

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

WRIT PETITION NO.5908 OF 2014

Jambrabai Laxman Tambe and
Anr.

..Petitioners.

Vs

Shri Balasaheb Vishnu Tambe
and Ors.

.. Respondents

Mr. Sanjiv A. Sawant, Advocate for Petitioners.
Mr. T.D.Deshmukh, Advocate for Respondent no.1.

CORAM : R.G.KETKAR,J.
DATE : 20/02/2017

PC:

1. Heard Mr.Sanjiv Sawant, learned counsel for the petitioners and Mr.Tejas Deshmukh, learned counsel for respondent no.1 at length. On the motion made by Mr.Sawant, leave to delete respondents no. 2 to 11 is granted as respondent no.1, being original plaintiff, is the only contesting respondent. Amendment shall be carried out forthwith. Rule. Mr. Deshmukh, waives service for respondent no.1. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants no. 3 to 6', have challenged the Judgment and order dated 15.5.2014 passed by the learned District Judge-1, Khed Rajgurunagar, Pune in Misc. Civil Appeal No.113 of 2014. By that

order, the learned District Judge allowed the appeal preferred by respondent no.1, hereinafter referred to as 'plaintiff', and quashed and set aside the judgment and order dated 15.4.2014 passed by the learned Civil Judge, Jr. Dn., Ghodegaon below Exhibits 5 and 29. The learned District Judge allowed the application Exhibit-5 moved by the plaintiff and issued injunction restraining defendants no.3 to 6 from creating third party interest in the suit property described in paragraph 1(b) of the plaint in any manner till decision of the suit. Learned District Judge dismissed application Exhibit 29 made by defendants no. 3 to 6.

3. Plaintiff had instituted suit, inter-alia, praying for partition and separate possession of properties described in paragraphs 1A to 1C of the plaint and separate possession of his 1/4th share in respect of the properties described in paragraphs 1 A to 1C of the plaint. During the pendency of the suit, the plaintiff took out application Exh.5 praying for injunction restraining defendants no.1 to 7 from creating third party interest. Defendants no.3 to 6 filed reply opposing application Exhibit-5 dated 2.5.2013. Defendants no.3 to 6 filed written statement resisting the suit and also set up counter claim on 27.6.2013. Defendants no.3 to 6 also took out application Exh.29 on 1.7.2013. The learned trial Judge disposed of the applications Exhibit 5 and Exhibit 29 by common order. Application Exh.5 filed by the plaintiff was rejected. Application Exh.29 filed by defendants no.3 to 6 was

allowed and the plaintiff and defendants 1,2,7 and 8 were temporarily restrained from obstructing defendants no.3 to 6 of their possession and enjoyment of suit lands Block Nos 158,160 and 163 till decision of the suit. Aggrieved by this order, the plaintiff preferred Misc.Civil Appeal which was allowed by the learned District Judge.

4. In support of this petition, Mr. Sawant invited my attention to paragraph 15 of the reply dated 2.5.2013 as also the findings recorded by the learned trial Judge in paragraphs 11 to 16. As against this, Mr. Sawant submitted that in paragraph 11 the learned District Judge observed that prima facie no satisfactory evidence is produced on record by defendants no.3 to 6 to establish existence of separate source of income in the name of deceased Laxman at the time of acquisition of the suit property. He submitted that the findings recorded in paragraph 11 are contrary to material on record.

5. On the other hand, Mr. Deshmukh supported the impugned order. He submitted that the suit is basically for partition and possession. Till filing of the suit, defendants no.3 to 6 never claimed that Gat nos 158, 160 and 163 are self-acquired property of Laxman. It is only after the plaintiff filed the suit, defendants no.3 to 6 are claiming that they are self acquired property of Laxman.

6. I have considered the rival submissions advanced by the

learned counsel appearing for the parties. I have also perused the material on record. In paragraph 11, the learned District Judge has observed that in the pleadings, there is no whisper about purchasing the property in the name of Laxman without utilizing nucleus of the joint family. Prima facie, the findings recorded by the learned District Judge ignore the case made out by defendants no.3 to 6 in their reply to Exhibit-5 as also the findings recorded by the learned trial Judge from paragraphs 11 to 16. As the learned district Judge has not considered these aspects, the impugned order cannot be sustained and as such is liable to be set aside.

7. While issuing notice to the respondents, on 28.8.2014, this Court granted ad-interim order in terms of prayer clause (c) and also clarified that pendency of the petition would not be an impediment for the trial Court to proceed with the suit in question. Hence, following order.

(i) Impugned order dated 15.5.2014 passed by the learned District Judge-1 is set aside. Misc. Civil Appeal No.113 of 2014 is restored to the file of the District Court. By way of abundant caution, it is clarified that the order dated 15.4.2014 passed by the learned trial Judge below Exhibits 5 and 29 shall remain in force during the pendency of the Appeal.

(ii) Pendency of the Appeal will not preclude the trial Court from proceeding with the suit.

(iii) Parties agree that they will appear before the District Court on 1.3.2017. Learned District Judge is requested to fix date as per his convenience and dispose of the Appeal as expeditiously as possible and preferably within four weeks from the date of appearance of the parties. All contentions of the parties on merits are expressly kept open.

(iv) Rule is made absolute in the above terms with no order as to costs. All parties including the learned District Judge to act upon the authenticated copy of this order. Order accordingly.

(R.G.KETKAR, J.)