

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13073 OF 2018

Dhondidram Maruti Jadhav and Another ..Petitioners

Vs.

Smt. Savita Krishnat Jadhav and Others ..Respondents

Mr. Pradeep D. Dalvi, for the Petitioners.

Mr. Chetan G. Patil a/w Mr. Mandar Bagkar, for Respondent No.4.

CORAM :- B.P.COLABAWALLA, J.

DATE :- NOVEMBER 21, 2018.

P. C.:

This Writ Petition has been filed seeking to quash and set aside the order dated 19th October, 2018 passed by the District Judge-7, Kolhapur in Miscellaneous Civil Appeal No. 253 of 2017 (hereinafter referred to as the “impugned order”).

2 By the impugned order, the Appellate Court substituted the order passed by the Trial Court below Exhibit- 5 in Regular Civil Suit No. 134 of 2016 and imposed a condition that Defendant No.4 is to execute an undertaking that he will not claim preference over agricultural land bearing Gat No. 534 to the

extent of 23.50 R situated at Ambapwadi, Taluka-Hatkanangale, District-Kolhapur during the actual division of the property in pursuance of the execution of the decree in RCS No. 186 of 1999, if the sale deed is proved to be valid.

3 The brief facts of this case are as under:-

The Petitioners before me are the Original Plaintiffs in RCS No. 134 of 2016. This suit was filed before the Trial Court for a declaration and injunction declaring that the Plaintiffs have a preferential right to purchase the agricultural land bearing Gat No. 534 situated at Ambapwadi, Tal Hatkanangale, District Kolhapur. According to the Plaintiffs, Defendant Nos.1 to 3 are members of the joint family and they also have a share in the suit property. However, Defendant No.4 is a stranger and if at all Defendant Nos.1 to 3 sold their share, then, they first have to sell it to the Plaintiffs as they have right of pre-emption. It is the case of the Plaintiffs that they are ready and willing to purchase the same on same consideration as paid by Defendant No.4. It is also averred in the Plaint that Defendant Nos.1 to 3 have entered into a registered sale deed dated 28th July, 2015 with Defendant No.4 and sold a specific portion of Gat No.534 admeasuring 23.50 R. It is

the case of the Plaintiffs that they are willing to pay same consideration that Defendant No.4 has paid to Defendant No.3 since this land is more convenient to Plaintiffs rather than Defendant No.4, coupled with the fact that the Plaintiffs fall under the category of Class-I heirs under the Hindu Succession Act. The Plaintiffs have averred that they have a preferential right to purchase the same and have accordingly filed RCS No. 134 of 2016 seeking the appropriate declaration.

4 In this Suit, the Plaintiffs filed an application below exhibit-5 for grant of an injunction restraining Defendant No.4 from disturbing their peaceful possession over the suit property. It was further contended by the Plaintiffs that the suit property was not yet partitioned by metes and bounds and therefore in law, the Plaintiffs and the Original Defendant Nos.1 to 3 are in joint possession as they are co- owners. It was in these circumstances that it was prayed that Defendant No.4 be restrained from disturbing the possession of the Plaintiffs. This application was contested by Defendant Nos. 1 to 4 by filing their Say. After hearing the parties, the Trial Court by its order dated 26th September, 2017, allowed the application below Exhibit-5 and

restrained Defendant No.4 or anybody claiming through him from disturbing the possession of the Plaintiffs over the Suit property and which is joint with Defendant Nos.1 to 3. Defendant No.4 was, also restrained from selling or disposing off the part of the suit property which was purchased by him.

5 Being aggrieved by this order of the Trial Court, Defendant No.4 approached the Appellate Court, namely, the District Judge-7 at Kolhapur, District-Kolhapur by filing Miscellaneous Civil Appeal No. 253 of 2017. After hearing the parties, the Appellate Court partly allowed the Appeal. It partly set aside the impugned order and substituted it as under:-

“Application below Exh.5 in RCS No.134/2016 is rejected subject to the condition that, defendant No.4/appellant to place undertaking with affidavit that he will not claim preference over agricultural land in Gat No. 534 to the extent of 23.50 R situated at Ambapwadi, Taluka Hatkanangale, District-Kolhapur during the actual division of property in pursuant to execution of decree in RCS No. 186/1999, if his sale deed is proved to be valid. He will deliver the possession of the above property immediately if same is allotted to others or if suit is decreed pertaining to the relief of his sale deed he would restore possession immediately.

3.The defendant No.4 has to place undertaking within seven days otherwise order passed by trial court below Exh.5 is treated to be confirmed.”

6 It is being aggrieved by this order of the Appellate Court that the present Writ Petition has been filed by the Original Plaintiffs.

