

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5093 OF 2021**

Uttam Sadashiv Patil & Anr. .. Petitioners

Vs.

Sagar Appa Patil & Ors. .. Respondents

...

Mr. Chetan G. Patil for the petitioners.

Mr. Vinayak Kumbhar for the respondents.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 20TH OCTOBER, 2021.

P.C:-

1. The petitioners, who are the original defendants in the Regular Civil Suit No.197 of 2020 filed by Sagar Appa Patil, his father Appa Ramji Patil and mother Lilabai Appa Patil, assail the concurrent findings recorded by the two courts by which the application filed below Ex-5 by the plaintiffs therein has been allowed firstly, by order dated 16/6/2020 passed by the 7th Joint Civil Judge, Junior Division, Kolhapur and which is subsequently upheld in Misc. Civil Appeal No.80 of 2020 by the Ad-hoc District Judge-3, Kolhapur, on 24/08/2020.

The property involved in the dispute between the petitioners and the respondents is a parcel of property

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admeasuring 0H 1.40 R, out of total land of 280 sq. meters of plot No.62 in Revision Survey No.1036 situated at Kasaba Karvir, 'A' Ward, Kolhapur, with the description as set out in the plaint.

2. For the sake of convenience, the parties are referred to by their original nomenclature in the suit.

The original plaintiffs (respondent Nos.1 to 3 in the writ petition) instituted a suit for injunction under Order 39 Rules 1 and 2 read with 151 of the CPC to restrain defendant No.1 from constructing over the suit property and from obstructing the peaceful possession of the plaintiffs over it. As per the plaint, the plaintiff Nos.1 is the son of plaintiff Nos.2 and 3 and defendant No.2 is the real brother of plaintiff No.2. The relief sought in the suit is based on a specific pleading that the suit property is joint family property of the plaintiffs and defendant No.2, which is purchased from income of joint agriculture family property situated at Mauje Savarde and Mouje Vadachiwadi. It is averred by the plaintiffs that Defendant No.2 being the eldest brother in the family, the suit property was purchased in his name from Amar Vikas Co-operative Housing Society, for the family and since then the plaintiffs and defendant No.2 are in joint possession of the suit property.

3. It is averred that son of defendant No.2 filed a suit for partition in court at Radhanagri, wherein he included several

joint family properties, except the suit property. The plaintiffs filed written statement and counter claim to include the suit property as joint family property and for including it in the schedule of properties for the purpose of partition. Plaintiff No.2 preferred an application to the City Engineer, Karvir, Talathi – Karvir and Taluka Superintendent of Land Record at Karvir in the year 2019 objecting to measurement of the suit property and he also published a notice in the daily newspaper on 19/07/2019 through his advocate that the property is subjudice and no transaction shall be effected qua the said property. Similarly, a notice board to that effect was displayed on the suit property indicating it being subjected to the suit.

4. The plaintiffs averred that the suit at Radhanagari court is pending and therefore the joint family properties are not yet partitioned. It is alleged that in spite of this fact being known, defendant No.2 sold the suit property to defendant No.1 on 28/11/2019 by registered sale deed and when the mutation entry came to the knowledge of the plaintiffs on 05/02/2020, plaintiff No.1 visited the suit property to find that defendant No.1 has started construction in the suit property. This constrained him to approach the court seeking an injunction against defendant No.1 from carrying out any constructing in the suit property and from obstructing his joint possession of the same along with defendant No.2.

5. The defendants marked their presence in the suit on being noticed and filed their say. The stand taken in defence is to the effect that defendant No.2 purchased the suit property from his self acquired income and, therefore, it is his self acquired property and, therefore, it is denied that the plaintiffs are in joint possession of the suit property. It is also pleaded that since the suit is already pending before Radhanagari court, it will determine whether the plaintiffs have any right or interest in the suit property or not. Defendant No.1 pleaded that he had *bona fide* purchased the suit property for consideration of Rs.29 lakhs by a registered sale deed and his name was accordingly mutated in the 7/12 extract. He pleaded that for construction of a house in the suit property, he has obtained a loan and has completed the construction of plinth level and first slab.

