

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6115 OF 2024**

Madhav Dada Jadhav ... Petitioner
versus
Kamal @ Pushpavati Yashwant Pawar and Ors. ... Respondents

Mr. Girish R. Agrawal with Ms. Naina Boraste, for Petitioner.
Mr. Sachin Kadam, for Respondents.

CORAM: N.J.JAMADAR, J.

DATE : 24 APRIL 2025

P.C.

1. Heard the learned Counsel for the parties.
2. The challenge in this Petition is to a judgment and order dated 20 February 2024 passed by the learned District Judge, Niphad, in Misc. Civil Appeal No.4 of 2024, whereby the appeal preferred by the Respondents – Plaintiffs came to be allowed by setting aside the order dated 20 December 2023 passed by the Trial Court on an application for injunction (Exh. 117) in RCS No.169 of 2015, and the Petitioner – Defendant No.1 came to be restrained from carrying out construction of a house in the land bearing Block No.65 (the suit property) till the final disposal of the suit.
3. Respondent Nos.1 and 2 are the sisters of the Petitioner. Dada Tukaram Jadhav was the father of the Petitioner, Respondent Nos.1 and 2 and 3 – Sukhdev. Dada Jadhav had two wives, Sakhubai, who passed away on 27 July 2002, and Punjabai – deceased Defendant No.3. On 6 September

1979, Dada Jadhav had allegedly executed a Sale Deed in respect of the suit property i.e. Gat No.65, in favour of Sakhubai and the Petitioner – Defendant No.1, who was then 16 years of age. Sakhubai, who was not the genitive mother of the Petitioner was shown as the natural guardian of the Petitioner. Eventually, Sakhubai had also allegedly executed an unregistered Deed of Relinquishment of her share in the suit land bearing Gat No.65 in favour of the Petitioner. Respondent Nos.1 and 2 have, thus, instituted a suit for a declaration that they have undivided interest in the suit property; for partition and separate possession of their share therein and that the Mutation Entry No.572 is illegal, void and not binding on the shares of the Plaintiffs and for the consequential relief of injunction.

4. In the said suit, the Plaintiffs had initially filed an application for temporary injunction. However, the said application was not pursued. In the year 2023, the Petitioner allegedly started construction of a house in the land bearing Gat No.65. Thereupon, the Plaintiffs preferred an application (Exh.117) seeking to restrain Defendant No.1 from carrying out construction in the suit land bearing Gat No.65 and changing the nature of the suit property till the final disposal of the suit.

5. By an order dated 20 December 2023, the learned Civil Judge was persuaded to reject the application (Exh.117). Being aggrieved, the Plaintiffs preferred an appeal before the District Court.

6. By the impugned judgment and order, the learned District Judge was persuaded to restrain the Petitioner from carrying out construction in the suit land bearing No.65 observing, inter alia, that there were other co-sharers in the suit property and the Defendant No.1 had proceeded with the construction of the house at his own risk, despite being cognizant of the claim of the Plaintiffs.

7. Being aggrieved, Defendant No.1 has invoked the writ jurisdiction.

8. Mr. Aggarwal, the learned Counsel for the Petitioner, submitted that by the time the learned District Judge granted injunction, the construction of the house had reached an advanced stage. It is on the verge of completion. Injunction at this stage operates onerously as, indisputably, the Petitioner has been residing in the dilapidated structure in the suit land before the application for injunction came to be filed. Construction of house was necessitated on account of the dilapidated nature of the original structure in which the Petitioner was residing. In this situation, the Petitioner is willing to file an undertaking not to claim any equity, and, in the event, the suit is decreed, remove the structure at his own cost. Therefore, the order of injunction needs to be suitably modified.

