

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

**925 CIVIL APPLICATION NO. 11762 OF 2017
IN SA/162/2007**

ALKA RAMAKANT PIRANGUTE

AND OTHERS

..APPLICANTS

VERSUS

VIJAY GURULINGAPPA LOHAKARE

AND OTHERS

..NON-APPLICANTS

...

Advocate for Applicants: Smt.Surekha G.Chincholkar

Advocate for Non-applicant Nos.2 to 4 :

Shri P.R.Katneshwarkar h/f. Shri V.R.Jain

...

CORAM : P.R.BORA, J.

DATE: 4th July, 2018

PER COURT:-

1 Heard learned Counsel Smt.Surekha G. Chincholkar appearing for the Applicants and learned Counsel Shri P.R.Katneshwarkar appearing for Non-applicant Nos.2 to 4.

2 The Applicants have filed the present application claiming following reliefs.

"A. This Civil Application may be allowed.

B. The Hon'ble High Court may allow the Applicants to add the non-applicant nos.2 to 4 as respondents in Second Appeal.

C. This Hon'ble High Court may restrain the non applicant nos.3 and 4 from creating any kind of third party interest in the suit property during the pendency of the Second Appeal.

D. This Hon'ble High Court may restrain the non Applicant Nos.3 and 4 from making any kind of construction over the suit property purchased from non applicant No.2 by registered sale dt.27/06/2014.

E. Status-quo as on today may be maintained by restraining the non-applicant nos.3 and 4 from carrying out construction over the suit property.

F. Any other relief to which the Applicants are entitled in the facts and circumstances of the case may be granted."

3 It is the contention of the Applicants that the property presently numbered as Gut No.923 was previously known as Survey No.316 and prior to that it was known as Survey No.544. The said property was the Suit property in Partition Suit bearing No.268 of 2000 filed by the present Non-applicant No.1 - Shri Vijay Gurulingappa Lohakare. Compromise was arrived at in the said Partition Suit in the year 2004. Shri Vijay Gurulingappa Lohakare however, filed Regular Civil Appeal No.355 of 2004 taking exception to the said

compromise decree. The said Regular Civil Appeal was dismissed in the year 2006, against which Shri Vijay Gurulingappa Lohakare has filed the present Second Appeal and the same has been admitted vide order passed on 13.02.2009. It is the further contention of the Applicants that during the pendency of the present Second Appeal, it is noticed by the Applicants that some transactions have entered into in respect of the property at Gut No.923 that is original property bearing Survey No.544 and mentioned as Survey No.316 in the Suit for partition.

4 Learned counsel for the Applicants submitted that while issuing notice in the present application, this Court had passed the following order on 29.09.2017:-

" Issue notice to respondent Nos.2 to 4, returnable on 27th November, 2017.

2. This Court, prima-facie, of the opinion that the very second appeal against compromise decree is not maintainable, the said respondents by impugned order are restrained from changing the nature of the property, till then."

5 Learned counsel further submitted that earlier, one another application bearing Civil Application No.7555 of 2011 was filed by the present Applicants and in the said matter the following order was passed on 08.08.2011:-

“1 Heard.

2 There shall be order in terms of prayer clauses 'B' and 'C' till further order.

4 Issue notice to the Non-applicants No.3, 4, 5/1 to 5/4 and 6 to 14 returnable on 20/09/2011.”

6 The learned Counsel further submitted that this Court vide order dated 27.02.2015 had allowed the amendment sought by the present Applicants and Non-applicant Nos.3 to 14 are added as the Non-applicants.

7 Learned counsel further submitted that in the meanwhile, it is noticed by the Applicants that present Non-applicant No.2 - Shri Rahul Rasiklal Bogawat purchased some part of the property

bearing Gut No.923 and Non-applicant Nos.3 and 4 in the present application i.e Dr.Pratap Prabhakar Chaure and Dr.Priyanka Pratap Chaure have subsequently purchased the said property from Non-applicant No.2 - Shri Rahul Rasiklal Bogawat and they are now carrying construction in the said property. The learned Counsel submitted that since the present Applicants are claiming share in the said property, it is necessary in the interest of justice that the nature of the said property does not change and hence, the present application has been filed for impleading present Non-applicants as party to the Second Appeal and a preventive order is sought against them restraining them from carrying any construction in the said property and changing the nature of the said property till the decision of the present appeal.

