

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

WRIT PETITION NO. 8886 OF 2014

Ramesh Hiranand Kundanmal & ors. ... Petitioners.
Versus
Gajanan Balaram Gawand & ors. ... Respondents.

Ms. Kavita A. Shah, advocate for petitioners.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : OCTOBER 31, 2017**

P.C.:

1 Heard the learned Counsel for the Petitioners. None appears for the respondents although served.

2 Rule. Rule made returnable forthwith.

3 The petitioners are the original plaintiffs in Special Civil Suit No. 139 of 2008. The suit is filed for specific performance. During the pendency of the suit, the respondent no. 6 herein filed an application under section 10 of the Code of Civil Procedure praying

that the proceedings in Special Civil Suit No. 139 of 2008 be stayed till the decision of the second appeal which is filed during the pendency of Second Appeal Nos. 1276/2005 and 1277/2005. It was contended by the defendant No. 6 that RCS No. 8 of 1997 and 42 of 1998 were tried together by the learned Civil Judge, S.D. Alibag, in which the respondents are parties to the suit interse. The suit was filed between the members of the family for seeking their rightful share in the suit property i.e. for partition and possession. It was contended that there was a partition between the parties dated 4.12.1999 effected in between defendant Nos. 1 to 4 and 6. Pursuant to the said partition, the share was given to Janaki Balaram Gawad.

4 The present petitioner happens to be third party. The specific contention raised in the plaint filed by the plaintiffs that the Petitioners had entered into an agreement to sale to the extent of 1/5th undivided share of each of the defendant Nos. 1 to 4 at a price of Rs. 1,75,000/- per guntha and the plaintiffs had also paid an amount of Rs. 21,000/- to the Defendant Nos. 1 to 4 as an earnest amount. That the agreement for sale was executed on 7/7/20017. It

is specifically contended in the plaint that the plaintiffs were aware of the decree passed in the earlier suit and pursuant to the said decree they had entered into an agreement with the defendants.

5 Section 10 of the Code of Civil Procedure, 1908 reads as under :

“10.Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in {Subs. by Act 2 of 1951, s.3, for "the States".} [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of {Subs. by Act 2 of 1951, s.3, for "the States".} [India] established or continued by {Subs. by the A.O.1937 for "the G.G.in C ".} [the Central Government {The words "or the Crown Representative" rep. by the A.O.1948.}] and having like jurisdiction, or before {Subs. by the A.O.1950 for "His Majesty Council".} [the Supreme Court].

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in {Subs. by Act 2 of 1951, s.3, for "the States".} [India] from trying a suit founded on the same cause of action.”

6 It is clear from the contentions raised in the application under section 10 of the the C.P.C. as well as the observations of the learned Judge that the Petitioners are not parties to the said suit. The second appeal is pending before the High Court. The very fact that they are not claiming any title in respect of the same properties in a

suit between the same parties, section 10 would have no bearing in the present case. The suit is not pending. It cannot be said that the suit filed by the plaintiffs is a subsequent suit in respect of the same properties against the same parties and therefore, section 10 would not have application in the present case. Hence, the Petition deserves to be allowed.

7 The impugned Judgment and Order dated 14/3/2014 passed by learned Civil Judge, S.D., Alibag is quashed and set aside. Upon receipt of this order, learned Civil Judge, S.D., Alibag shall proceed with the Special Civil Suit No. 139 of 2008.

8 Rule is made absolute in the above terms.

Office to communicate this order to the concerned court forthwith.

(SMT. SADHANA S. JADHAV,J)