

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

WRIT PETITION NO. 8479 OF 2018

Deepak s/o Ishwardas Badshah
& others

... Petitioners

Versus

Janumati Ranchoddas Badshah
& others

... Respondents

Mr. K.C. Sant, Advocate for the Petitioners.

Mr. D.K. Kulkarni, Advocate for Respondent no. 4.

Mr. R.N. Raut, Advocate for Respondents no. 8 to 11.

Coram : N.M. Jamdar, J.

Date : 20 December 2018.

Oral Order :

1. Heard learned counsel for the parties.
2. Though there is a checkered history to this litigation, the issue involved in this petition is narrow.
3. The order impugned in this petition is passed below

Exhibit 219 in M.A.R.J.I. No. 243/1985 dated 11 July 2018. This application was filed by respondent no. 4 under Order 21 Rule 16 of the Code of Civil Procedure for issuance of warrant of possession. It is the stand of respondent no. 4 that the decree of partition where 1/3rd share was granted in favour of Kanhaiyalal, his legal heirs had assigned their share in his favour and a relinquishment deed is stated to have been executed in favour of respondent no. 4. This application was contested by petitioners contending that there was a compromise in the execution proceeding and infact, the legal heirs of deceased Kanhaiyalal had created a right and interest in their favour. The learned Civil Judge considered the rival contentions and held that the case of respondent no. 4 that he is entitled to the 1/3rd share of deceased Kanhaiyalal is to be accepted. Thereafter, the present petition is filed.

4. Curiously, the heirs of deceased Kanhaiyalal who admittedly received the 1/3rd share as per the decree were not represented nor their version was before the learned Civil Judge when the impugned order was passed. The legal heirs of deceased Kanhaiyalal are however, represented in this petition. Learned counsel for the legal heirs of deceased Kanhaiyalal submit that the legal heirs have not created right in favour of either the petitioners or the

respondent no. 4 and being an immovable property, such unregistered documents have no force in the eyes of law. He further submits that it is the legal heirs of deceased Kanhaiyalal who alone are entitled to 1/3rd share. Therefore, this is the third angle that is now being placed before this Court, which was not placed before the learned Civil Judge. Before the learned Civil Judge decides as to who succeeds to the 1/3rd share of the legal heirs of deceased Kanhaiyalla, the version of the legal heirs that they have not created any right relinquishing their share will have to be considered.

5. In these circumstances, the impugned order will have to be set aside and the application filed by respondent no. 4 will have to be restored. It is open to the legal heirs of deceased Kanhaiyalal to file their reply to this application. The reply of the petitioner is already on record. The learned Civil Judge will have to decide the application on its own merits. Accordingly the following order :

- a) The impugned order dated 11 July 2018 is quashed and set aside.
- b) Application below Exhibit 219 stands restored to file.
- c) The legal heirs of deceased Kanhaiyalal i.e. respondents no. 8 to 11 are permitted to file their reply to the application.

- d) The learned Civil Judge, upon receipt of the reply of respondents no. 8 to 11, will decide the application on its own merits.
 - e) Since the decree is of the year 1981, the learned Civil Judge will give priority to the disposal of the application and dispose of the same within a period of eight weeks if there are no earlier time bound directions.
 - f) All the contentions of the parties are kept open.
6. Writ petition is accordingly disposed of in above terms.

N.M. Jamdar, J.