8 Shri Katneshwarkar learned Counsel appearing for Non-applicant Nos.2 to 4 submitted that Non-

applicant No.2 – Shri Rahul Rasiklal Bogawat had purchased one plot out of Gut No.923 from Non-applicant No.1 – Shri Vijay Gurulingappa Lohakare by registered Sale Deed in 2005. Learned counsel submitted that the proposed Non-applicant Nos.3 and 4 purchased the said plot from Non-applicant No.2 – Shri Rahul Rasiklal Bogawat in the year 2014. It is the common contention of these Non-applicants that they have purchased the said plot for valuable consideration under bonafide belief that Non-applicant No.1 – Shri Vijay Gurulingappa Lohakare was absolute owner of the said property. The learned counsel further contended that the proposed Non-applicant Nos.2 to 4 were not aware of any dispute or litigation between the present Applicants and present Non-applicant No.1 – Shri Vijay Gurulingappa Lohakare. It is further contended that after purchasing the said plot, the proposed Non-applicant Nos.3 and 4 have obtained non-agricultural permission from the competent authority and have also got permission

for construction. The learned counsel submitted that till the date substantial construction of the hospital building is completed.

9 I have duly considered the submissions made by learned counsel appearing for the respective parties. I have also perused the documents filed on record. The applicants have asserted that Gut No.923 situated at Jamkhed, Tq.Jamkhed, District Ahmednagar, was one of the properties involved in the Partition Suit No.268 of 2000, whereas it is the contention of the proposed Non-applicants that Gut No.923 was not the suit property in the said Partition Suit. It was sought to be contended by Smt.Chincholkar learned counsel for the applicants that in Civil Application No.7555 of 2011 in Second Appeal No.162 of 2007, present Non-applicant No.1 i.e. Shri Vijay Lohakare was a party and was arrayed as Non-applicant No.1 in the said application. Learned counsel further submitted that in the said Civil Application, on

08.08.2011 the order, which is already reproduced above in paragraph No.5, was passed.

10 I deem it appropriate to reproduce the prayer clause 'B' and 'C' made in the Civil Application No.7555 of 2011, which reads thus:-

"B) The above named respondent Nos.3 to 14 purchased the suit property and or in illegal possession of the suit property may be added as respondents in this second appeal.

C) The non applicant no.1 and 3 to 14 may be directed not to alienate the suit property by any mode or not to create any third party interest in the suit property."

11 It was therefore, the contention of the learned counsel for the applicants that inspite of restraining order so passed, Non-applicant No.1 - Shri Vijay Lohakare indulged in alienating some part of Gut No.923, which according to her is the suit property.

12 From the material on record, it is however difficult to accept the contentions of the learned counsel Smt.Chincholkar. As has been submitted by Shri Katneshwarkar learned counsel appearing for proposed Non-applicant Nos.2 to 4, Non-applicant No.2 namely Shri Rahul Bogawat purchased one plot ad-measuring 260.22 sq.mtrs. from out of Gut No.923 of Jamkhed, Tq.Jamkhed, District Ahmednagar by registered Sale Deed from Non-applicant No.1 – Shri Vijay Lohakare in the year 2005. The aforesaid transaction has thus admittedly taken place prior to passing of the order in Civil Application No.7555 of 2011 on 08.08.2011. As has been submitted by the proposed Non-applicant Nos.2 to 4, proposed Non-applicant Nos.3 and 4 purchased the said plot for valuable consideration by way of registered Sale Deed from Non-applicant No.2 – Shri Rahul Bogawat in the year 2014. The proposed Non-applicant Nos.2 to 4 were not parties to any of the earlier proceedings arising out of Partition Suit No.268 of 2000 and as such were not

expected to have any knowledge of any order passed in the said proceedings.

13 Now, in the present application, applicants are praying for adding present Non-applicant Nos.2 to 4 as respondents in the Second Appeal and have also prayed that Non-applicant Nos.3 and 4 be restrained from creating any kind of third party interest in the said property during the pendency of the Second Appeal. It has also been prayed that proposed Non-applicant Nos.3 and 4 be restrained from making any kind of construction over the suit property purchased by them from Non-applicant No.2.

