

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.351 OF 2014

Bhagyashree V. Bhide

... Appellant

Vs.

Chintaman M. Dixit & Ors.

... Respondents

Mr.Y.S. Jahagirdar, Sr.Adv. i/b S.S. Patwardhan for the Appellant
Mr.S.M. Gorwadkar for Respondent Nos.1, 7 to 11, 13 to 20, 22, 24 to 26,
28 to 32

CORAM: **MRS.MRIDULA BHATKAR, J.**

JUDGEMENT RESERVED ON: **DECEMBER 24, 2014**

JUDGEMENT DELIVERED ON: **JANUARY 9, 2015**

JUDGMENT:

1.This Appeal is directed against the order dated 6.1.2014 passed by the 4th Joint Judge, Senior Division, Pune below exhibit 5 in Special Civil Suit No. 643 of 2013. The appellant is the original defendant No.1 and is the main contesting party. Respondent No.1, who is the original plaintiff, filed the Special Civil Suit for partition against total 31 defendants including the present appellant i.e., defendant No.1. This being a suit for partition, they are to be treated like plaintiffs as they have equal shares in the property. All the defendants, as per the case of the plaintiff, are the co-sharers and he demands 1/24th share in the suit property and also prayed for perpetual injunction restraining appellant/ defendant No.1 from carrying out

construction of the suit property and creating third party interest and so also prayed for mandatory injunction that defendant No.1 be ordered to demolish the construction carried out by her on the suit property. It is the case of the plaintiff that one Waman Yadneshwar Dixit, a common ancestor, had 2 sons, namely, Govind and Damodar. The plaintiff i.e., respondent No.1 is the descendant of the branch of Damodar while the original defendant No.1 is the lineal descendant of the branch of Govind. The plaintiff gave the genealogy of the entire family. The plaintiff and the defendants are approximately 5th and 6th degree lineal descendants of Govind and Damodar. The suit property and some properties at Khed are the ancestral properties and one Indirabai Dixit, a widow of Dattatray Dixit, has made a will, whose name has appeared in the city survey record, died in Pune in 2011, after executing a will by which she bequeathed the suit property in favour of defendant No.1 alone and defendant No.1's name was mutated in the revenue records in 2011. It is the case of the plaintiff that Indirabai had 50% of the share and she had acknowledged the 50% right, interest and claim of the other defendants in the said share. It is also the case of the plaintiff earlier an appeal was filed for an apportionment of compensation of the part of the suit properties acquired by Pune Municipal Corporation and ½ share in the property of the descendants of Damodar of which the plaintiff is the lineal descendant was acknowledged by the defendant.

2.As the name of the Defendant No.1 i.e., the appellant, was mutated in the record of rights, the plaintiff sent notice to defendant No.1, on 6.4.2013, demanding partition and separation of the share. Defendant No.1 did not give reply to the notice. The plaintiff made publication about his $\frac{1}{2}$ share in the suit property and as his right was denied by defendant No.1, he filed suit. He filed suit on 10.5.2013, wherein he moved an application under exhibit 5 praying that defendant No.1 be restrained by an order of injunction against creating third party interest in the suit property till effective partition. The said application was contested by both the parties and the defendant challenged the plaintiff's right in the suit property and it was contended that as Indirabai Dixit was alive and prior to 1960 till her death in 2011, she was in exclusive possession of the suit property and therefore she became the owner of the entire property by way of adverse possession. It was further contended that during the lifetime of Indirabai, late Damodar had instituted a Special Civil Suit No.1264 of 1967 for partition of the suit property and in that suit, late Indirabai was defendant No.1 and the father of the plaintiff was also defendant to the suit. The father of the plaintiff in that suit demanded partition. However, the suit was dismissed for default on 9.7.1999. It was argued that in view of the dismissal, the present suit is not maintainable and it was also contended that Indirabai executed her last will on 18.11.1983. Then, a Codicil on 1.6.1991 and thus bequeathed property to her daughter i.e., defendant No.1 i.e., the present appellant. The will of Indirabai is

probated in M.A. No.650 of 1997 and defendant No.1 submitted plans to the Corporation after obtaining sanction, which were approved by the corporation. He carried out construction upto the 8th floor. It is contended that some third parties have booked the flats by raising loans. It appears that the matter was mainly argued on the point of exclusive right of defendant No.1 in the whole property by way of adverse possession. The learned trial judge has rightly considered that the possession and enjoyment by one of the co-owners in respect of the property does not amount to ouster unless it is specifically proved. Hence, the contention of defendant No.1 that he is the owner of the entire suit property by adverse possession was rightly not accepted at this prima facie stage.