9. Mr. Kadam, learned Counsel for the Respondents – Plaintiffs resisted the submissions on behalf of the Petitioner. It was urged that the sale deed and the purported deed of relinquishment executed in favour of the Plaintiff

are ex-facie untenable. The Petitioner was barely 16 years of age when the sale deed was allegedly executed by the father of the Plaintiffs. Both the instruments are apparently forged and fabricated. Therefore, the Petitioner could not have claimed any exclusive right to use and occupy Gat No.65. Till the suit properties are divided by metes and bounds, the Petitioner could not have appropriated a portion of the property to construct the house. Therefore, learned District Judge was fully justified in granting injunction. Mr. Kadam, further submitted that since the suit is at the stage of recording of evidence, a direction for expeditious hearing of the suit would take care of the concern of the Petitioner.

10. I have carefully perused the material on record. The relationship between the parties is not in dispute. The Petitioner claimed exclusive title over Gat No.65 on the basis of the instruments executed by Dada Jadhav and Sakhubai. The Plaintiffs, on the other hand, asserted that both the instruments have been forged and fabricated, and the Plaintiffs also have an undivided interest in the suit properties, including Gat No.65.

11. On first principles, the Petitioner being a co-owner is not entitled to occupy a particular portion of the suit property and construct a house. The principle of unity of possession and community of interest squarely applies. However, the entirety of the facts of the case deserves to be kept in view.

12. Initially, the Petitioner had been in the occupation of the house

premises situated at Gat. No.65. Whether the said premises was in a dilapidated state need not be delved into. Indisputably, the Petitioner started construction of the permanent structure on the suit property bearing Gat No.65. Initially, injunction was not granted by the trial Court. By the time the learned District Judge granted injunction, the structure was almost on the verge of completion.

13. In the aforesaid backdrop, the question that wrenches to the fore is whether the Petitioner can claim the leave to complete the structure and occupy the same. The suit is for partition. In the event, decree for partition is passed, the trial Court would be in a position to pass necessary incidental and consequential orders so as to balance the equities, and allot a particular portion of the property to the sharers who are entitled to a share in the joint family property. The provisions contained in the Partition Act, may also have application.

14. In these circumstances, when construction has reached an advanced stage and is on the verge of the completion, the order of restraint does not serve any fruitful purpose. The Petitioner – Defendant No.1, in such a situation, can be permitted to complete the construction and occupy the said structure for residential purpose only, subject to certain conditions. Support can be drawn from the judgments of the Supreme Court in the cases of

K.M.Pratap V/s. K.M.Gourish and Anr.¹, Mandali Ranganna and Ors. V/s. T. Ramchandra and Ors.² and an order passed by this Court in the case of Goverdhan baburao Pawar and Ors. V/s. Smt. Saraswati Dnyaneshwar Pawar and Ors.³.

15. I am, therefore, inclined to allow the Petition and permit the Petitioner to complete the construction and occupy the said house for residential purpose only, subject to certain conditions.

13. Hence, the following order :

ORDER

(i) The impugned order dated 20 February 2024 stands quashed and set aside.

(ii) The Petitioner – Defendant No.1 is permitted to complete the construction subject to the following conditions :

(a) The Petitioner – Defendant No.1 shall use the said structure for residential purpose only.

(b) The Petitioner – Defendant No.1 shall not create any third party interest in the structure which is to be constructed at Gat No.65.

(c) The Petitioner – Defendant No.1 shall not part with possession of the suit property or otherwise create any encumbrances therein.

1 (2017) 11 SCC 103

2 2008(4) ALL MR 932

3 AO(ST) No.35068 of 2015 dated 1 March 2016

(d) The Petitioner – Defendant No.1 shall file an undertaking before the trial Court that he will not claim any equities and in the event the decree for partition and separate possession is passed, and the appurtenant land is allotted to the co-sharers, the Petitioner – Defendant No.1 shall remove the structure at his own costs and expenses. Such an undertaking be filed within a period three weeks from the date of uploading of this order.

(e) In the backdrop of the developments which have taken place in the intervening period, it would also be expedient to expedite hearing of the suit.

(f) The trial court is requested to hear and decide RCS No.169 of 2015 as expeditiously as possible and preferably within a period of one year from the date of communication of this order.

The Writ Petition stands disposed.

(N.J.JAMADAR, J.)