

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

WRIT PETITION 2481 OF 2022

Kamalabai Subhana Masurkar and Anr. ... Petitioners
Versus
Dinkar Bapu Patil and Anr. ... Respondents

Mr. Chetan G. Patil a/w Mr. Mandar G. Bagkar for the Petitioner.
Mr. Rahul P. Kasbekar for the Respondents.

CORAM: ROHIT B. DEO, J.
DATE : 11st JULY, 2022

P.C. :-

. The challenge in the petition is to the judgment and order dated 4th October, 2021 rendered by the learned District Judge 4, Kolhapur in Miscellaneous Civil Appeal 46 of 2021 whereby and where under the appeal preferred by the respondent 1 challenging the order dated 15th February, 2021 rendered by the learned Trial Judge in Regular Civil Suit 7 of 2021, is set aside.

2. The learned Trial Judge was pleased to reject the application for temporary injunction preferred by the respondent 1 – plaintiff under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (for short ‘Code’).

3. Regular Civil Suit 7 of 2021 is preferred by the respondent 1 – plaintiff seeking decree of perpetual injunction restraining the defendants from carrying out any construction on the suit property and from changing the nature of the suit property. According to the

plaintiff, the suit property has not been partitioned by metes and bounds. Insofar as the petitioners are concerned, they claim to have purchase $1/3^{\text{rd}}$ portion of the property from Tanubai. The petitioners are not strangers to the family, since the petitioner Bhikaji is the grandson of Tanubai.

4. Be that as it may, while the petitioners are contending that there is oral partition which is reflected in the revenue record in the sense that the revenue record mentions the ascertained and specific share of the family members, the plaintiff has a counter narrative. It would not be necessary at this stage to make any definite observation on the issue which will have to be decided on the basis of evidence.

5. However, what I note from the material on record including the photographs which are not in dispute is that the construction has progressed significantly. The petitioners have placed on record an undertaking dated 27th June, 2022, the relevant portion of which reads thus :-

“2. I say that we are in possession of the Suit property as mentioned in para 1 of the Plaint. We have already carried out substantial construction in the suit property. I hereby undertake on behalf of the petitioners that if we are permitted to complete the construction, the same shall be subject to the outcome of the lis and that no equity shall be claimed on the basis of the completion of the construction. Hence this undertaking.”

6. The plaintiff has also filed on record undertaking dated 28th June, 2022 which states that the construction is at the initial stage. However, considering the photographs on record which are not disputed, it is difficult to accept the statement that the construction is at the initial

stage.

7. In my considered view, rather than injuncting the petitioners-defendants 1 and 2 from completing the construction, it would be appropriate if Regular Civil Suit 7 of 2021 is decided expeditiously and I order accordingly.

8. The judgment impugned is set aside.

9. The undertaking which is placed on record by the petitioners shall be scrupulously complied with till the lis is finally decided.

10. Petition is disposed of in the aforestated terms.

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[ROHIT B. DEO, J.]