

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

WRIT PETITION NO. 12935 OF 2016

Shri Chandrakant Baburao
Khaire and Anr.

..Petitioners.

Vs

Smt. Bhagubai Shankar Jarande
and Ors.

.. Respondents

Mr.Dnyaneshwar G Adsul, Advocate for Petitioners.
Mr. Pandit Kasar, Advocate for Respondent no.1.

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

PC:

1. Not on Board. At the request of Mr.Adsul, taken up for admission. Heard Mr. Dnyaneshwar Adsul, learned counsel for the petitioners and Mr.Pandit Kasar, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged (1) Judgment and order dated 27.7.2016 below Exhibit-38 as also (2) Judgment and order dated 14.9.2016 below Exhibit-60 passed by the learned Jt. Civil Judge, Jr. Dn., Saswad in Regular Civil Suit No.72 of 2014. By order dated 27.7.2016 below Exhibit 38, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as 'defendants no.22 and 24', under section 11 of C.P.C. By order dated 14.9.2016, the learned trial Judge fixed

hearing of application Exhibit-5 by discarding the reply filed by defendants no. 20 to 31 at Exhibit 60.

3. In support of this petition, Mr.Adsul submitted that predecessor-in-title of the present plaintiffs had instituted Regular Civil Suit No.173 of 1980 for partition and separate possession. The learned trial Judge dismissed the suit on 11.8.2013. Aggrieved by that decision, the plaintiffs preferred Appeal. By order dated 13.1.2009, the learned District Judge dismissed the appeal. Aggrieved by these orders, the plaintiff's predecessor-in-title preferred Second Appeal No.125 of 2009 in this Court and the same is admitted. He submitted that the Courts below have concurrently held that predecessor-in-title of the plaintiffs are not entitled to any share in that suit. The present suit is also for partition and separate possession. In view of the findings recorded in the earlier round of litigation, namely, R.C.S. No.173 of 1980, the suit is liable to be dismissed on the ground that it is barred by res judicata.

4. On the other hand, Mr. Kasar submitted that the Second Appeal challenging the decisions of the Courts below is admitted by this Court and the same is pending for final hearing. The findings recorded by the Courts below in Regular Civil Suit No.172 of 1980 cannot be said to have attained finality. The application filed by the defendants 22 and 24 under section 11 is, therefore, misconceived.

5. As noted earlier, though the suit instituted by the predecessor-in-title of the plaintiffs was dismissed by the trial Court and the Appeal preferred by them was also dismissed by the learned District Judge, Second Appeal No.125 of 2009 is admitted by this Court and the same is pending for final hearing. It, therefore, cannot be said that the findings recorded by the Courts below in R.C.S. No. 173 of 1980 has attained finality. In view thereof, no fault can be found with the impugned order dated 27.7.2016 rejecting the application Exhibit-38 filed by defendants no.22 and 24 under section 11 of C.P.C.

6. As far as order below Exhibit 60 is concerned, by that order, the learned trial Judge has discarded reply filed by defendants 20 to 31 to application Exhibit-5. Mr. Kasar submitted that the application Exhibit-5 was decided by the learned trial Judge on 8.11.2016. By that order, the learned trial Judge has issued injunction restraining defendants no.20 to 31 from causing obstruction to the plaintiff's possession as also issued injunction restraining the defendants from creating third party interest. Aggrieved by that decision, the plaintiffs have preferred Misc Civil Appeal No. 453 of 2016. He further submitted that arguments are concluded in that appeal and the matter is reserved for Judgment.

7. As the application Exhibit-5 is already decided on 8.11.2016, the learned District Judge while deciding Misc. Civil

Appeal, will consider the reply and pass appropriate orders. It is made clear that I have not examined merits of the application Exh.5. Subject to this, Petition fails and the same is dismissed by granting liberty to the petitioners for filing application under Section 10 of C.P.C. Grant of liberty shall not be construed as an expression on merits either way. All contentions of the respondents in that regard are expressly kept open.

(R.G.KETKAR, J.)