3. Apart from the point of adverse possession, Mr. Jahagirdar, learned Senior Counsel appearing for the appellant, made other submissions. He submitted that in Appeal from Order, the parties shown in the genealogy are not the parties in the suit. He submitted that the original defendant No.1 and defendant Nos.8 to 26 are not shown in the genealogy. Moreover, their relations as lineal descendants is also not clear and it is challenged by the appellant in reply filed below the exhibit 5 application. He submitted that out of 32 defendants, only 10 persons are shown as lineal descendants of Waman Dixit. Thus, the appellants challenged the status of these defendants. He further submitted that the suit is not maintainable because

the plaintiff has not claimed the partition of all the properties but has chosen to claim partition of only the suit property and did not claim partition for the landed properties in village Khed. Partial partition is not allowed in law. He further submitted that Indirabai's will by which she bequeathed the property in favour of the appellant is probated and the judgment of the probate Court is in realm. In support of this, he relied on the judgment of the Supreme Court in the case of **Syed Askari Hadi Ali Augustine Imam & anr. vs. State (Delhi Administration) & anr.**¹. On the point of probate, the learned Senior Counsel relied on the decision in the case of **Kenchegowda (since deceased) by legal representatives vs. Siddegowda alias Motegowda**².

4. Further, the learned Senior Counsel submitted that the case of the plaintiff should fail on account of delay and laches and on failure to establish a prima facie case and also considering the balance of convenience and irreparable loss, which is a requirement of Order 39 Rules 1 and 2 of the C.P.C. The learned Senior Counsel further submitted a suit for partition was earlier filed in 1967, by Damodar in which the defendants' predecessor was a defendant and the father of the plaintiff was also a defendant. Hence, it cannot be said that the plaintiff and other defendants were unaware of the suit property. The stand taken by the original plaintiff that he had no knowledge of the existence of this property; and their right as co-sharers in

1 (2009) 5 SCC 528

2 (1994) 4 SCC 294

the suit property is false and is to be rejected. He submitted that the appellant has good case on merits to show that Respondent No.1, the original plaintiff, and other defendants have no right in the suit property. He further submitted that though the original plaintiff/Respondent No.1, was aware of his share in the suit property as the suit was filed in 1967, he did not bother to claim his right in the suit property, so on the grounds of delay and laches, no interim relief is to be granted. The learned Senior Counsel while buttressing the principles of injunction, relied on the judgment in the case **Dalpat Singh vs. Prahlad Singh**³. The learned Senior Counsel also relied on **Mandali Ranganna & Ors. vs. T. Ramchandra & Ors.**⁴

5. Per contra, Mr. Gorwadkar, learned Counsel for the Respondent No.1, the original plaintiff, submitted that the plaintiff and other defendants have right in the property. They are co-sharers and defendant No.1 has illegally used the property on his own and has tried to grab the property. He submitted that the defendant no.1 claims title by adverse possession and it is a false claim and no equity can be shown in favour of such person. Being an ancestral property, if the plaintiff and the other defendants have right in the property, then, one person cannot stake claim to the suit property by adverse possession. He has clandestinely used the property for his own benefit with a view to deprive of others and therefore, no order in his favour

3 (1992) 1 SCC 719

4 (2008) 11 SCC 1

be granted. He submitted that the trial Court has rightly prevented him from creating any third party right. He further submitted that the order is passed on 6.1.2014. Since then for nearly 1 year, the order is in operation against him and therefore, in this appeal, that order is not to be vacated. He submitted that Indirabai is the owner of 50% of the property and therefore the will though probated is to be considered only for 50% of the property. When the testator has mentioned that Damodar has 50% right in the suit property and the exclusive title of the appellant is doubtful. He submitted that the suits do not suffer from any either delays or laches. In support of his submissions, he relied on the judgment of the Supreme Court in **Shankar Balwant Lokhande (dead) by LRs. vs. Chandrakant Shankar Lokhande & anr.**⁵ and **Sakhahari P. Korhale vs. B.S. Korhale**⁶.

6.As regards adverse possession, he relied on the judgment in the case of **State of Haryana vs. Mukesh Kumar & Ors.**⁷ He submitted that the law of adverse possession is extremely harsh for a true owner and is a windfall for a dishonest person, who illegally takes away possession of the property of the true owner. Therefore, the law is not to favour a person, who in a clandestine manner takes away the possession of the property of the owner in contravention of law.

