

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY*****CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 27467 OF 2018****Anil Kisanlal Marda****..... Petitioner****VERSUS****Shivaji Narayan Pawar & Ors.****..... Respondents**

Mr.Ajay A.Joshi for the Petitioner.

Mr.Suresh M. Sabrad for the Respondent no.1.

**CORAM : R.D. DHANUKA, J.****DATE : 22<sup>nd</sup> OCTOBER, 2018****P.C.**

By this petition filed under Article 227 of the Constitution of India, the petitioner (original plaintiff) has impugned the order dated 23<sup>rd</sup> August, 2018 passed by the learned *Ad-hoc* District Judge – 1, Pandharpur in Civil Misc.Appeal No.44 of 2018 thereby dismissing the appeal filed by the petitioner (original plaintiff) and upheld the order passed by the learned trial judge against the common order passed below Exs. 5 and 18 i.e. temporary injunction applications of the plaintiff and defendant respectively.

2. The petitioner has filed a suit *inter alia* praying for declaration and for other reliefs. The suit came to be dismissed for default. An application for restoration of the suit is still pending before the learned trial judge. In the meanwhile the respondents completed the construction of the suit property.

3. A perusal of the order dated 23<sup>rd</sup> August, 2018 passed by the appellate court indicates that the court has rendered a finding that *prima facie* case as well as the balance of convenience lies in favour of both the parties. However further held that if injunction is granted in favour of the plaintiff, then it would cause irreparable loss to the defendant.

4. A perusal of the said order further indicates that the Ex.5 filed by the petitioner was rejected on the ground that there was no prayer for stay against the defendant from carrying out construction of the suit property.

5. There is no dispute that by an order dated 27<sup>th</sup> April, 2018, the appellate court had granted temporary injunction against the defendant from creating any third party rights in the suit property. The said *ad-interim* order was continued by the appellate court and was in force till disposal of the Civil Misc. Appeal No.44 of 2018 filed by the petitioner.

6. Mr. Joshi, learned counsel appearing for the petitioner (original plaintiff) states that in view of the defendant already having carried out construction as observed by the appellate court, the petitioner would file an application for amendment of the plaint and for appropriate reliefs and in the meanwhile *ad-interim* relief granted by the appellate court on 27<sup>th</sup> April, 2018 be continued for sometime to enable the petitioner to apply for amendment of the plaint and for appropriate reliefs.

7. Learned counsel for the defendant on the other hand submits that the impugned order passed by the appellate court does not warrant any interference. He submits that he has no objection if the plaintiff applies for amendment of the plaint. However, he strongly opposes the continuation of the *ad-interim* protection granted by the order dated 27<sup>th</sup> April, 2018 on the ground that the defendant has already spent substantial amount for construction of the suit property and also on the ground that the defendant has proposed to enter into a leave and licence agreement in respect of the suit property in favour of bank. He submits that if the injunction granted by the appellate court is continued by this court, his client will suffer a financial loss.

8. Learned counsel for the defendant does not dispute that the application filed by the plaintiff for restoration of the suit which was *inter alia* praying for declaration of the ownership in respect of the suit property is still pending. The said suit admittedly was dismissed for default.

9. A perusal of the impugned order passed by the appellate court indicates that though the appellate court has rendered findings that the *prima facie* case and the balance of convenience was in favour of both the parties, has refused to grant any interim relief in favour of the petitioner. The application (below Ex.5) was also rejected on the ground that there was no prayer for stay of the construction.

10. In these circumstances, I am inclined to accept the submission made by Mr.Joshi, learned counsel for the petitioner that he shall be

granted an opportunity to pursue for application for restoration of the suit dismissed for default and for making an application for amendment of the plaint and to seek interim reliefs.

11. Learned counsel for the defendant does not dispute that the order dated 27<sup>th</sup> April, 2018 passed by the appellate court was in force till 23<sup>rd</sup> August, 2018 and even thereafter till disposal of the appeal and thereafter continued by this court.

12. I, therefore, pass the following order :-

The impugned order dated 23<sup>rd</sup> August, 2018 passed by the learned *Ad-hoc* District Judge – 1, Pandharpur is substituted by the following order :-

(a) The petitioner shall pursue the application for restoration of the suit filed before the trial court.

(b) Hearing of the said application is expedited.

(c) None of the party shall seek an unnecessary adjournment before the trial court.

(d) The applicant shall be at liberty to file an application for amendment of the plaint and for seeking appropriate reliefs in view of the defendant having already completed the construction of the suit property.

(e) If any application is made by the plaintiff, the same shall be decided on its own merits and without being influenced by the observations made and the conclusion drawn in the impugned order dated 23<sup>rd</sup> August,2018.

(f) *Ad-interim* protection which is granted by the learned District Judge on 21<sup>st</sup> April,2018 below Ex.5 in Civil Misc.Appeal No.44 of 2018 to continue for a period of four weeks from today.

(g) The plaintiff would be at liberty to apply for continuation of the said *ad-interim* protection before the learned trial court after giving notice to the defendant.

(h) The learned trial judge shall consider the said application on its own merits.

14. Writ petition is disposed of in the aforesaid terms. There shall be no order as to costs.

**[R.D. DHANUKA, J.]**