

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.3528 OF 2019

Bhausahab Baburao Katore,
Age 71 years, Occupation Agri.,
R/o Nimgaon Korhale Tq.Rahata
Dist. Ahmednagar.
And Other

...Applicants.

VERSUS

Raosaheb Baburao Katore,
Deceased, Through His Legal
Heirs.
And Others.

...Respondents.

...

Advocate for Appellants : Mr. A. V. Hon.
Advocate for Respondent : Mr. S.S.Kulkarni for respondents
No.1-a to 1-f and 2 to 4.
Advocate for respondent No.7 : Mr. V. D. Sapkal

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 16-04-2019.

ORAL ORDER :

1. Present application has been filed by respondents No.1 and 2 in the second appeal with two prayers, one is, restraining the appellant i.e. present respondents No.1 to 4 from creating third party interest in the suit property i.e. land Gut No.120/3 situated at Nimgaon Korhale Tq. Rahata Dist. Ahmednagar, and the second is, in respect of fixing an early date for final hearing of the second appeal.
2. Present respondents No.1 to 4 are the appellants in second

appeal No.164 of 2016 and the present applicants are the respondents in the second appeal. The applicants had filed Regular Civil Suit No.462 of 2000 for partition and separate possession in respect of movable as well as immovable properties. It was contended that, there were seven agricultural lands and house properties in which they had claimed share. The said civil suit was decreed by learned Civil Judge, Junior Division, Rahata on 21-03-2013. It was held that, the plaintiffs have 1/18th share. It is stated that, the applicants felt aggrieved by the said decree because they were claiming 1/9th share in the said properties, they preferred Regular Civil Appeal No.38 of 2013 before District Court, Kopergaon. The said appeal was allowed by the learned District Judge -2 , Kopergaon on 28th July 2015. It was held that, the plaintiffs No.1 and 2 i.e. present applicants and defendants No.1 to 7 are entitled to get 1/9th share in the suit properties. Aggrieved by the said Judgment and decree passed by the first appellate Court, the second appeal has been preferred. It has been admitted on the substantial questions of law. Separate civil application was filed for interim orders. It was observed by this Court that, in view of the orders earlier passed, all the steps in respect of execution of the impugned decree may be taken up except deliver of physical possession of the suit land to the parties.

3. The applicants have come with a case that, the present respondents are aware about the order passed by this Court on 17-07-2017, however they are trying to create third party rights which will cause great inconvenience to the respective shares. Respondent Vijay Katore has approached Grampanchayat and then obtained no

objection certificate in respect of land bearing Gut No.120/3 giving a nod for installation of diesel outlet in favour of one Sanjaybhai Bhikabhai Choudhari. The applicants had raised specific objection to the Gramsevak who was issued that certificate giving all the details. It is stated that, the respondent Vijay and the person in whose name the certificate is obtained are trying to set up diesel outlet, and therefore, marking was done on 01-03-2019. The applicants are apprehending that, they will take steps hurriedly and it would be in the violation of the Judgment and decree passed in favour of applicants. Under such circumstance they have made the prayer for restraining respondents from creating any third party interest and also the prayer is made for fixing the early date of final hearing.

4. Affidavit in reply has been filed by respondent No.3 Vijay Katore. It is stated that, he had sought permission to run petrol pump in land Gut No.120/3. It is stated that, similar application was filed at Exhibit 32 during the pendency of the suit. Injunction was granted by the trial Court on 16-01-2003 but thereafter he had filed Misc.Civil Appeal No.04 of 2003 before learned District Judge, Kopargaoon. The said appeal was allowed and the order of injunction was passed by learned trial Court was set aside till the decision of the suit. It is also stated that, the order passed in Misc. Appeal No.04 of 2003 was challenged before this Court in Writ Petition No.3646 of 2003, however the said petition came to be rejected on 03-09-2003. It is stated that, the present application is not maintainable as it is barred under res-judicata. It is also stated that, the applicants have failed to make out the prima facie case, no loss would be caused to the applicants.

5. It will not be out of place to mention here that, by order dated 02-04-2019 when a statement was made on behalf of respondent No.3 that respondent No.3 was running a petrol pump at the said place in the past and it was for some period not working and now he wants to restart it, the respondent No.3 was directed to produce whatever contract he was entered into with the petroleum company. In pursuant to the said order, additional affidavit in reply has been given by respondent No.3. It is stated that, he was appointed as a dealer of IBP Company vide order dated 22-12-2002 and the said agreement has been annexed. Said IBP Company has now merged with IOC Company and it was informed to him on 22-05-2007. Thereafter, he was running the said petrol pump for IOC Company. He was running the said petrol pump in a part of Gut No.120 and thereby he is in possession of 1 Hectare 40 R land out of said gut number. Out of that, it is stated that the petrol pump is occupying only 50 R land. Work has been completed as it was recorded by the learned District Judge in Misc.Civil Appeal No. 04 of 2003 decided on 01-08-2003.

6. Heard Mr. S. S. Kulkarni, Advocate for non-applicant No.1-a to 1-f and 2 to 4, Mr. Swapnil Joshi, Advocate for respondents No.3 to 5, Mr. V. D. Sapkal, Advocate for respondent No.7.

