

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

WRIT PETITION NO. 3694 OF 2022

1. Rajendra S/o. Rangnath Hadule,
Age. 61 Years, Occu. Agriculture,
R/o. Malapuri, Tq. And Dist. Beed.
2. Harishchandra S/o. Rangnath Hadule,
Age. 63 Years, Occu. Agriculture,
R/o. Malapuri, Tq. And Dist. Beed.
3. Prakash S/o. Rangnath Hadule,
Age. 61 Years, Occu. Agriculture,
R/o. Malapuri, Tq. And Dist. Beed.
4. Navnath S/o. Rangnath Hadule,
Age. 49 Years, Occu. Agriculture,
R/o. Malapuri, Tq. And Dist. Beed. .. Petitioners.

Versus

1. Ramnath S/o. Rangnath Hadule,
Age. 46 Years, Occu. Agriculture,
R/o. Malapuri, Tq. And Dist. Beed.
2. Kusumbai W/o. Ramnath Hadule,
Age. 40 Years, Occu. Agriculture,
R/o. Malapuri, Tq. And Dist. Beed.
3. Kirti D/o. Ramnath Hadule,
Age. 22 Years, Occu. Household,
R/o. Malapuri, Tq. And Dist. Beed.
4. Arti D/o. Ramnath Hadule,
Age. 21 Years, Occu. Household,
R/o. Malapuri, Tq. And Dist. Beed.

5. Subhash S/o. Rangnath Hadule,
Age. 64 Years, Occu. Household,
R/o. Malapuri, Tq. And Dist. Beed.
7. State of Maharashtra,
Through Collector, Beed.
8. Deputy Superintendent Land Record
Beed, Tq. And Dist. Beed. .. Respondents.

Shri Hrishikesh V. Tungar, Advocate for Petitioners.

Mrs. Sabahat Kazi Advocate for Respondent No. 1.

Shri Girish K. Naik Thigle, Advocate for Respondent Nos. 2 to 4.

Shri R. R. Karpe, Advocate for Respondent No. 5.

Shri B. V. Virdhe, AGP for Respondent Nos. 7 & 8

CORAM : SHAILESH P. BRAHME, J.

Reserved for Judgment on : 26th OCTOBER, 2023

Judgment pronounced on : 03rd NOVEMBER ,2023

JUDGMENT :-

. Rule. Rule is made returnable forthwith with consent of the learned counsel appearing for the parties. Heard finally at the admission stage.

2. The petitioners are challenging concurrent findings of facts recorded by the Trial Court vide order dated 29th September, 2021, below exhibit 41 as well as judgment and order dated 11th February, 2022, passed in Miscellaneous Civil Appeal No. 64 of 2021. The petitioners are aspiring to secure stay to the execution and operation of decree passed in R.C.S. No. 255 of 2007.

3. The petitioners are original plaintiffs who have filed R.C.S. No. 315 of 2017 for declaration, partition and injunction against the respondents. The respondent no. 1 is real brother of petitioners. The respondent no. 2 is wife and respondent nos. 3 and 4 are daughters of the respondent no. 1. Land Gat nos. 95, 96, 118 and 198 are the suit lands which according to the petitioners are undivided joint family properties.

4. It is a case of the petitioners that respondent nos. 2 to 4 had filed R.C.S. No. 255 of 2007 for partition and separate possession against the present respondent No. 1 – Ramnath in respect of land Gat Nos. 96 and 198. The lands were joint family properties of the respondent Nos. 1 to 4. Due to matrimonial disputes, respondent Nos. 1 and 2 were living separate. The respondent Nos. 2 to 4 had claimed partition against respondent No. 1. By judgment and decree dated 31st December, 2009, the suit was decreed. Against that Regular Civil Appeal No. 15 of 2010, was preferred which was marginally allowed by judgment dated 13th February, 2015, to the extent of modification of the shares. Second Appeal against the judgment is pending. The respondent nos. 2 to 4 have put the decree passed in RCS No. 255 of 2007 for execution to the extent of land Gat Nos. 96 and 198.

