

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 106 OF 2011
WITH
CIVIL APPLICATION NO. 3135 OF 2011

Sunder s/o. Kishanrao Jadhav
and Ors.

....Appellants.

Versus

Shamptrao s/o. Mariba Nisrgandha
and Ors.

....Respondents.

Mr. J.M. Murkute, Advocate for appellants.

Mr. B.S. Kudale, Advocate for respondent No. 3.

CORAM : T.V. NALAWADE, J.
DATED : 27th August, 2015.

ORDER :

1) The appeal is filed against judgment and order of Regular Civil Appeal No. 148/2004 (Old No. 117/02), which was pending in the Court of Ad-hoc District Judge-1, Majalgaon and also against the judgment and decree of Regular Civil Suit No. 277/1994 which was pending in the Court of Civil Judge, Junior Division, Majalgaon. The suit filed by the present appellants for relief of declaration and temporary injunction is dismissed. Both the sides are heard.

2) The suit was filed in respect of 4 Acre portion (1 Hecter 21 R.) out of Survey No. 182 (Gat No. 488) situated at

village Talkhed. It is the case of plaintiffs that Mariba, the father of defendant Nos. 1 to 5, was holding the property and it was joint family and ancestral property. It is contended that Mariba was Karta of the joint Hindu family and in that capacity and for legal necessity, Mariba sold the suit property to the plaintiffs.

3) It is the case of plaintiffs that defendant Nos. 1 to 3 had filed a collusive suit against the father which was bearing No. 100/1979 and they obtained decree of partition against Mariba and that was done only to deceive the appellants. It is contended that in view of the rights given to the plaintiffs, it is not necessary to challenge the decree given in favour of defendants in partition suit. It is contended that the sale deed was executed on 11.12.1981 and on the date of the sale deed, the possession of the suit property was given to the plaintiffs by Mariba. It is contended that the plaintiffs have taken a well in this land and has installed electric motor for irrigation of the land and he has developed the property. It is contended that on the basis of sale deed, mutation is effected in favour of the plaintiffs in revenue record.

4) It is the case of the plaintiffs that defendants, the successors of Mariba have no concern whatsoever with the suit property. It is contended that Mariba was entitled to have share

in aforesaid survey number and so that share is purchased by the plaintiffs. Relief of declaration was claimed that plaintiffs are joint owners and they are in possession of the suit property and declaration was claimed that the decree of Civil Suit No. 100/79 is not binding on the plaintiffs. Relief of injunction was claimed to prevent the defendants from interfering in the possession of plaintiffs over the suit property.

5) The defendants filed joint written statement and contested the matter. They contended that Mariba was not the Karta of joint family and defendant Nos. 1 to 3 were living separate from Mariba for about 30 years. It is contended that as Mariba was not effecting partition of the suit property amongst sons, suit No. 100/79 was filed for relief of partition and separate possession of respective shares.

6) It is the case of defendants that defendant Nos. 1 to 3 were living out of station for many years due to their occupation and the plaintiffs deceived Mariba and got executed the sale deed in respect of the suit property. It is contended that the decree in partition suit has become final and as the suit property was shown to be purchased during the pendency of the suit, plaintiffs do not get any right in the suit property. It is contended that for execution of the decree given in partition

suit, execution proceeding is already filed and only to protract the execution of the decree, the suit is filed. The execution proceeding is bearing No. 26/1984.

7) It is the case of plaintiffs that partition had not taken place amongst the co-parceners of the suit property and so, Mariba had no right to sell any separate portion of the land. It is contended that no consideration was paid to Mariba by plaintiffs and dividing the land and giving separate possession to the plaintiffs will be against the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holding Act. It is contended that there was no necessity of any kind to Mariba as he was getting more than sufficient income from agriculture and he was cultivating all the lands of the family. It is contended that only when the measurement of the property was started in execution proceeding No. 26/1984, the suit came to be filed and it shows the malafides of the plaintiffs.