7. It has been submitted on behalf of the applicants that, by order dated 17-07-2017 this Court had granted stay to the extent of delivery of physical possession of the suit lands as per the decree, but it was specifically stated that all the steps in respect of execution

should go on. Therefore, when the interest is created in favour of the applicants, they have the right to protect their own interest and share from the suit properties. He pointed out that, no objection certificate has been obtained on 11-02-2019 stating that the Grampanchayat has no objection for sale of diesel on Gut No.120/3 which is non agricultural belonging to Vijay Katore for the business of one Sanjaybhai Bhikabhai Choudhary under the name and style as "Ashirvaad Biofuel". Written objection has been taken with the Grampanchayat but then thereafter it is stated that as per the photographs the marking has been done. He also pointed out that the agreement which had taken place between respondent Vijay with IBP Company was dated 22-12-2002 / 31-12-2002 and it was for a period of 15 years, and thereafter, to be renewed on the basis of performance by the company. No document has been produced by the respondent stating that there was any renewal after 2017 when the said agreement or dealership came to an end. If the respondent No.3 is allowed to go on with the business which is in fact he do not want to conduct but it is for somebody else then he would be creating a third party interest which cannot be allowed taking into consideration the fact that both the Courts below have decreed the suit filed by the applicants.

8. Per contra it has been submitted on behalf of the respondents, especially respondent No.3 that, as per the contract entered into in 2002, respondent No.3 was conducting the petrol pump. A similar application was filed before the trial Court and the injunction was granted but the said order was challenged by respondent No.3 in Misc.Civil Appeal No.04 of 2003 which came to be decided by

learned additional District Judge, Kopargaon on 01-08-2003. The said protection granted under said order was operating till the decision of the suit. Now also respondent No.3 wants to carry out the business himself. He would make a statement that, he will not create any third party interest as stated, and therefore, there is no absolutely ground made out for any interim injunction as prayed. He also showed his willingness for the early hearing of the appeal.

9. As regards the impugned decrees are concerned, the things are clear. The suit for the partition was partly decreed. The trial Court had granted 1/18th share in the suit properties whereas plaintiffs were contending 1/9th share, and therefore, they had approached the first appellate Court in Regular Civil Appeal No.38 of 2013. The said appeal came to be allowed on 28th July 2015, thereby modifying the decree passed by the learned trial Court, and thereafter, now the respondents before the first appellate Court have approached this Court in the second appeal. This Court by order dated 17-07-2017 in the civil application for stay clarified that all the steps in execution of the impugned decree may be taken up except the delivery of physical possession of the suit land to the parties. This gives clear indication that this Court was of the view to maintain status-quo in respect of possession, till the final decision of the appeal. It also appears and not disputed in specific by the respondent No.3 that, no objection certificate was collected by respondent No.3 on 11-02-2019 from Village Development Officer of the Grampanchayat wherein it was stated that the Grampanchayat has no objection for running a business by name "Ashirwaad Biofuel" by Sanjaybhai Bhikabhai Choudhary for the purpose of purchase and

sell of diesel on the land Gut No.120/3 belonging to Viajy Katore. This certificate indicates or leads us to infer that there is some contract or agreement that had taken place between said Sanjaybhai Choudhary and respondent No.3. The photographs those have been produced on behalf of the appellant would also show that some marking is also done. Now the respondents intends to rely on the agreement between him and IBP Company dated 22-12-2002. However, it can be seen that, as per the term of the said agreement, the dealership was given initially for 15 years only and the renewal was after every five years subject to the examination by the company of the performance of the dealer. If we calculated then the duration of the agreement had come to an end in 2017. No other document has been produced on record by the respondent No.3 showing that, the agreement has been continued or renewed. The conjoint reading of the agreement as well as the no objection certificate which states that the business would be done by said Sanjaybhai Bhikabhai Choudhary under the name and style "Ashirwaad Biofuel", that there might have been an agreement or contract between Sanjaybhai Choudhary and the petroleum company and not with respondent No.3 directly.

10. It was also tried to be contended that, it has been informed by the company that, unless you get the certificates there cannot be renewal and for that purpose attempt was made to obtain no objection certificate. There is no substance in such submission because the no objection certificate gives different picture and further when the period of dealership had ended in 2017 itself how there can be a renewal after two years of the expiry of that period.

There has to be some communication to that effect between the company and respondent No.3 which has not been produced on record.

11. All these aspects would clearly show that, the apprehension in the mind of the applicants that, respondents would create third party interest appears to be genuine or reasonable. Taking into consideration the fact that, both the decrees are at present in favour of the present applicants. If respondents are not restrained from creating third party rights then definitely it will cause prejudice and irreparable loss to the applicants, and therefore, case is made out to grant relief in terms of prayer Clause 'A'. As regards fixing the appeal for final hearing is concerned, at least at this stage it cannot be taken up, as there are much old matters standing in queue for final hearing. Hence, following order.

ORDER

- 1) The application is partly allowed.
- 2) Relief is granted in terms of prayer Clause 'A' till the final hearing and decision in the Second Appeal No.164 of 2016.
- 3) Parties to the appeal may renew their request for early hearing of the appeal after one year.

**(SMT. VIBHA KANKANWADI)
JUDGE**

vjg/-.