

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 9688 OF 2016**

Shri Shankar Subrao Salunkhe ] Petitioner

Vs.

Shri Anil Vishanu Amate & Ors. ] Respondents

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Mr. Sandeep Koregave, Advocate for the petitioner.  
Mr. Kedar P. Lad, Advocate for respondent Nos. 1 and 2.

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**CORAM : R.G. KETKAR, J.**

**DATE : 21ST MARCH, 2017.**

**P.C.**

Heard Mr. Sandeep S. Koregave, learned Counsel for the petitioner and Mr. Kedar Lad, learned Counsel for respondents No. 1 and 2.

2. By this petition, under Article 227 of the Constitution of India, the petitioner hereinafter referred to as 'plaintiff' has

challenged the judgment and order dated 4<sup>th</sup> April, 2016 passed by the learned District Judge-4, Kolhapur in Misc. Civil Appeal No. 5 of 2015. By that order, the learned District Judge allowed the appeal preferred by respondents No. 1 and 2 hereinafter referred to as 'defendants No. 2 and 3' and quashed and set aside the judgment and order dated 5<sup>th</sup> December, 2014 passed by the Joint Civil Judge, Senior Division, Kolhapur below Exhibit 5 in Special Civil Suit No. 80 of 2012. The learned District Judge dismissed the application Exhibit 5 taken out by the plaintiff and expedited the suit with a direction to the trial Court to dispose of the suit within six months from the date of the order.

3. In support of this petition, Mr. Sandeep Koregave submitted that Narayan Santu Salunkhe died leaving behind his two sons, namely Bhiva and Subrao. Bhiva had two sons namely plaintiff, Shankar and defendant No.1 Balu. Subrao did not have any issue and, therefore, he adopted plaintiff Shankar. He submitted that the plaintiff has instituted suit for partition and separate possession of his share in land bearing Gat No. 1155, admeasuring 1 Hectare 60 Are and land bearing Gat No. 1157, admeasuring 0 Hectare 06 Are situate at Village Sagav, Tal. Kagal,

Dist. Kolhapur (for short 'suit lands'.) Plaintiff also sought a declaration that the sale deed executed by defendant No.1 Balu in favour of defendant No. 2 Anil and defendant No.3 Sunil on 13<sup>th</sup> October, 2011 is not binding on the plaintiff's share and also prayed for cancellation of the sale deed. The plaintiff has also claimed preferential right for purchasing the share of defendant No.1 in the suit land.

4. During the pendency of the suit, plaintiff took out application at Exhibit 5 which was resisted by defendant Nos. 2 and 3. By order dated 5<sup>th</sup> December, 2014, the learned trial Judge partly allowed the application and issued injunction restraining the defendants from causing obstruction to the plaintiff's possession over the suit land and restrained defendants No. 2 and 3 from creating third party interest on the basis of the sale deed in their favour.

5. Mr. Koregave submitted that the learned trial Judge considered the documents on record and by a detailed order held that the plaintiff is in possession of the suit land. He has taken me through the trial Court's order, as also;

- (I) Extract prepared under consolidation in respect of survey No. 268,
- (ii) Mutation entry No. 5551,
- (iii) Application dated 28<sup>th</sup> April, 2011 made by defendants No.1 and 2 to Gaonkamgar Talathi and
- (iv) Mortgage Deed dated 28<sup>th</sup> July, 1967 executed by defendant No.2 and 3 jointly.

He submitted that all these documents clearly establish that firstly there was no partition in the suit land and, secondly, the plaintiff is in possession of the suit lands.

6. As against this, the learned District Judge held that the plaintiff did not come to the Court with clean hands. Survey No. 268 Hissa No. 24 was divided into Gat No. 1155, Gat No. 1156 and Gat No. 1157. From consolidation papers, it is clear that the plaintiff Shankar has got Gat No. 1156, defendant No.1 Balu has got Gat No. 1155, and Gat No. 1157 was kept common between the plaintiff and defendant No.1. He submitted that the said finding is not borne out from the record. The learned District Judge was also not justified in observing that there was partition between the plaintiff and defendant No.1, wherein the plaintiff was

alloted Gat No. 1156 and defendant No.1 was alloted Gat No. 1155.

7. On the other hand, Mr. Lad supported the impugned order. He has taken me through the Sale Deed dated 13.10.2011 executed by defendant No.1 in favour of defendants No. 2 and 3. By that sale deed, defendant No.1 sold entire Gat No. 1155 and half of Gat No. 1157 together with right to fetch water from the well and the pipeline. He states that defendants No. 2 and 3 have never obstructed the plaintiff from fetching water from well situate in Gat No. 1157 as also will not damage the pipeline situate in Gat No. 1157. He further invited my attention to paragraphs 7 to 10 of the impugned order and submitted that the learned trial Judge did not consider the position obtaining after implementation of the consolidation scheme. He, therefore, submitted that no case is made out for interfering with the impugned order.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. With the assistance of the learned Counsel of the parties, I have perused the orders passed by the trial Court as

also the District Court. A perusal of the trial Court's order shows that it has considered the position obtaining prior to implementation of the consolidation scheme. The trial Court, however, did not consider the effect after implementation of the consolidation scheme. A perusal of paragraphs No. 7 to 10 of the impugned order shows that the learned District Judge has considered the effect that the consolidation scheme was implemented on 23<sup>rd</sup> November, 1978. After consolidation, one part of 0.31 ares was given to defendant No.1 Balu and another part of 0.26 ares from Survey No. 268, Hissa No.24 was allotted to the plaintiff Shankar. Papers of consolidation show that the plaintiff was given Gat No. 1156 and defendant No.1 Balu was given Gat No. 1155 and Gat No. 1157 was kept common for well between the plaintiff and defendant.

9. The learned District Judge also observed fact that the plaintiff did not disclose existence of Gat No. 1156 which is standing in his name and this conduct is required to be considered while considering the application for injunction which is an equitable relief. In paragraph 9, the learned District Judge referred to the sale deed and observed that entire Gat No. 1155

and half share in Gat No. 1157 was sold to defendants No.2 and 3. In paragraph 10, the learned District Judge observed that in view of the position obtaining in respect of the suit lands after implementation of the consolidation scheme, defendant No.1 Balu is in possession of Gat No. 1155 and the plaintiff Shankar is in possession of Gat No. 1156. For the reasons recorded in paragraphs 7 to 10 of the impugned order, I do not find that the learned District Judge committed any error in allowing the appeal. Hence, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed. It is clarified that the observations made herein are tentative and prima facie and the learned trial Judge shall decide the suit on the basis of the evidence on record, uninfluenced by the observations made in this order. Order accordingly.

**[R.G. KETKAR, J.]**