

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8648 OF 2017

Ramchandra Khashaba Pawar	 Petitioner
V/s.	
Shantaram Pandurang Pawar	 Respondent

Mr. Shrikant D. Patil for the Petitioner.

Mr. Vikas Kolekar for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 26TH MARCH, 2018.

P.C. :

1. Heard Mr. Patil, learned counsel for the Petitioner, and Mr. Kolekar, learned counsel for the Respondent.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 10th March 2017 passed by the District Judge-4, Sangli, thereby dismissing the Miscellaneous Civil Appeal No.28 of 2014.

3. The said Appeal was preferred by the present Petitioner against the order below the application at "Exhibit-5" passed on 23rd January 2014 in Regular Civil Suit No.2 of 2014 by the Civil Judge, Junior

Division, Palus. By the said order, the Trial Court has granted the relief of interim injunction in favour of the Respondent-Plaintiff, thereby restraining the present Petitioner from carrying out construction over the joint family property during the pendency of the Suit.

4. Both, the Trial Court and the Appellate Court, have recorded a concurrent finding of fact to the effect that, the suit property being the joint family property of the Petitioner and Respondent; Petitioner, Respondent and other co-sharers/co-owners are having equal right of partition therein; and as per '7/12 Extract' of the suit property, the present Petitioner is shown to be in joint possession of the suit property with the other co-sharers, including the present Respondent. Hence, during pendency of the Suit, he cannot carry out construction on the suit property, which will change the nature of the suit property and thereby Respondent will be deprived from getting share in the said property.

5. While challenging this concurrent finding of fact arrived at by the Trial Court and confirmed by the Appellate Court, the submission of learned counsel for the Petitioner is that, the partition of the joint family property had taken place long back and Petitioner is in possession of his share to the extent of 27 Gunthas of land. Out of that, Petitioner is carrying out construction over the area admeasuring 1½ Guntha of land only and he is ready to file an undertaking and to abide by any

conditions, as may be imposed by this Court to the extent of demolition of the said construction, if the result of the Suit ultimately goes against him. Further, it is submitted by learned counsel for the Petitioner that, Respondent is not taking objection to the constructions, which are already erected and even completed by the other co-sharers / co-owners on the land given in their possession in the partition. Hence, it would not be just and proper to restrain the Petitioner alone from carrying out further construction, which is almost at the stage of completion, and he is ready to do so at his own costs and peril.

6. In support of his submissions, learned counsel for the Petitioner has relied upon the Judgment of the Hon'ble Supreme Court in the case of *Mandali Ranganna & Ors. Vs. T.Ramachandra & Ors., 2008 DGLS(SC) 647*, particularly, the observations made by the Apex Court in paragraph No.30 of the Judgment in the case of *Seema Arshad Zaheer and Ors. Vs. Municipal Corporation of Greater Bombay and Ors., (2006) 5 SCC 282*, wherein it was held as follows :-

“30. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff :-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiffs rights by issue of a temporary injunction;

- (ii) *when the need for protection of the plaintiffs rights is compared with or weighed against the need for protection of the defendants rights or likely infringement of the defendants rights, the balance of convenience tilting in favour of the plaintiff; and*
- (iii) *clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiffs conduct is free from blame and he approaches the Court with clean hands."*

7. It is urged that, here in the case, Respondent has not come before the Court with clean hands. His conduct is also not equitable. He is allowing other co-sharers/co-owners to carry on and complete their constructions on the joint family property. Not only that, he did not obstruct the construction of the Petitioner immediately. After the Petitioner has made substantive investments, which are his life-time earnings, he is now being stopped from completing the rest of the construction. Hence, according to learned counsel for the Petitioner, as held in the above-said Judgment of the Apex Court, *"whether rightly or wrongly, the constructions have come up and hence, it would not be proper to stop further constructions. At the most, the same can be made*

subject to the ultimate decision of the Suit and the hearing of the Suit can be expedited”.

8. Per contra, learned counsel for the Respondent has supported the impugned Judgment and Order of the Trial Court, which is confirmed by the Appellate Court, by pointing out that the Respondent has already filed an application for breach of the interim injunction order passed by the Trial Court. It is submitted that, during pendency of the Suit, the Petitioner has further carried out construction and, therefore, such construction cannot be protected.

9. I have given my thoughtful consideration to the submissions advanced at bar by learned counsel for both the parties. As per the case of the Respondent himself, the Petitioner is having 1/3rd share in the suit property and the said share comes upto 27 Gunthas. It is not disputed that the construction, which the Petitioner has undertaken, is only to the extent of 1 ½ Guntha of land or at the most 2 Gunthas of land. As can be seen from the photographs, construction has progressed quite a bit. It may be true that, in case of joint family properties, as every one is in joint possession of the same, for the purpose of having the equitable partition, it is desirable that the status-quo of the property is preserved, so that no one can be deprived from having the share in that particular property. Hence, if such construction is allowed to be carried out, then, it

would be as good as denying or depriving the other co-owners from getting their share in that particular portion.

10. Here in the case, however, one has to consider that, as observed by the Apex Court, rightly or wrongly, the construction has already come up and that too, to the extent of slab. The construction is also not of such a huge nature that it cannot be demolished, if, ultimately, the decision in the Suit goes against the Petitioner. Moreover, if the area, which is to be allotted to the share of the Petitioner, is to the extent of 27 Gunthas and the construction is maximum to the extent of 2 Gunthas only, then, that portion can be allotted to his share in equitable partition by metes and bounds.

11. Thus, I am of the considered opinion, especially in the light of the fact that the Respondent has allowed the other co-sharers/co-owners to carry out constructions, which can be seen from the photographs, which are quite of a huge nature, and then restraining the Petitioner alone, who is also one of the co-sharers and the co-owners, from carrying out his small construction, in which he has spent and invested his life-time earnings, then, it would be a travesty of justice. If as per the Petitioner, he is in possession and which is a separate possession, according to him, since last more than 50 years and if the Respondent has allowed the construction to be carried out and mostly completed and not only that,

but he has allowed other co-sharers/co-owners also to carry out their constructions on the joint family properties, then, this conduct of the Respondent makes it necessary for this Court to protect the construction of the Petitioner at this stage and as held by the Apex Court in this case, it would not be proper to stop further construction. Of-course, whatever construction, which Petitioner has already undertaken and which will be done subsequently, will be subject to the outcome of the Suit and subject to condition that the Petitioner files an undertaking-cum-affidavit to the effect that, he will, on his own, demolish the said construction, if, ultimately, the decision of the Suit goes against him and subject further to the condition that, the Petitioner will not create any third party interests therein. Learned counsel for the Petitioner also undertakes to give Bank Guarantee of upto Rs.1,00,000/- to the satisfaction of the Trial Court.

12. Accordingly, the Writ Petition is allowed. The impugned order passed by the Trial Court and confirmed by the Appellate Court, accordingly, stands set aside. The Petitioner is permitted to carry out further construction, subject to the conditions, as imposed above.

13. Writ Petition is disposed of in the above terms.

[DR. SHALINI PHANSALKAR-JOSHI, J.]