

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 6967 of 2018

Parashram Tukaram PatilPetitioner.

Vs

Shri Govind Dattatraya Patil & Ors ..Respondents.

Mr. Prashant Bhavake, Advocate for the petitioner.

Mr. Chetan G. Patil for Respondent No.1.

CORAM: R.D. DHANUKA, J.

4th October, 2018

P.C:-

1) By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 27th April, 2018 passed by the learned District Judge-6, Kolhapur in Misc.Civil Appeal No.48 of 2018 which was filed by respondent No.1 (original defendant No.1), whereby appeal preferred by him was allowed by the learned District Judge and the order of the learned trial Court in RCS No.4 of 2088 dated 6/2/2018 below Exh.5 directing defendant No.1 to maintain status-quo for construction in suit land till the decision of the suit has been set aside.

2) The petitioner herein (original plaintiff) has filed a suit for cancellation of sale deed between petitioner and respondent No. 2 to 5. It is the case of the plaintiff that out of the ancestral property in which the petitioner and respondent No. 2 to 5 had share ad-measuring about 11.10 R land, respondent No. 2 to 5 have allegedly sold an area of 01.89 R in favour of respondent No.1 (original defendant No.1) without dividing the suit property by metes and bounds and without taking consent of the petitioner. In support of his submission learned counsel for the petitioner has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Gajara Vishnu Gosavi vs. Prakash Nanasaheb Kamble & Ors, (2009) 10 Supreme Court Cases 654 and in the case of Ramdas Vs. Sitabai & Ors, 2009 (5) Bom.C.R. 290 (S.C.).

3) It is submitted that since the suit property which was part of the ancestral property was not divided by metes and bounds, respondent No. 2 to 5 could not have sold undivided share in the suit property in favour of Respondent No.1. He submitted that the purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of the land what he

had purchased and such party could not be put into physical possession of the property. The learned trial Judge had though rejected application filed by the petitioner below Exh.5 for seeking injunction had passed an order of status-quo against both the parties. The learned District Judge by the impugned order dated 27th April, 2018 has allowed the said appeal partly and set aside the order of status-quo passed by the learned Trial Judge in R.C.S.No.4 of 2008 below Exh.5.

4) It is the case of respondent No.1 that on the date of execution of the sale deed by Respondent No.2 to 5 in favour of Respondent No.1, the property was already partitioned and only upon such partition, the suit property ad-measuring 1.89 R was sold by respondent No. 2 to 5 in favour of Respondent No.1 and thus there is no question of filing any suit by respondent No.1 for seeking partition of the property. It is also the case of respondent No.1 that respondent No.1 was put into physical possession of the suit property by respondent No. 2 to 5 and after obtaining possession, respondent No.1 has already created third party rights in the suit property.

5) Mr. Patil, learned counsel for respondent No.1 states that about 80% construction on the suit property has been already

completed. He submits that respondent No.1 be allowed to carry out balance construction. He will not claim any equity before the trial Court in view of respondent No.1 having been allowed to carry out balance construction and will not seek any compensation from the plaintiff if the plaintiff succeeds ultimately in the suit for carrying out such construction. Statement is accepted.

6) In view of the fact that respondent No.1 is admittedly put into possession of the suit property, at this stage, I am inclined to accept the request of the learned counsel for respondent No.1 to permit his client to carry out balance construction on the suit land at his own cost and without claiming any equity. If the respondent No.1 does not succeed in the suit, he would not claim any compensation in the event of the plaintiff succeeding in the suit.

7) In so far as the issue as to whether suit property was already partitioned on the date of execution of sale deed, said issue can be decided by the learned trial Judge after recording appropriate evidence of the parties. I, therefore, pass the following order :-

ORDER

(a) Respondent No.1 is permitted to complete construction on the suit property at his own risk and cost and shall not claim any equity before the learned trial Judge and shall not seek any compensation in the event of the plaintiff succeeding in the suit property. If the plaintiff succeeds in the suit property, respondent no.1 shall remove the structure at his own costs.

(b) During the pendency of the suit, respondent No.1 shall neither create any third party right, nor sell or alienate or create any encumbrance on the suit property.

- 8) Writ petition is disposed of in the aforesaid terms.
- 9) There shall be no order as to costs.

(R.D. DHANUKA, J.)