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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3874 OF 2019

Hirabai Murlidhar Dalvi & Ors. Petitioners

Vs.

Sou. Shobha Kailash Salunkhe Respondents
& Ors.

Mr. Drupad Patil i/by Mr. Dheeraj Patil for Petitioners.
Mr. Siddharth Wakankar for Respondents

Coram : NITIN W. SAMBRE, J.
Date : 22nd January, 2021

P.C.:

1. The Plaintiffs/Respondents initiated the suit proceedings being Regular Civil Suit No.1053 of 2017 for partition and separate possession of the properties bearing Gat Nos. 40/1, 673 and 675 from Mouje Lonikand, Taluka Haveli, District Pune. In the said suit, it is also prayed that defendant Nos. 2 and 3 who are carrying out construction in land Gat No. 40/1, without permission, be declared as illegal and directed to be stopped.

2. In the said suit, an application, Exhibit 5 came to be moved by the Plaintiffs seeking injunction. The said application came to be allowed vide order impugned dated 14th August, 2018, whereby the Petitioners/defendants are restrained from carrying out any further construction on the suit properties and also restrained them from creating any third party interest upon the suit properties till disposal of the suit.

3. The Petitioners/Respondents feeling aggrieved, preferred an appeal before the learned District Judge, Pune being Miscellaneous Civil Appeal No.283 of 2018 vide order impugned dated 11th January, 2019.

4. The submissions of learned counsel appearing for the Petitioners are that the possession of the Petitioners over the suit properties is not in dispute and based on the same, they have approached the development authority, who have issued commencement permission for carrying out the construction on 18th April, 2018. According to him, the construction is being carried out

only on the area of land of 2 gunthas and the total area of the suit property as is reflected in the plaint i.e. consisting of Gat No. 40/1, is 2 Hectare, 23 R, of which the partition is sought.

5. According to him, the Petitioners being co-owners of the suit property, no injunction ought to have been granted against the Petitioners. Learned counsel for the Petitioners would further urge that the construction activity, which is carried out by the Petitioners for their personal use and their activity in any case need not go beyond area of 2 gunthas, where they are carrying out construction. He would further claimed that if the claim of the Respondents for partition is allowed, they shall not be claim equities.

6. While countering the aforesaid submissions, learned counsel for the Respondents would urge that both the Courts below have concurrently held against the Petitioners, which is based on oral relinquishment theory cannot be believed and as such the injunction is ordered. He would also invite attention of this Court to the construction stop notice issued to the Petitioners, which is formed basis for grant of order of injunction.

7. In the aforesaid background, according to him, the Petition is liable to be dismissed.

8. Considered rival submissions.

9. At the outset, this Court records an undertaking of the Petitioners, which is given on instructions from the Petitioner Nos. 2 and 3 who are present in the Court that the Petitioners' activity of carrying out the construction of their own house will not exceed 2 gunthas land out of the suit property and in case if the claim for partition is decreed, they shall not be claiming any equity against the co-shares in the suit property.

10. Apart from above, this Court cannot be oblivious to the fact that the Petitioners had taken permission from the Planning authority for construction, which was stopped pursuant to the objections raised by the Respondents. The construction on the suit premises has already commenced, which justifies the case of the Petitioners of their possession over the area of atleast 2 gunthas.

11. In that view of the matter, in my opinion, the order impugned passed by the Courts below granting injunction warrants interference.

12. Both the orders impugned are quashed and set aside.

13. The Petitioners being co-owners are entitled to proceed with their act of carrying out construction of 2 gunthas land as is mentioned in the sanction/Commencement Certificate issued by the planning authority.

14. The aforesaid statement of the Petitioners that they will not create third party interest and their construction activity will not travel beyond 2 guntha land mentioned in the Commencement Certificate and that they shall not claim any equity against the co-sharers during the course of suit for partition is accepted as an undertaking to this Court.

15. In addition to above oral undertaking given to this Court, all the petitioners, within a period of four weeks from today, shall

furnish an undertaking to the trial Court in a pending suit to the above extent.

16. The petition as such stands allowed in terms of prayer clause (a).

(NITIN W. SAMBRE, J.)