

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13707 OF 2017

SHALIGRAM DINKAR INGLE
VERSUS
BHOJRAJ DHONDU INGLE

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Advocate for Petitioner : Mr. H.P. Kshirsagar
Advocate for Respondents : Mr. A.G. Talhar

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CORAM : V. K. JADHAV, J.
DATED : 9th JANUARY, 2018

PER COURT:-

1. Being aggrieved by the order dated 21.1.2017 passed by the Civil Judge, Junior Division, Yawal below Exh.6 in R.C.S. No.93 of 2015 and confirmed by the learned District Judge-2, Bhusawal on 02.05.2017 in Misc. Civil appeal No.03 of 2017, the original plaintiff has preferred this writ petition.

2. It is the case of the petitioner-plaintiff that the suit property is ancestral property and after death of one Dhondhu Bhagu Ingle, the suit property came in the name of all legal heirs. However, other legal heirs have relinquished their right over the suit property in favour of plaintiff and defendant by executing the relinquish deed. It is the case of the plaintiff that the suit property has not been partitioned. However, by filing an application Exh.6 the petitioner-plaintiff sought order of temporary injunction since the defendant had

unauthorizedly started construction and kept a window of 4x4 ft. without taking any permission from Gram Panchayat.

3. The respondent-defendant on appearance in the matter has strongly resisted the suit as well as application Exh.6. It is the contention of the respondent-defendant that the suit property was partitioned between the plaintiff's father, plaintiff's brother Subhash and defendant Bhojraj and each of them got area admeasuring 424 sq.ft. The Northern side 424 sq. ft. area came to be allotted to the share of defendant and since then he is residing over it. The plaintiff's father and uncle have got southern side portion. Since Subhash has also relinquished his share, the plaintiff and defendant have got 636 sq. ft. each. Though the defendant has kept open space of 5 feet in his area allotted to him in the southern direction of his house, the petitioner-plaintiff has unnecessarily instituted the suit. The Gram Panchayat has given notice to the respondent-defendant to demolish the suit house being old construction and in dilapidated condition. The respondent-defendant has therefore, constructed new house on the said plot. Learned Judge of the trial court has rejected application Exh.6 with the observations that the petitioner-plaintiff has failed to make out the prima facie case. The balance of convenience does not lie in his favour and he is not likely to suffer any irreparable loss. The learned District Judge has also taken similar view.

4. On going through the order passed by learned Judge of the trial court, more particularly para 12 and 13 thereof, it appears that the learned Judge of the trial court has rightly observed that each co-sharer has right to enjoy each inch of the suit property. However, a co-sharer cannot be allowed to raise any construction either in the best portion of the joint property or by covering an area exceeding his share. In the instant case, the learned Judge of the trial court has observed that, it is admitted that the defendant is not raising the construction on the open plot but has raised the construction over the already existing structure. The notices filed on record issued by the Gram Panchayat support the contention raised by the defendant. The learned Judge of the trial court has also rightly observed that going by the pleading, for the sake of arguments, it is for the plaintiff to first seek partition and in absence of seeking relief of partition, the plaintiff cannot seek decree of perpetual injunction simplicitor. The learned Judge has further observed that the defendant is in possession of his share and the defendant appears to have a better title. It is well settled that one co-sharer cannot seek injunction simplicitor against the other co-sharers without seeking partition.

5. In view of the above and also in view of observations made by the trial court and the same are confirmed by the District Court, I do

not find any substance in the writ petition. The writ petition is devoid of any merits. The writ petition is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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