8) Issues were framed by the trial Court. Both the sides gave evidence. The trial Court has held that the plaintiffs have failed to prove their ownership over the suit property. The trial Court has also held that the plaintiffs have failed to prove that there was legal necessity for selling the suit property. The trial Court has held that the decree in R.C.S. No. 100/79 is binding on

the present plaintiffs and the trial Court has held that the sale deed executed in favour of plaintiffs is hit by the provisions of lis-pendence.

9) It appears that in the appellate Court, no specific points were framed. Much was argued by the learned counsel for the appellants on this point and he submitted that substantial question of law needs to be framed on this point of procedure. The judgment delivered by the first appellate Court however shows that all the relevant points which could have been framed by the appellate Court on the issues decided by the trial Court were considered by the appellate Court and they are answered against the plaintiffs.

10) The learned counsel for the plaintiffs submitted that this Court, other Hon'ble Judge, had made an order on 24.11.2014 and had directed to District Court to ascertain as to whether the property shown to be sold to the plaintiffs can be protected and equity can be done and the rights of the plaintiffs, acquired by them under the aforesaid sale deed, can be protected and the area which is in possession of the plaintiffs at present can be allotted to them by presuming that it was the share of Mariba. The learned counsel submitted that on this point also, substantial question of law can be formulated.

11) The suit was filed for partition and separate possession in respect of 2 agricultural lands. Agricultural land bearing Gat No. 488 having area of 14 Hector 16 R. (around 35 Acres) and another property bearing Gat No. 64 admeasuring 7 Hector 10 R. The suit in respect of both suit properties is decreed and plaintiffs of Regular Civil Suit No. 100/79 are given 3/4th share together in these two properties. This decree has become final. It appears that prior to the date of suit, some transactions were made by Mariba and some portions were sold to other persons and on the date of the sale deed, portion of around 16 Acres was in possession of Mariba. On the basis of this circumstance and as the purchasers were not made party to the suit, the learned counsel for the plaintiffs/appellants submitted that equal share needs to be given to Mariba, in the land which was available with Mariba. This submission is not at all acceptable. The main reason is that the plaintiffs purchased the suit property during the pendency of the partition suit. Even cross examination of the plaintiff shows that plaintiffs were aware on the date of sale deed that such suit for partition was filed against Mariba. Plaintiffs gave evidence that Mariba had represented to them that partition had taken place and his sons had no concern whatsoever with this land. In the plaint itself, it is admitted that it was ancestral property of Mariba. In view of

these circumstances, it is not open to plaintiffs to say that they are entitled to equity and the portion sold by Mariba to them can be kept with them. Only because, they were not made party after the date of purchase, they cannot say that they are entitled to equity. There is a decree of partition and from Gat No. 488, from total area of Gat No. 488, the defendants are held to be entitled to 3/4 share. In view of these circumstances, it can be said that nothing was left with Mariba for selling to the present plaintiffs.

12) The provision of section 52 of Transfer of Property Act need to be kept in mind. When present plaintiffs were knowing that suit was pending for partition and they were also knowing that present defendants had equal share with Mariba in the property and they were claiming their share from the entire area of land Gat No. 488, it can be said that without obtaining permission of Court, they had taken the risk. In such cases, the principle of equity cannot be used in favour of purchaser. Further, there is finding of the first appellate Court that passing of consideration is not duly proved. The first appellate Court has appreciated the evidence of one witness examined by the plaintiffs on execution of sale deed.

13) When this Court, other Hon'ble Judge, had asked the

District Court to ascertain as to whether equity can be done, District Judge considered the material and has given finding that it is not possible to do equity. Though reasons given are different, this finding needs to be accepted as it is. The plaintiffs are not entitled to get anything in view of the aforesaid circumstances. This Court finds nothing on the basis of which substantial question of law can be formulated. No such question is involved in the present matter.

14) In the result, the appeal stands dismissed. Civil Application stands disposed of.

[T.V. NALAWADE, J.]

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