

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6428 OF 2021

Dattatray Dyanoba Javalkar

...Petitioner

Versus

Tukaram Dyanoba Javalkar & Anr.

...Respondents

...

Dr. Uday P. Warunjikar *along with Mr. Siddhash Pilankar for Petitioner.*

Ms. Tanvi Phatak, *h/f. Mr. Amol Deshpande or Respondents.*

...

CORAM: SANDEEP V. MARNE, J.

DATE : 4th May 2023.

P.C.:

1 By this petition, petitioner challenges judgment and order dated 17th September 2021 passed by District Judge-14, Pune in Miscellaneous Civil Appeal No. 84 of 2021 thereby setting aside the order dated 18th February 2021 passed by the trial court granting injunction in favour of the plaintiff.

2. Plaintiff has instituted Regular Civil Suit No.1202 of 2020 against defendant Nos.1 and 2 for declaration and injunction. It is the case of the plaintiff that the suit property is a joint family property which is yet to be

partitioned. On the contrary it is the case of the defendant that there has already been a partition of the suit property. Defendant proceeded to undertake construction on the suit property by describing it as a 'farmhouse'. Plaintiff contends that since the suit properties are yet to be partitioned, defendant Nos.1 and 2 could not have carried out any construction therein. It is also the case of the plaintiff that no permission has been obtained from Planning Authority before carrying out construction. Defendants on the other hand contend that since the nature of construction is that of a farmhouse, no permission is necessary.

3. The trial court proceeded to grant injunction in favour of the plaintiff by order dated 18th February 2021 restraining defendants from carrying out any construction on the suit property or changing the nature of the suit property. The Appellate Court, by its judgment and order dated 17th September 2021, has reversed the order of the Trial Court and has vacated the order of injunction.

4. Dr. Warunjikar, the learned counsel appearing for petitioner would submit that since the properties between plaintiff and defendants are yet to be partitioned, the defendants cannot be permitted to carry out any construction on any portion of the suit property. He would submit that in

absence of a valid development permission, defendants could not have commenced construction on the suit property. He would further submit that there was an order of injunction operating against defendants since 18th February 2018. That though interim protection was vacated by lower appellate court on 17th September 2021, this court, by its ad-interim order dated 17th October 2021, has continued interim protection and the same continues to operate till date. He would pray for setting aside the order of lower appellate court.

4. Ms. Phatak, the learned counsel appearing for respondents would oppose the petition and support the order passed by the lower appellate court.

5. I have gone through the findings recorded both by the trial court as well as lower appellate court. The lower appellate court has held that though the plaintiff has asserted that the suit properties are not partitioned, he has not sought for any relief for partition of the suit property. He has chosen to restrict the suit only for declaration and injunction. The Lower Appellate Court has also held that the defendants have come up with the case of previous oral partition of the suit properties. The Lower Appellate Court has also perused the photographs

of the construction and has arrived at the conclusion that the construction of the house has already been completed.

6. If the case of the plaintiff-petitioner is that the suit properties are yet to be partitioned, failure on his part to seek relief for partition of the suit properties would assume importance. If indeed the suit property was not partitioned, the plaintiff ought to have sought relief for partition, which he has not. Instead, he has restricted the suit for reliefs of declaration and injunction. Of course, this issue would be considered by the Trial Court at the time of decision of the suit and no opinion is expressed in this regard. All the contentions of the parties on this issue are left open.

7. The construction of the house is already complete. The plaintiff had pressed for injunction against defendants to restrain them from carrying out any construction. The Trial Court had granted interim injunction in favour of the plaintiff on 18th February 2021 restraining defendants from carrying out construction or changing the nature of the suit properties. However, since the construction of the house is already complete, no purpose would be served by continuing the injunction granted by the trial court in the changed circumstances. Since the defendants have

already completed construction of the house, they can be permitted to use and occupy the same during pendency of the suit. Dr. Warunjikar would submit that the construction, which is carried out by defendants during pendency of the suit, should be made subject to the final outcome of the suit. The submission appears to be reasonable.

8. I accordingly dispose of the Writ Petition by upholding the judgment and order passed by the lower Appellate Court. It is however clarified that though the defendants are permitted to use and occupy the construction during pendency of the suit, the construction would be subject to the final outcome of the suit. No equities would be calimed by defendants. In the event if Trial Court comes to conclusion that construction of the farmhouse is on any portion of suit property coming to the share of the plaintiff, the trial court shall adjust the equities by awarding compensation to the plaintiff or by passing such suitable order as it may deem fit.

9. With these observations Writ Petition is disposed of.

(SANDEEP V. MARNE, J.)