5 (1995) 3 SCC 413

6 (2002) 9 SCC 608

7 (2011) 10 SCC 404

7.He also relied on **Maharwal Khewaji Trust (regd.) Faridkot vs. Baldev Das**⁸ on the point that alienation and transfer of property is not allowed with a view to arrest multiplicity of the proceedings. In the said suit, the trial Court granted an order of temporary injunction on the transfer and alienation of property. The appellate Court allowed the alienation subject to the law of *lis pendens* and if the construction is carried out, the respondent No.1 will be removed on his own risk and cost, if the suit is decreed. Then the revision filed against the order of the High Court was dismissed. The High Court recorded oral undertaking that the respondent has no intention to alienate the property, against which civil appeal was filed before the Supreme Court wherein the Supreme Court observed thus:

“5. 10. ... unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings.”

8.The learned Counsel also relied on **Kamala & Ors. vs. K.T. Eshwara Sa & Ors.**⁹, in support of his contention that partial partition is permissible.

9.He further submitted that to prove that a third party right is created,

8 (2004) 8 SCC 488

9 (2008) 12 SCC 661

defendant No.1 i.e., the appellant, did not produce any document. He submitted that the documents which are now shown to the Court i.e., registered agreement of sale, cannot be looked into as they were not produced before the trial Court. He submitted that the trial Court has rightly held that no third party interest is created and therefore, the order of the trial Court is to be upheld as legal.

10.The claim of the appellant/defendant No.1 of adverse possession against the co-sharers, at this prima facie stage, cannot be appreciated. The appellant may lead evidence and seek admissions to that effect at the time of trial. However, at this stage, the suit for partition which was filed by Damodar was dismissed for default and non-action, cannot be labelled by the lineal descendants of Damodar as ouster to accept the right of the appellant by adverse possession. So also, in the present suit, the contentions of Respondent No.1 i.e., the plaintiff that he was not aware of the possession of the suit property and he did not take any step till there was an express denial of his right, are difficult to accept. The appellant is a resident of Pune where the property situates in a prime locality. While deciding the application under Order 39 Rule 1 of the CPC, the Court has to look into the settled principles on which the case of the plaintiff is tested.

11.Assuming the plaintiff had knowledge of the denial of his right in 2011,

though he filed the suit within time i.e., within 3 years from the date of cause of action, yet, no urgency of action was shown by the plaintiff. Though the suit was filed in June, 2013 and though there was an express denial in April, 2013, there was a specific prayer in the plaint that no third party is to be created, no prayer for stoppage of construction was made in the application below exhibit 5; instead, prayer for simplicitor injunction not to create third party interest was made and the same was granted. It shows that by choice, the plaintiff has allowed the construction to go on and thus, the 8 storied building with 24 flats is ready as on today, as per the approved sanction plan by the Corporation. Undoubtedly, defendant No.1 has spent money and put in his efforts to get the building constructed. By construction of the building, the value of the suit land is definitely added. Thus, it shows that the defendant has taken a care of the property, laboured on it and spent huge amounts in construction of the flats. It is also true that the plaintiff and some of the defendants also have prima facie right in the suit property.

12. In the case of **Syed Askari Hadi Ali Augustine Imam & anr. (supra)**, the Supreme Court in para 32 has held that the judgment rendered by a probate Court is in rem and is binding on all Courts and authorities. However, in the present case, the original plaintiff i.e., respondent No.1, claims that Indirabai herself has acknowledged 50% share of the branch of Damodar and she claimed only 50% of the suit property being the lineal

descendant of Govind and, therefore, whether the probate is for the entire property or not, is the issue before the trial Court and it can be decided after evidence.

13. In the case of **Kenche Gowda (supra)**, the Supreme Court in para 14 thereof, observed that the death of one of the defendants and deletion of his name from the array of parties and not bringing the legal representatives would result in abatement of the suit. It is also held that a suit for partial partition in the absence of inclusion of all joint family properties, and the impleadment is not legal.

14. In the case of **Dalpat Singh vs. Prahlad Singh (supra)**, it is held that the 3 criteria which are used for while deciding application of interim relief, are not rhetoric phrases for incantation, but, are the words of width and elasticity. In para 6, it is held thus:

“6. ... The phrases “prima facie case”, “balance of convenience” and “irreparable loss” are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by men's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice.”