5. The petitioners have contended that the decree passed in R.C.S. No. 255 of 2007 is null and void and not binding. The subject matter of the said suit is in fact undivided joint family property. The petitioners have also referred to the sale deeds

executed while purchasing the suit lands to contend that all are joint family properties. Apprehending the execution of decree to the extent of land Gat Nos. 96 and 198, application exhibit 41 is moved. It has been rejected by the Trial Court and the order has been confirmed by lower Appellate Court. Learned counsel for the petitioners submits that the respondent nos. 1 to 4 have no right, title or interest in land Gat Nos. 96 and 198. There was no partition in the family by metes and bounds. The mutation entry no. 245 cannot be the proof of partition. He would submit that the decree passed in RCS No. 255 of 2007, is void and patently illegal. He submits that a strong, *prima facie*, case has been made out still both the Courts below committed error of jurisdiction in refusing to grant injunction.

6. Learned counsel for respondent nos. 2 to 4 – Mr. Girish Thigle, would support both the impugned orders. He would submit that the present suit is a proxy litigation. The petitioners and the respondent no. 1 have collusively filed the suit to frustrate decree passed in earlier suit. He would submit that the petitioners were having knowledge of earlier suit of partition despite that they kept mum and allowed the Courts to pass the decree. He would submit that respondent no. 1 – Ramnath, has taken inconsistent stand. In the alternative, it is submitted that the equities can be adjusted, if in future, the present suit is decreed. It is further submitted that relief of restitution can be resorted to, if the petitioners succeed in suit.

7. Learned counsel for respondent no. 5 – Mr. Rahul Karpe, adopts the submission of respondent nos. 2 to 4. Additionally, he would submit that mutation entry no. 245 was recorded in respect of land Gat No. 96 only. He would further submit that the land Gat No. 198 was purchased by sale deed no. 860 of 1995, by the respondent no. 1. Hence, it is not a joint family property. Learned counsel Mrs. Sabahat Kazi, appearing for respondent no. 1, supports the petitioners.

8. I have considered submissions canvassed by learned counsel. There is no dispute that R.C.S. No. 255 of 2007 was in respect of land Gat Nos. 96 and 198. It was decreed and Second Appeal is pending arising out of it. The respondent nos. 2 to 4 have filed execution petition. In the present suit, land Gat Nos. 95, 96, 118 and 198, are involved.

9. The respondent No. 2 – wife and respondent Nos. 3 and 4 – daughters, have filed R.C.S. No. 255 of 2007 for partition and possession against respondent no. 1 – husband, contending that the land Gat Nos. 96 and 198 are their joint family properties. There is absolutely no evidence on record that these two lands are purchased by respondent Nos. 1 to 4, jointly. Even, if it is presumed that respondent no. 1 acquired these two lands then also it is impermissible for respondent Nos. 2 to 4 to claim partition during lifetime of respondent no. 1. *Prima facie*, the suit filed by the respondent Nos. 2 to 4 for partition is not maintainable. The respondent No. 1 has taken inconsistent stand in that suit which creates doubt for the entitlement of the

respondent No. 2 to 4. As the decree passed in R.C.S. No. 255 of 2007 is under consideration in the Second Appeal, it is not appropriate to render any finding regarding validity of decree passed therein.

10. Learned counsel for the respondents have vehemently argued that there was a partition in the year 1980 and the shares were demarcated. Appropriate information was given for recording the mutation. The mutation entry no. 245 was effected indicating partition amongst the sons of Rangnath. The petitioners repelled this submission by stating that there was only demarcation of the shares and not the partition by metes and bounds. There is no evidence on record that there was physical partition amongst the members of the family. He would point out the 7/12 extract indicating joint names of the parties in the record of right of the suit land.

11. Both the courts below have not taken into account the source of the title of the suit lands. Land gut No. 96 (Sy. No. 46 and 47) is the only ancestral property. Other suit lands are purchased from the nucleus of the joint family in the names of siblings of Rangnath at different point of time. The mutation entries are recorded in the name of the purchasers. The alleged partition in the year 1980 does not show that land gut No. 96 is exclusively allotted to the respondent No. 1/Ramnath. Similarly, either land gut No. 198 would be the joint family property of the petitioners or self acquired property of the respondent No. 1. In any case the said land cannot be subjected to partition during the

lifetime of the respondent No.1. This aspect has not been considered by both the Courts below and they have recorded perverse findings.

