

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

WRIT PETITION NO.8071 OF 2022

Ananda Baburao Patil & Ors.

.... Petitioners

versus

Shantabai Hari Patil & Ors.

.... Respondents

.....

- Mr. Akshay Kulkarni, Advocate for Petitioners.
- Mr. Suresh M. Kamble, Advocate for Respondent Nos.1 to 3.

CORAM : SARANG V. KOTWAL, J.
DATE : 24th APRIL 2023

P.C. :

Heard Mr. Akshay Kulkarni, learned counsel for the
Petitioners and Mr. Suresh M. Kamble, learned counsel for the
Respondent Nos.1 to 3.

1. The Petitioners who are the Original Plaintiffs have challenged the order dated 10/05/2022 passed by the District Judge-2, Kolhapur. By the impugned order the learned District Judge had set aside the order dated 30/11/2021 passed by the learned Civil Judge Junior Division, Gargoti, below Ex.5 in

Regular Civil Suit No.102 of 2021. The Trial Judge had granted interim injunction in favour of the Petitioners.

2. The Petitioners had filed the said suit for partition of the joint family. The properties are mentioned in paragraph No.1 of the plaint. The subject matter of the present Petition is Gat No.275 at village Admapur, Taluka Bhudargad, District Kolhapur. It is one of the properties from the subject matter of the suit. It is the case of the Petitioners that the construction was being carried out on Gat No.275 even before the partition was effected.

3. According to the Petitioners they were one of the co-owners of the properties and till the partition was effected they had a share in Gat No.275 as well. In spite of that, the construction was being carried out without their permission and therefore they had sought injunction against such construction by filing application vide Ex.5 in the said suit. The said application was allowed by the Trial Court vide order dated

30/11/2021. The learned Trial Judge held that the concerned Defendants had not substantiated their claim that there was an oral partition earlier. Therefore, at this stage, the Petitioners were also the co-owners and therefore balance of convenience lay with the Petitioners. The concerned Defendants had undertaken to remove the construction at their own cost if the construction was held to be unauthorized or illegal. However, according to the learned Judge, the construction was being carried out against the provisions of law and therefore no protection for such construction was given and the interim application filed by the Petitioners was allowed.

4. The Appellate Judge on the other hand took a contrary view. He particularly relied on the revenue record which indicates that there was some previous partition. According to Appellate Judge it had definite probative value and cannot be thrown away at the threshold. More importantly he referred to the concerned Defendant's statement that they would demolish the construction if it caused hurdle to effect the partition

effectively and if it was proved that possession of the land Gat No.275 was subject to partition. The learned Appellate Judge observed that on the face of such undertaking it was difficult to find prima facie case to grant temporary injunction when the construction of those Defendants was not going to cause any hurdle in the partition; if it was to be effected in future. Learned Judge did not find balance of convenience and issue of irreparable loss in favour of the Plaintiffs. He further observed that the Plaintiffs/Petitioners may still prove their case that the suit lands are joint properties and can get possession of their respective share, even by demolishing the construction raised by the Defendants, if required. The learned Judge referred to Ex.69 which was a fresh undertaking given in the Appeal proceeding. The learned Appellate Judge took that undertaking into consideration while passing the impugned order.

5. Learned counsel for the Petitioners submitted that the entire suit properties are the ancestral properties. Still the oral partition has to be proved during trial. He submitted that the

construction is being carried out on a piece of land which was at a prominent position. Hence unfair advantage was being taken by the Defendant in raising that construction.

6. Learned counsel for the Respondent Nos.1, 2 and 3 i.e. the contesting Defendants submitted that the Appellate Court considered all these aspects and considered the undertaking, which is the part of the record of the Appeal and a separate undertaking which is part of the record of the original suit. Those undertakings show that these Respondents have bonafide intention and no irreparable loss would be caused to the Petitioners.

7. I have considered these submissions and I do not see any reason to take a contrary view from the one taken by the learned District Judge-2, Kolhapur. The learned Trial Judge has considered the undertaking and its effect on the issue of balance of convenience and on the issue of irreparable loss. On all these counts he has held that the Petitioners would not suffer any

irreparable loss and also observed that balance of convenience did not lie with the Petitioners. This order was passed on 10/05/2022 i.e. almost one year ago. The construction has been completed as of today as submitted by learned counsel for the Respondent Nos.1, 2 and 3. Therefore, at this stage, I do not see any reason to grant interim injunction in favour of the Petitioner. It is clarified that all the questions raised in the suit can be decided during the suit proceedings. With the result, the impugned order passed by the District Judge-2, Kolhapur is confirmed and the Petition is dismissed.

(SARANG V. KOTWAL, J.)