7 In this factual backdrop, the learned counsel for the Plaintiffs (Petitioners herein) submitted that admittedly the suit property is the ancestral property of the Plaintiffs and Defendant Nos. 1 to 3. They are, therefore, in joint possession of it. Though a partition suit, namely RCS No. 186 of 1999, was filed and decreed, no physical partition by metes and bounds has taken place. This being the case, Defendant Nos.1 to 3 could not have sold any specified share in Gat No. 534 to the extent of 23.5 R to Defendant No.3. Consequently, there was no question of any possession being handed over to Defendant No.4 unless partition was done, was the submission of the learned counsel. According to him, the purchaser of a share in joint property has no right of possession, either exclusive or joint. At the highest, the purchaser has only a right to *sue* for partition. He, therefore, submitted that looking to the facts of this case, the Appellate Court had grossly erred in interfering with the order of the Trial Court under which

Defendant No.4 was restrained from interfering with the possession of the suit property, and which possession was with the Plaintiffs and Defendant Nos.1 to 3 jointly. He, therefore, submitted that the impugned order ought to be set aside and the order passed by the Trial Court dated 26th September, 2017 be restored back to file.

8 On the other hand, the learned counsel appearing on behalf of Original Defendant No.4 (Respondent No.4 herein), refuted the contentions of the Plaintiffs. According to him, Defendant Nos.1 to 3 and as set out in their Written Statement itself, have a separate share to the extent of 23.5 R in the land bearing Gat No. 534. It is accordingly argued that they have alienated this share vide a the registered sale deed in favour of Defendant No.4, which sale deed is dated 28th July, 2015. It is stated by Defendant No.4 that it is pursuant to this registered sale deed that he has purchased 23.5 R in the land bearing Gat No. 534 and has been put in possession thereof. He submitted that Defendant No.4 already being in possession of the said property, there was no question of the Trial Court restraining Defendant No.4 from disturbing the so called possession of the Plaintiffs.

Considering that the Plaintiffs were never in possession on the date when the suit was filed, he submitted that the Appellate Court was absolutely justified in partly setting aside the order passed by the Trial Court and imposing the condition as set out by me earlier. On taking instructions, the learned counsel further stated that till the hearing and final disposal of the suit, his client (Defendant No.4 who is present in Court) is willing to make a statement that he shall not create any third party rights and/or interest in the suit property which is the subject matter of the registered sale deed dated 28th July, 2015. For all the aforesaid reasons, the learned advocate for Defendant No.4 submitted that there was no merit in the Writ Petition and the same be dismissed with costs.

9 I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the Petition including the orders passed by the Trial Court as well as the Appellate Court.

10 On perusing the Plaint, what can be seen is that it is the case of the Plaintiffs that the suit property, namely land

bearing Gat No. 534 is an ancestral property of Plaintiffs and Defendant Nos.1 to 3. It is the case of the Plaintiffs that since they are Class-I heirs under the Hindu Succession Act, they are entitled to a right of pre-emption as more particularly set out in Section 22 of the Hindu Succession Act. It is on this basis that interim relief is sought.

11 On going through Section 22 and looking at the genealogy which has been reproduced at page 30 of the paper book, at least prima facie, I am not satisfied that the Plaintiffs are Class-I heirs so as to have a right of pre-emption. I, therefore, find that no prima facie case has been made out by the Plaintiffs to entitle them to the relief that was sought for below Exhibit-5.

12 In any event, I find that the Appeal Court has gone through all the facts and all the material produced before it and thereafter interfered with the findings given by the Trial Court. The Appellate Court has referred to the 7 X 12 extracts of the property and has also taken into consideration the argument of the Defendant that the suit property was already partitioned between their predecessors in the year 1960-70 and pursuant to

which entries were carried out in the 7 X 12 extracts of the suit property. The Appellate Court has also taken into consideration the registered mortgage deed executed by the Plaintiffs in favour of Warana Co-operative Bank which indicates that the Plaintiffs claim that they are in separate possession of a part of the suit property (to the extent of 70 R land towards the western side of the property). This mortgage deed and which has been executed by the Plaintiffs themselves, also prima facie indicates that the Plaintiffs and Defendant Nos.1 to 3 were in possession of a specific area of the suit property and which was exclusively in their respective possession.

13 Looking to all this material, I do not think that the order passed by the Appellate Court suffers from any perversity or any error apparent on the face of the record that would require my interference under Article 227 of the Constitution of India. The Appellate Court has given cogent reasons for coming to the conclusion that it has. This being the case, I do not find that any interference is called for.

14 In these circumstances, and in view of the foregoing

discussion, I do not find any merit in this Writ Petition. It is accordingly dismissed. However, there shall be no order as to costs.

15 The statement made on behalf of Defendant No.4 that he shall not create any third party rights or interest in the suit property to the extent of 23.5 R that is in his possession is accepted as an undertaking to this Court. This statement shall continue till the hearing and final disposal of the suit.

16 It is clarified that the observations and findings given in this order are only prima facie and the Trial Court shall not be influenced by any of these observations when it hears the suit finally. It is further ordered that the undertaking to be given by Defendant No.4 (as directed by the Appellate Court) shall be filed within a period of one week from today.

(B. P. COLABAWALLA, J.)