12. Learned counsel for the petitioners has invited my attention to mutation entry No. 245, which was effected on 21st April, 1980. He invited my attention to sale deed dated 26th May, 1995, of land gut No. 198. The age of the respondent no. 1 is ascribed to be twenty one years. He would submit that going by the dates, the respondent no. 1 would be of six years in the year 1980, when partition took place. It would not be possible to partition the land when one of the members is of six years old and to get separated. *Prima facie*, I am of the view that partition in the year 1980 by metes and bounds is not probable.

13. Both the courts below have given undue importance to the mutation entry No. 245, the decree passed in R.C.S. No. 255 of 2007 and the deposition of the respondent No. 1 recorded therein. The inconsistent stands of the respondent No. 1 is not decisive while considering the application for temporary injunction in the present matter. A full fledged trial is required to come to conclusion whether there was partition by metes and bounds or not. The purport of the mutation entry no. 245 and the revenue record can be gone into after conclusion of the trial. At this juncture, the case of the petitioners appears to be probable.

14. Both the Courts below have considered mutation entry No. 245, the findings recorded in R.C.S. No. 255 of 2007, deposition

and the stand taken by the respondent No.1, source of the suit land for coming to the conclusion against the petitioners. The findings of the Trial Court recorded in para No. 14 and 15 as well as findings recorded by the lower Appellate Court in paragraph No. 17 are perverse. Unless the matter is examined on merits after full fledged trial, it is not permissible to arrive at such a finding. I hold that both the Courts below have committed error of jurisdiction.

15. Learned counsel for the respondent Nos. 2 to 4, vehemently submitted that the present suit is collusive one and it is incomprehensible why the petitioner did not intervene in earlier litigation. If the suit for partition filed by respondent Nos. 2 to 4 is defective and not maintainable then it is inconsequential whether the petitioners kept mum or pretended to be dormant. Though role of respondent no. 1 – Ramnath appears to be dicey, that itself would not confer entitlement upon respondent nos. 2 to 4 to claim partition.

16. Learned counsel for the respondents have pointed out the findings recorded in paragraph no. 10 of the judgment of the Trial Court passed in R.C.S. No. 255 of 2007. He has also invited my attention to the findings recorded by Trial Court in paragraph No. 14 of order dated 29th September, 2021. He submits that both the Courts below have appreciated the material on record and the conduct of respondent No. 1. I am of the considered view that the pleadings of the respondent no. 1 in earlier litigation and his deposition before the Court cannot be

appreciated at this juncture of the trial.

17. I have gone through the judgments cited by the learned counsel of the petitioner. They may not assist at this stage. The matter in hand is of interlocutory stage. They may be useful while appreciating the evidence, during trial of the suit.

18. Though there are concurrent findings of facts, the submissions made by the petitioners in the present case appear to the more probable. The learned counsel for the respondents has submitted that the equities can be adjusted and there is remedy of restitution hence no interference is called for in the impugned judgments and orders. If the decree passed in R.C.S. No. 255 of 2007 is permitted to be executed, more complications would be created and the petitioners would suffer more hardship. I find that they are likely to suffer irreparable loss.

18. Considering the material record and the submissions of the parties I am of the view that the petitioners have made out prima facie case. The balance of convenience is in their favour. They are likely to suffer irreparable loss if the decree in R.C.S. No. 255 of 2007 is executed. Under these circumstances I do not find any substance in the submissions of the learned counsel for the respondents that at least an amount of Rs. 70,00,000/- be directed to deposited or petitioners be directed to furnish the security to that effect. Both the impugned judgments and orders are unsustainable. I therefore pass following order.

ORDER

- A. The writ petition is allowed.
- B. The judgment and order dated 11.02.2022 passed by the Principal District Judge, Beed in Misc. Civil Appeal No. 64 of 2021 and the order dated 29.09.2021 passed below Exhibit 41 in R.C.S. No. 315 of 2017 are quashed and set aside.
- C. The application Exhibit 05 submitted by the petitioners in R.C.S. No. 315 of 2017 stands allowed by staying the effect, operation, execution of decree dated 31.12.2009 passed in R.C.S. No. 255 of 2007 till final disposal of suit R.C.S. No. 315 of 2017.
- D. The learned Trial Judge shall make an endeavour to decide R.C.S. No. 315 of 2017 as expeditiously as possible.
- E. Rule is made absolute in above terms.

[SHAILESH P. BRAHME, J.]

bsb/Nov. 23