is whether the parties have changed their positions in the meantime and the extent of the change. In this case, during the period i.e. March, 2016 to August, 2016 much progress had been done on the

construction of the house. On perusal of the photographs as annexed to the reply and the findings recorded in the impugned order, substantial construction work in respect of the house had already been completed. This cannot be ignored. It was the fact that the construction of the house being substantially completed that had led the impugned order to reverse the stay granted by the trial Court, restraining the Respondents from constructing further. In these facts, the view taken by the impugned order allowing the respondent to construct the house at his own costs and subject to the final decision in this suit as well as partition suit being RCS No.22 of 2011, cannot be said to be an impossible view or an order passed beyond the boundaries of law in the context of the facts arising for adjudication. Merely because a different view is possible, would not warrant any interference under Article 227 of the Constitution of India.

10. Moreover, Mr. Tajane, the learned Counsel for the respondents on instructions states that they would not create any third party rights till the final decision in this suit as well as in the partition suit. Further, on instructions, Mr. Tajane states that in case the petitioner

succeeds, they would comply with the orders passed in the suit as well as in the partition Suit being RCS No.22 of 2011 with regard to the house constructed without claiming any equity of having constructed the house. I accept the statement.

11. In the peculiar facts and circumstances of this case, the ends of justice are met by the impugned order allowing the construction to be carried out by the respondents, subject to the final decision of the pending partition suit as well as this suit, without the respondent claiming any equities / rights in having been allowed to construct the house.

12. Accordingly, petition is dismissed. No order as to costs.

13. Parties are at liberty to apply to the trial Court for expedited hearing of the suit, which the trial Court will consider sympathetically.

(M.S. SANKLECHA, J.)