15. In **Mandralli Ranganna & Ors. vs. T. Ramchandra & Ors. (supra)**, the Supreme Court has considered that if a person had slumbered upon his

own right for a long time and allowed another person to deal with the property exclusively, then, he would not be entitled to an order of injunction. It also held that if at all the entire construction has come up, then it cannot be demolished and the party was allowed to carry out the construction subject to ultimate decision in the suit and if third party interest is created upon completion of the construction, then, the deeds in question, shall clearly stipulate that the matter is subjudice and further transactions are subject to ultimate decision in the suit.

16.In the case of **Sakhahari P. Korhale vs. B.S. Korhale (supra)**, the Supreme Court held that each member of the joint family is a co-sharer and possession of one is possession of all. Exclusive possession by a co-sharer cannot disentitle the other co-sharers claim against the property. In the case of **Maharwal Khewaji Trust (regd.) Faridkot vs. Baldev Das (supra)**, the Supreme Court held that the Court should not permit the nature of the property being changed which also includes alienation and transfer of property which may lead to irreparable loss and damage by a party to the suit.

17.As regards the case of **Maharwal Khewaji Trust (regd.) Faridkot (supra)**, the same is distinguishable from the present case as in the present case, there is an issue of partition and there is also undivided share of plaintiff and also defendant No.1 and other defendants. Moreover, it is

undisputed fact that in the suit plot, 8-storied building is constructed with 24 flats. Also, there is no question of stopping the construction as one flat is sold. Thus, the plaintiff has made out a case of irreparable loss and damage to the property. If injunction is granted and the suit may drag minimum for 4 to 5 years, then the value of the entire building which is constructed will decrease as the building will become old.

18. In the case of **Kamala & Ors. vs. K.T. Eshwara Sa & Ors. (supra)**, the earlier ratio laid down in **M/s.Kalloomal Tapeswari Prasad (HUF) vs. Commission of Income Tax**¹⁰, is relied on. In that case, as per Hindu law, it was held that partition may be either total or partial. It may be as regards the persons who are the members of the family or as regards the property which belonged to it.

19. As pointed out by the learned Senior Counsel that out of 32 defendants, defendant No.2 and defendant Nos.8 to 26 are not shown in the genealogy and only 10 defendants are shown as lineal descendants of Damodar. In the affidavits filed by those defendants do not disclose as to how they are related lineally to the common ancestor i.e., Waman Dixit. These submissions will have to be given some weightage as it is a suit for partition. The 50% right of the branch of Govind is prima facie undisputed. The submissions of the learned Counsel that this 50% cannot be carved out but

10 (1982) 1 SCC 447

it is undivided share in the absence of specific partition by metes and bounds are also accepted. However, when the injunction on transfer and creating third party is asked for in respect of such property, then, considering the fact of delay, undisputed 50% right of the branches of Govind and the huge amount invested and contributed by defendant No.1 and the efforts taken by defendant No.1, some workable arrangement is required to be done to meet equity till the rights of the parties are finally adjudicated. If the building is kept vacant, then the building will become uninhabitable as it loses its utility value and as it will gradually become older and unusable. Thus, it leads to irreparable loss to the person(s) who spent money in constructing the building.

20. Out of 24 flats, as pointed out, 4 flats are sold and the entire 8th floor is occupied by a person who funded the project. There are 4 flats in each floor. Thus, as on today, considering the submissions of the learned Senior Counsel, 8 flats are sold. As the 50% right of Defendant No.1 in the suit property, prima facie, is not disputed, he is allowed, without prejudice to the rights and contentions of both the parties, to sell 50% flats i.e., 12 flats. Out of remaining 12 flats, he can sell 2 flats by informing in writing and mentioning in the agreement with the proposed purchaser about the disputed rights or ownership and also that the same shall be subject to the outcome of the suit. The remaining 10 flats are to be kept vacant and no third party right / interest is to be created till the final outcome of the suit and

subject to furnishing a bank guarantee to the extent of construction cost of those 10 flats which can be provided by the plaintiff and the other defendants.

21.Thus, the order of the trial Court is modified to the above effect.

22.Appeal from Order is partly allowed.

(MRS.MRIDULA BHATKAR, J.)

After pronouncement of the judgment, Mr S.M.Gowardkar, learned counsel for respondents requests for stay of the above order for a period of four weeks as the respondents want to challenge the same.

The learned counsel for the appellant opposed.

The request granted. There shall be stay to the order for a period of four weeks.

(MRS.MRIDULA BHATKAR, J.)

...