

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 8003/2018
(SUDHIR BHAIYYAJI THAKRE **VERSUS** VIDYA PRAMOD GAWANDE & OTHERS)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri K.P. Sadavarte, counsel for petitioner.
Shri U.A. Gosavi, counsel for R-1.

CORAM : A.S. CHANDURKAR, J.

DATE : JULY 30, 2019.

Heard finally with consent of counsel for the parties.

The petitioner is the original plaintiff, who is aggrieved by the order passed by the Appellate Court in the miscellaneous appeal that was filed by the original defendant no.2 which appeal has been allowed.

In the suit as initially filed by the petitioner herein it was prayed that the Will dated 13.01.2002 executed by the father of the petitioner and respondent no.1 be declared as legal and valid. A further declaration was sought that the respondent no.1-defendant no.2 had a right over 50% of the plot in question alongwith ground floor construction of six rooms in terms of the aforesaid Will which was also the subject matter of the gift-deed dated 23.07.2015. With these reliefs sought in the plaint, the plaintiff filed an application for temporary injunction so as to restrain the defendant nos.1 and 2 from alienating or creating third party rights in the suit property. The trial Court after observing

that a triable issues were arising for adjudication granted temporary injunction and restrained the defendants from creating third party rights in the suit property. Being aggrieved by that order, the defendant no.2 on 06.06.2017 filed a miscellaneous appeal for challenging the same. When the miscellaneous appeal was pending, the plaintiff sought to amend the plaint which amendment was allowed on 28.02.2018. The Appellate Court by the order dated 15.10.2018 by considering the order passed below Exhibit 5 on 06.04.2017 allowed that appeal by observing that the defendant no.2 was claiming right to property by way of a registered gift-deed to which she was entitled even by way of the Will. The plaintiff has therefore filed the present writ petition.

After hearing Shri K.P. Sadavarte, learned counsel for the petitioner and Shri U.A. Gosavi, learned counsel for the respondent no.1, it is seen that the order passed by the trial Court granting temporary injunction is dated 06.04.2017 and the appeal in that regard was filed by the defendant no.2 on 06.06.2017. When that appeal was pending, the plaintiff amended the plaint after which the miscellaneous appeal was decided. However, while deciding the miscellaneous appeal, the Appellate Court has considered the pleadings prior to amendment and has thus held that the plaintiff was not entitled for injunction as prayed. In the present writ petition, the petitioner seeks to rely upon the averments made in the amended plaint while challenging the order of the Appellate Court. Since the Appellate Court has adjudicated the miscellaneous appeal in the light of the fact that the plaint was not amended when the trial Court passed the order, that approach on the part of the Appellate Court cannot be faulted.

However, at the same time, since the plaint has now been amended, if the plaintiff on the basis of the amended pleadings seeks to obtain any order of temporary injunction he would have to first apply to the trial Court to consider that prayer in the light of such amended pleadings. On that ground, it is not found necessary to interfere with the impugned order.

Accordingly, the Writ Petition is disposed of by observing that in case the plaintiff seeks to apply for temporary injunction in the light of the amended pleadings, he is free to make such application before the trial Court. If such application is made, the defendants are free to oppose same by raising all possible defences. The trial Court is free to consider such application on its own merits. As the parties are stated to be senior citizens, the proceedings in the civil suit are expedited.

With these observations, the Writ Petition is disposed of. No costs.

JUDGE

APTE