14 The Non-applicant Nos.3 and 4 have contended that after having purchased the property in question from proposed Non-applicant No.2 – Shri Rahul Bogawat, they have started the construction of their hospital by obtaining necessary building permissions from the competent authority and half

of the construction is completed. It is the further contention of the proposed Non-applicant Nos.3 and 4 that they have purchased the property in question for valuable consideration with a bonafide belief that the person from whom they purchased the said property was the owner of the said property.

15 Shri Katneshwarkar learned counsel appearing for the proposed Non-applicant Nos.3 and 4 submitted that grave prejudice would be caused to the proposed Non-applicant Nos.3 and 4, if they are restrained from completing the construction of their hospital since the entire material for carrying out the construction has been brought on the building construction site. It was further contended by learned counsel that proposed Non-applicant Nos.3 and 4 are ready to take risk of completing the construction by giving an undertaking that if ultimately this Court passes any order in favour of the appellants in the

Second Appeal, holding the property in question to be an ancestral property entitled to be shared by the appellants and if any such direction is given by the Court, the Non-applicant Nos.3 and 4 would demolish the construction at their own and would handover the possession of the property as would be directed by this Court. The proposed Non-applicant Nos.3 and 4 have filed such affidavit in the form of an undertaking sworn by them on 26.06.2018 and the same has been already taken on record.

16 In view of the submissions so made by the parties, the question arises whether proposed Non-applicant Nos.3 and 4 can now be restrained from carrying out further construction as has been prayed by the applicants in the present application. An attempt was made by learned counsel for the applicants to convince me by bringing to my notice certain documents that Gut No.923 was previously Survey No.316 and prior to

that it was known as Survey No.544 and Survey No.316 was very well known as suit property in Regular Civil Suit No.268 of 2000.

17 The proposed Non-applicants have also brought to my notice certain other documents creating doubt whether the said property was ever the suit property involved in Regular Civil Suit No.268 of 2000.

18 As has been contended by the proposed Non-applicant No.2, he had purchased the property in question by registered Sale Deed in 2005 and subsequently he sold it to proposed Non-applicant Nos.3 and 4 in the year 2014. None of the proposed Non-applicant Nos.2 to 4 were party to any of the earlier proceedings and hence were not expected to have any direct knowledge of orders passed in the said proceedings.

19 What would be the effect of the transactions

entered into during the pendency of the suit will be an issue to be considered at the time of hearing. However, considering the facts as aforesaid, it does not appear to me that any case is made out by the present applicants so as to accept their prayer for restraining the proposed Non-applicant Nos.3 and 4 from carrying out the further construction on the plot in question.

20 It further appears to me that the proposed Non-applicant Nos.3 and 4 have shown all fairness by submitting an undertaking on record to the effect that if any adverse order is passed in the Second Appeal by this Court and if it is held that the property in question was an ancestral property and the appellants are entitled to have share even in that property, the proposed Non-applicants would demolish the construction carried out by them over the property in question and handover the possession of land to the person as may be directed by this Court. It appears to me that the

undertaking so given by the proposed Non-applicant Nos.3 and 4 adequately protects the interest of the applicants. However, there may not be any difficulty in passing an order restraining the Non-applicant Nos.3 and 4 from further alienation of the property in question in favour of any third party.

21 For the reasons stated above, the following order is passed:-

ORDER

(I) The Non-applicant Nos.2 to 4 be added as respondents in the Second Appeal Necessary amendment be carried out within three weeks.

(II) The Non-applicant Nos.3 and 4 shall not create any kind of third party interest in the property in question during pendency of the Second Appeal.

(III) The prayers made in prayer clause 'D' and 'E' stand rejected.

(IV) The Civil Application is partly allowed and stands disposed of.

(P . R . B O R A)
JUDGE

Later on:

22 The learned counsel for the applicants has prayed for continuing the effect of the order passed on 29.09.2017 for a period of next four weeks so as to enable the applicants to approach the Hon'ble Apex Court. I am however, not inclined to accept the request. I have elaborately discussed in the order passed as above that the interest of the present applicants is sufficiently protected because of undertaking submitted by the Non-applicant Nos.3 and 4. The request of the learned counsel for the applicants therefore, stands rejected.

(P . R . B O R A)
JUDGE

SPT