6. The learned Judge of the trial court proceeded to determine whether the plaintiffs had made out a *prima facie* case and whether the other two necessary ingredients for grant of injunction are in favour of the plaintiff. The claim of the plaintiffs that the suit property is a joint family property was juxtaposed against the claim of the defendant No.2 that the property is his self acquired property.

Recording that the plaintiffs have asserted their right on the suit property being a joint family property, learned Judge has recorded that whether the suit property is joint family property or not cannot be decided in R.C.S. Suit No.70 of 2014, which is a

suit for partition and since the defendants have denied the plaintiffs' claim, it is held that the issue whether the said suit property is a joint family property or self acquired property of defendant No.1 will have to be determined in the present suit. Recording that the plaintiffs have already established the *prima facie* case that the defendant No.2 has alienated the suit property in favour of defendant No.1 by a registered sale deed and it is held that while defendant No.1 has been constructing the structure over the suit property, the nature of the suit property is in the process of change and the existence of the plaintiffs' right over the suit property is in danger of being wasted or alienated, is established on record. The learned Judge, therefore, has recorded a *prima facie* case in favour of the plaintiffs and also considered the serious injury to the rights of the plaintiffs over the suit property, if the construction made by defendant No.1 on the suit property is not stalled. It is held that the factum of irreparable loss and permanent injury are in favour of the plaintiffs and so also the balance of convenience. It is held that before the right of the parties could be effectively adjudicated, the suit property needs to be maintained and on being satisfied that the necessary ingredients to grant injunction, the application vide Ex-5 was allowed on 16/06/2020 and defendant No.1, his agents, servants or anybody claiming on his behalf was restrained temporarily from constructing over the suit property and disturbing the joint possession of the plaintiffs in the suit property till final disposal of the suit.

7. The finding recorded by the Civil Judge, Junior Division, Kolhapur was assailed in appeal before the District Judge at Kolhapur, where the appellants staked the claim that the property is self acquired property since it is purchased from the salary income of appellant No.2. Recording that there exists a presumption of jointness of family as per Hindu Law and there is no presumption that the joint family possesses the property jointly, the Appellate Court recorded a finding that the burden of proving that a particular property is a joint family property is on the person who claims it. Learned Judge referred to various authorities on the said aspect. By referring to the stand of the plaintiff No.2 in the Regular Civil Suit No.70 of 2014, where he claimed that the suit property is a joint family property and since the said suit is pending, learned Judge agreed with the trial court, that the issue would be determined in that suit. The burden to show that the suit property is a self acquired property to be discharged by appellant No.2 in absence of any footprints being shown that the payment was made to the Society from the salary income and since there was failure to adduce any evidence to that effect that the said property was purchased from salary income, the appellate court agreed with the findings recorded by the trial court in respect of a *prima facie* case in favour of the original plaintiffs.

Learned appellate court went a step ahead and held that since appellant No.2 was a Government servant, buying an

immoveable property, he ought to have obtained some permission from the Government, but it is not placed on record, which has been held against him. Necessarily, the appeal came to be dismissed.

8. On hearing learned counsel for the petitioners and the respondents, I concur with the findings recorded by the courts below. The defendants have failed to prove that the suit property is a self acquired property and prior to the institution of the said suit, plaintiff No.2 has specifically pleaded in RCS Suit No.70 of 2014 wherein the partition was claimed that the suit property being a joint family property must undergo a partition.

9. Since *prima facie* case and balance of convenience are shown in favour of the plaintiffs and taking into consideration, the irreparable loss to be caused to the plaintiffs, if the structure of defendant No.1 is allowed to be completed, the courts below have enjoined defendant No.1 from proceeding with the construction, I see no legal infirmity in the impugned order, which is upheld. Necessarily, writ petition is dismissed.

[SMT. BHARATI DANGRE, J.]