

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

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WRIT PETITION NO.379 OF 2019

KANTILAL ANANT JOUNJAL
VERSUS
ASHOK ANANT JOUNJAL AND OTHERS

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Advocate for Petitioner : Mr. S. S. Bora
AGP for Respondent nos. 8 to 11: Mr. K. B. Jadhavar
Advocate for Respondent nos. 1 to 7 : Mr. N. C. Garud

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CORAM: N. B. SURYAWANSHI, J.

DATED: 29th SEPTEMBER, 2021.

P.C. :

This petition takes exception to the order passed by the learned District Judge-8, Ahmednagar in Miscellaneous Civil Appeal No. 192 of 2015 in RCS No. 53 of 2015.

2. RCS No. 148 of 1995 was filed by respondent no.1 seeking partition and separate possession of the ancestral property between the petitioner, respondent no.1 to 7 and respondent nos. 12 to 14. The suit came to be decreed and 1/10th share was given to the plaintiff and defendants. For execution of the said decree, execution proceeding was filed by respondent no.1. Pursuant to the partition decree, the

matter was forwarded to the Collector for effecting partition under Section 54 of Code of Civil Procedure. The procedure for partition was undertaken in which a partition chart was prepared by revenue authorities. The petitioner contends that the said chart was prepared without giving an opportunity of hearing to him and it is prepared at the behest of respondent no.1.

3. The petitioner filed Miscellaneous Civil Application No. 72 of 2014 for condonation of delay challenging the decree passed in RCS No. 148 of 1995. The delay condonation was refused. The petitioner, therefore, filed Second Appeal No. 253 of 2017, wherein notices are issued and respondent no.1 has appeared in the same.

4. The petitioner being aggrieved by the incorrect partition chart, filed Regular Civil Suit No. 53 of 2015 seeking relief of permanent injunction restraining the revenue authorities from handing over the possession of the suit property. Further declaration is sought that the partition chart is illegal and a fresh partition chart be prepared after giving opportunity of hearing to all the concerned and possession on that basis be delivered.

5. In the suit, application Exh.5 was filed seeking stay. The trial court after hearing the parties, allowed Exh.5 and restrained defendant nos.1 to 4 from delivering possession of the suit properties till final disposal of the suit.

6. Being aggrieved by the order passed by the trial court below Exh.5, respondents filed Miscellaneous Civil Appeal No. 192 of 2015. The appellate court by impugned order, allowed the appeal thereby partly setting aside the order of the trial court to the extent of restraining defendant nos. 1 to 4 from delivering the possession of the suit properties till the final decision of RCS No. 53 of 2015. Further direction is given to defendant nos. 1 to 4, particularly defendant no.4 to give proper opportunity of hearing to the parties, particularly to the plaintiff and after taking into account of his objections and factual circumstances of the suit site, finalize a fresh partition chart and proceed further in terms of decree in RCS No. 148 of 1995 within a period of three months from the date of the order. The petitioner is aggrieved by this order.

7. Heard learned advocate for the petitioner and learned advocate for the respondents.

8. The learned advocate for the petitioner submits that,

while passing the impugned order, the appellate court has exercised jurisdiction of the trial court and has decided the suit, which is not permissible in law. By placing reliance in ***Prakash Nathyaba Bhosale vs. Laxman Ganaba Bhosale, AIR 2003 Bom. 41*** he submits that the impugned order is unsustainable and the same is liable to be quashed and set aside.

9. On the other hand, the learned advocate for the respondents submitted that though decree is passed in their favour in RCS No. 148 of 1995 in the year, 2004 till date they are not able to enjoy the fruits of the decree because of the petitioner. By taking into account the order impugned, he submits that the appellate court has rightly considered the fact of pendency of the dispute for years together and was justified in passing the impugned order thereby partly modifying the order passed by the trial court. He, therefore, supports the impugned order and also seeks to rely in the decision relied upon by the learned advocate for the petitioner. He therefore, states there is no merit in the petition and therefore, the petition is liable to be dismissed.

10. In application Exh.5 the petitioner has claimed that the partition chart was prepared by the revenue authorities by

joining hands with respondent no.1. The order of the Tahsildar dated 16/01/2015 reveals that the say of the petitioner / plaintiff was not considered by the Tahsildar. On the contrary, it is mentioned in the Tahsildar's order that the plaintiff and defendants admitted partition chart (वाटप तक्ता).

In **Prakash Bhosale** (supra) it is held that :

“The contention regarding Wataptakta being contrary to the decree and fact of acquisition of the property subsequent to the issuance of decree, having not been considered by the Tahsildar, and the said issues being directly relating to the execution of the decree passed in the suit, certainly can be raised by the aggrieved party by filing a suit and not by way of an application under Section 47 of the Code of Civil Procedure”.

11. In the light of above ratio, the suit filed by the petitioner/ plaintiff is maintainable. Taking into consideration the fact that the partition chart was prepared without hearing the petitioner prima facie there appears substance in the contention of the petitioner that the partition chart was prepared by the revenue authorities in collusion with respondent no.1. In that view of the matter, the trial court considering these aspects was justified in allowing application Exh.5 by holding that the plaintiff / petitioner has made out a prima facie case and balance of convenience lies in his favour.

12. There is substance in the argument of the learned advocate for the plaintiff / petitioner that the appellate court has exercised jurisdiction of the trial court while passing the impugned order. The tenor of the order passed by the appellate court shows that the appellate court has decided the matter as if it was hearing the appeal challenging the decree passed by the trial court. It is obvious that the appellate court has usurped the jurisdiction of the trial court while passing the impugned order. By giving directions in the impugned order, the appellate court has almost disposed of the suit as nothing remains to be decided by the trial court.

13. The appellate court though held that the plaintiff is having prima facie case and the balance of convenience is in favour of the plaintiff, it erroneously proceeded to record a finding that irreparable loss would be caused to both the parties if execution proceeding is stayed. The only ground weighed with the appellate court appears to be that the defendant should be able to enjoy the fruits of the decree passed in the year 2004. However, while arriving at the said conclusion the appellate court has ignored the fact that if the partition is effected on the basis of the partition chart which is prepared without hearing the petitioner, it would cause injustice to the petitioner. By giving the impugned directions

the appellate court has exceeded its jurisdiction.

14. The trial court has passed a reasoned order and has rightly allowed application Exh.5. Plaintiff is having prima facie case and the balance of convenience lies in his favour. Therefore, the appellate court ought not to have interfered in the order passed by the trial court. The reasons assigned by the appellate court in the impugned order are not acceptable and the impugned order cannot be sustained.

15. In the result, writ petition is allowed and the impugned order is quashed and set aside. Taking into consideration the fact that the suit is of the year 2015, the trial court is directed to decide the same within a period of six months from the receipt of this order.

16. Needless to mention that the observations made in the present order are prima facie and the trial court shall not get influenced by the above observations at the time of deciding the suit.

(N. B. SURYAWANSHI, J.)

vsm/