

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7647 OF 2024

Mangesh Tukaram Marye

.. Petitioner

Versus

Dilip Tukaram Marye and Ors.

.. Respondents

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- Mr. Pradeep J. Thorat i./by Ms. Aditi S. Naikare, Advocate for Petitioner.
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CORAM : MILIND N. JADHAV, J.

DATE : JULY 23, 2024

P.C.:

- 1.** Heard Mr. Thorat, learned Advocate for Petitioner.
- 2.** By virtue of twin orders which are impugned dated 22.10.2021 passed below Exhibit-5 in Regular Civil Suit No.73 of 2021 and order dated 02.01.2024 passed in Miscellaneous Civil Appeal No.25 of 2021, Defendant No.1 is restrained temporarily by the learned Trial Court and District Court from raising construction and cutting the cashew trees in one of the suit land bearing Gat No.18 until the suit is decided.
- 3.** The grievance of Defendant No.1 who is Petitioner before me is that he does not have a house of his own to live despite there been substantial ancestral property which is described in the suit plaint in respect of which partition is yet to be completed.

4. Three Plaintiffs who are Respondents before me have filed the suit seeking partition of one-seventh share in the suit property to the seven branches. Admittedly, Defendant No.1 would be entitled to one-seventh share of the suit properties. There are substantial suit properties which are described in Annexure-A and Annexure-B in paragraph No.1 of the suit plaint. In respect of one out of five immovable suit properties, Defendant No.1 started construction of a house on an area admeasuring 10 Guntas out of the total area of admeasuring 2H and 94R of that particular property.

5. One of the submission advanced by Mr. Thorat in support of Defendant No.1's case, after taking me through the facts of the case, is that in the suit plaint it is prayed by Plaintiffs that partition of the suit properties will take place to the exclusion of an area admeasuring 4 Guntas out of Gat No.18 on which Plaintiff No.3 already has constructed a Gram Panchyat house and is residing therein. However, Mr. Thorat would submit that after Defendant No.1 was driven out of the ancestral house by Plaintiffs after a quarrel and due to dispute between the parties, Defendant No.1 had to stay on rent in the village for quite some time and thereafter it was Plaintiff No.3 who told Defendant No.1 to construct his own house on a portion of Gat No.18. One allegation leveled against Defendant No.1 is that while doing so he has cut / destroyed several cashew trees thereby rendering the income received from these cashew trees to the parties redundant.

However details are not given.

6. It is also seen that Defendant No.1 has dug a well on a portion of Gat No.18 and water from the said well is also supplied and used by Plaintiff No.3. Plaintiffs at that time did not take any objection against Defendant No.1 for digging the well. One of the probable reason could be because water from the said well is used for the agricultural plantation of the parties. However objection is raised by filing an Application for temporary injunction against Defendant No.1 by the Plaintiffs.

7. Plaintiff Nos.1 and 2 stand on a different footing *qua* Plaintiff No.3 in view of the reasons which have been observed herein above and prayer clause (a) of the suit plaint. One of the most striking feature which appeals to this Court and is argued by Mr. Thorat is that in any event Defendant No.1 would be entitled to one-seventh share out of the five immovable properties which are described in the suit plaint.

8. That apart, Mr. Thorat would contend that in Gat No.18 itself, share of Defendant No.1, if partitioned would come to 42 Ares and in that view of the matter, construction of the house on an area admeasuring 10 Gunthas can always be permissible as 1 Guntha is equivalent to 1.01 Are.. He would submit that the sole reason given in the twin impugned orders is that partition has still not taken place. He

would submit that if partition is delayed, Defendant No.1 would have to live on rent despite having legitimate share in the suit property, rather share which would enure to his benefit.

9. In view of the above reasons, I am not in agreement with the findings returned by the learned Trial Court and learned District Court while passing the twin impugned orders. *Prima faice*, both these orders are not sustainable. Considering that this is a suit for partition, putting embargo on one of the beneficiary and recipient of the suit property post partition cannot be allowed in this fashion when other parties to the suit properties are themselves enjoying the suit properties, in this case the Plaintiff No.3. In that view of the matter, the impugned orders deserve to be interfered with.

10. In view of the above observations, issue notice to the Respondents. Humdast permitted. In addition to Court's notice, Petitioner is directed to serve the Respondents a copy of this order and copy of the Writ Petition shall be served by Advocate for Defendant i.e. Writ Petitioner and inform them about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof. Respondents are directed enter appearance and file Affidavit-in-Reply to the Writ Petition within a period of two weeks from today.

11. Plaintiffs shall take cognizance of this order and Writ Petition filed by Defendant No.1. Needless to state that objections of Plaintiffs shall be heard by this Court.

12. It is also clarified that if Plaintiffs do not remain present despite being served and such appropriate Affidavit of service is filed of having served all Plaintiffs, this Court shall not await for presence of the Plaintiffs and dispose of the present Writ Petition by passing appropriate order strictly in accordance with law on the next adjourned date.

13. Stand over to **06th August, 2024.**

H. H. SAWANT

[MILIND N. JADHAV, J.]

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