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

WRIT PETITION NO.10927 OF 2022

Shankar Maruti Jaid & Ors.

... Petitioners

V/s.

Vilas Narayan Jaid & Ors.

... Respondents

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GANESH
KULKARNI

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Mr. A.Y. Sakhare, Senior Advocate i/by Mr. Ashok B.
Tajane for the petitioners.

Mr. Rahul S. Kadam for respondent Nos.1 to 5 & 7.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 12, 2023

P.C.:

1. By this writ petition under Article 227 of the Constitution of India, the petitioners/plaintiffs in a suit for partition are challenging order dated 25 April 2022 passed by the Trial Court rejecting application under Order 39 Rule 11 of the Code of Civil Procedure, 1908.

2. The petitioners filed Special Civil Suit No.32 of 2017 seeking relief of partition and separate possession of the suit properties. In the said suit, the petitioners on 3 March 2017 filed an application for temporary injunction seeking following prayers: (a) not to create third party rights; and (b) not to change the nature of the property.

3. The Trial Court by order dated 26 April 2017 directed all the defendants to maintain *status quo* regarding suit property till the next date. It is not in dispute that the said order is in force.

4. The petitioners on 3 December 2019 filed an application under Order 39 Rule 11 of the Code of Civil Procedure, 1908 alleging that defendant Nos.1 to 5 and 7 despite knowledge of order of *status quo*, changed nature of the suit property and created third party rights.

5. Defendant Nos.1 to 5 filed their reply on 19 December 2018, which reads thus:

“1. One illegal act cannot be allowed to justify another illegal Act.

2. Defendant Nos.1 to 5 are ready to remove the contempt by repaying the loan amount, as per direction of this Hon’ble Court.

3. Plaintiff should also remove the contempt by demolishing the permanent structure which they have admitted to have erected after filing of the said suit, on suit property.”

6. The Trial Court by the impugned order recorded a finding that relief of striking of defense is available to the plaintiff only if it is proved that there is willful disobedience by the defendant. The Trial Court, therefore, recorded a finding that there is no willful disobedience of the order.

7. Having heard learned senior Advocate for the petitioner and learned advocate for the respondent, from the material on record following factual scenario emerges: (i) 26 April 2017, the Trial

Court directed all the defendants to maintain *status quo*. The order of *status quo* is in the context of application for temporary injunction restraining defendants from creating third party rights and restraining defendants from changing nature of the suit property; (ii) From 5 November 2017 to 20 November 2017, respondent No.1 constructed permanent onion shed on the suit property; (iii) 2 February 2018 respondent No.3 mortgaged suit property and obtained loan amount of Rs.45 lakh; (iv) 25 June 2018 to 11 October 2018, respondent No.3 constructed new house on the suit property; (v) 7 December 2018 respondent No.2 mortgaged suit property and obtained loan of Rs.5 lakh; (vi) 14 May 2019, respondent No.2 again mortgaged suit property and obtained loan of Rs.5 lakh; (vii) 5 October 2021, respondent No.4 mortgaged suit property and obtained loan of Rs.20 lakh; (viii) 5 October 2021 respondent No.7 stood guarantor to the loan obtained by respondent No.4; (ix) 27 March 2023, this Court granted ad-interim relief restraining respondents from creating third party rights during pendency of the writ petition; and (x) 7 August 2023, respondent No.3 executed agreement to sale in favour of third party for consideration of Rs.6,25,000/-.

8. Learned advocate for the respondents submitted that the conduct of the respondents cannot be termed as willful disobedience of the order. According to him, the plaintiffs also carried out construction over the property in their possession. He submitted that in so far as creation of third party rights by mortgage is concerned, the respondents are ready to restore the situation as on the date of passing of the order of *status quo* by

paying the amount of loan. However, since respondent Nos.1 and 3 have constructed over the property, the construction cannot be demolished.

9. Learned Senior Advocate for the petitioners submitted that the suit is for partition. Respondent Nos.1 to 5 and 7 are defending the suit jointly. The nature of the suit is for partition. Therefore, the respondent Nos.1 to 5 and 7 are acting in connivance. According to him, therefore, respondent Nos.1 to 5 and 7 have violated orders of the Trial Court and this Court at least on seven occasions. Therefore, the disobedience on their part needs to be treated as willful disobedience.

10. Having heard the parties, in my opinion, in absence of dispute regarding knowledge of the order, it is evident that defendant Nos.1 to 5 and 7 had knowledge of the order of *status quo*. The order of *status quo* if read in the context of prayer in the temporary injunction application, it has effect of restraining defendants from creating third party rights or changing nature of the suit property. Despite such order, it appears that respondent Nos.1 to 4 and 7 constructed over the suit property and created third party rights. It is pertinent to note that despite knowledge of order of this Court in the present writ petition, respondent No.3 executed agreement to sale in favour of third party on 7 August 2023. Therefore, in my opinion, the disobedience committed by defendant Nos.1 to 4 need to be constructed as “willful disobedience” within the meaning of Order 39 Rule 11 of the Code of Civil Procedure, 1908.

11. It is well settled that the provisions of Order 39 Rule 11 of the Code of Civil Procedure, 1908 are directory. However, breach as alleged by the plaintiffs is not a single instance. Defendant Nos.1 to 5 and 7 have contested the suit as a single unit. Therefore, I am of the opinion that respondent Nos.1 to 4 and 7 have committed will disobedience of the order.

12. In so far as respondent No.5 is concerned, in absence of positive act committed by respondent No.5, she cannot be held responsible for the acts committed by respondent Nos.1 to 4 and 7. Therefore, except respondent No.5 the impugned order deserves to be quashed and set aside. Hence, following order:

- a) Impugned order dated 25 April 2022 passed by the Civil Judge Senior Division, Khed Rajgurunagar in Special Civil Suit No.32 of 2017 is quashed and set aside;
- b) Application below Exhibit 189 in Special Civil Suit No.32 of 2017 is allowed, except as against respondent No.5;
- c) Since the application under Order 39 Rule 11 of the Code of Civil Procedure, 1908 is allowed, necessary legal consequences as regards rights of the defendants shall follow.

13. The writ petition stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)