

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2749 OF 2015

Hindurao Ganu Patil,	]
Age- 65, Occ- Agri,	]
R/o- Koge, Taluka – Karveer,	]
District- Kolhapur.	].. Petitioner

Versus

1. Balawant Pandurang Patil,	]
Age-49, Occ- Agri,	]
R/o- Koge, Taluka- Karveer,	]
District- Kolhapur,	]
Through Power of Attorney Holder	]
Rajiv Sadashiv Mulik,	]
Age-24, Occu- Agri,	]
R/o- Koge, Taluka- Karveer,	]
District- Kolhapur.	]
2. Pandurang Ganu Patil,	]
Age- 70, Occ- Agri,	]
R/o- Kore, Taluka- Karveer,	]
District- Kolhapur.	]
3. Parvati Pandurang Patil,	]
Age- 65, Occu--	]
R/o- Koge, Taluka- Karveer,	]
District- Kolhapur.	]

4. Anandi Sadashiv Mulik,]
Age- 55, Occu- Agri,]
R/o- Mahe, Taluka- Karveer,]
District- Kolhapur.]
5. Malubai Balawant Patil,]
Age- 50, Occu- Agri,]
R/o- Chafodi, Taluka- Karveer,]
District- Kolhapur.].. Respondents

Mr. P D. Dalvi a/w Mr. K. P Lad, for the Petitioner.

Mr. G. N. Salunke, for the Respondent No.1.

Mr. R. G. Patil, for the Respondent No.2.

CORAM : R.M. SAVANT, J.

DATE : 14th OCTOBER, 2015

ORAL JUDGMENT

1. Rule, with the consent of the Learned Counsel for the contesting parties made returnable forthwith and heard.

2. The Writ Jurisdiction of this Court is invoked against the order dated 24.02.2015 passed by the Learned Adhoc District Judge, Kolhapur, by which order the Appeal being Misc. Civil Appeal No.11 of 2015 came to be allowed and resultantly, the order dated 03.01.2015 passed by the Trial Court came to be modified to the extent mentioned in the operative part of the said order. The said operative part would be

referred to in the latter part of this order.

3. The Petitioner herein is the Defendant No.5 to the suit which has been filed by the Respondent No.1 herein who is the original Plaintiff. The said suit has been filed for partition and separate possession as also for a declaration in respect of the Sale Deed executed by the Respondent No.2 herein i.e. Defendant No.1 to the suit in favour of the Petitioner herein who is the Defendant No.5 to the suit. The Sale Deed between the Defendant No.1 and Defendant No.5 is dated 20.03.2014. The suit properties are mentioned in paragraph 1 of the plaint. However, out of the suit properties mentioned in paragraph 1, the subject matter of the Sale Deed are properties mentioned at Sr. No.2 and Sr. No.4 of the table appearing in paragraph 1 of the plaint. They are Gat No.436 out of which 1/3 share i.e. 8 Ares and Gat No.973 in its entirety i.e. 5 Ares. The Defendant No.1 is the father of the Plaintiff and claims to be the Karta of the family. The execution of the Sale Deed by the Defendant No.1 in favour of the Defendant No.5 has triggered off the filing of the suit. In the said suit, the Plaintiff filed an application for temporary injunction against the Defendants i.e. Defendant Nos.1 and 5. In so far as the Defendant No.1 is concerned injunction was sought for restraining him from alienating the suit property and in so far as the Defendant No.5 is concerned, the injunction was sought that on the basis of the Sale Deed

the Defendant No.5 should not interfere with the possession of the Plaintiff in the suit properties. At this stage, it is required to be noted that the Defendant No.1 in his Written Statement has stated that the suit properties were sold by a Sale Deed and the possession was handed over to the Defendant No.5. It is stated that the Defendant No.1 was constrained to sell the properties in view of fact that he was facing financial crisis as the Plaintiff was not taking care of him. It seems that the Plaintiff is an engineer and was employed in Ahmednagar. The Trial Court considered the said application for temporary injunction and by its order dated 03.01.2015 partly allowed the said application and enjoined the Defendant No.1 from dealing with the suit property in whatsoever manner pending the suit. In so far as the Defendant No.5 is concerned, the Defendant No.5 was restrained from dealing with the suit properties at Sr. Nos.2 and 4 in whatsoever manner pending the suit.

4. The Plaintiff aggrieved by the said order dated 03.01.2015 passed by the Trial Court carried the matter in Appeal by way of Misc. Civil Appeal No.11 of 2015. The Lower Appellate Court as indicated above has allowed the Appeal and modified the injunction granted by the Trial Court. In so far as the Defendant No.5 is concerned, the Lower Appellate Court enjoined the Defendant No.5 from interfering with the Plaintiff's possession in respect of the suit properties mentioned at

Sr. Nos.2 and 4 in the table appearing in paragraph 1 of the plaint. Hence, the Lower Appellate Court for the first time granted injunction in favour of the Plaintiff restraining the Defendant No.5 from interfering with his possession in respect of the suit properties at Sr. Nos.2 and 4 of the table appearing in paragraph 1 of the plaint. As indicated above, it is the said order dated 24.02.2015 which is taken exception to by way of the above Petition.

5. Heard the Learned Counsel for the parties. The Learned Counsel for the Petitioner would contend that assuming that the suit filed by the Plaintiff for partition is allowed, the Plaintiff would ultimately be entitled to a share of 15 Ares of the land out of the total suit properties as also the Defendant No.2 would be entitled to a share of 15 Ares of land. Since the Defendant No.1 has sold 12 Ares of land to the Defendant No.5, the land sold to the Defendant No.5 can obviously be apportioned against the share of the Defendant No.1. The Learned Counsel would contend that the possession of the suit property was handed over to Defendant No.5 which fact has been accepted by the Defendant No.1 in his Written Statement-cum-reply filed to the application for temporary injunction. It was the submission of the Learned Counsel that the Lower Appellate Court has unnecessarily roped in the Defendant Nos.2 to 4 in respect of the grant of injunction when the said Defendants are siding with the Defendant

No.5 and standing by the Sale Deed executed by the Defendant No.1 in favour of the Defendant No.5.

6. Per contra, it is submitted by the Learned Counsel appearing for the Respondent No.1/original Plaintiff that having regard to the well settled position that a purchaser of an undivided share in a joint family property has to file a suit for partition to get the possession of his share, the grant of injunction by the Lower Appellate Court cannot be faulted with. It was the submission of the Learned Counsel that the Plaintiff was in joint possession with the Defendant No.1 and therefore there is no question of handing over of possession by the Defendant No.1 to the Defendant No.5. It was the submission of the Learned Counsel that since the suit is one for partition, the injunction granted in favour of the Plaintiff by the Lower Appellate Court cannot be faulted with.

7. Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, the Trial Court in a suit for partition has refused to grant injunction against the Defendant No.5 having regard to the fact that the Defendant No.1 has executed a Sale Deed in favour of the Defendant No.5 and therefore he partakes the character of a co-owner in so far as the joint family is concerned. It is required to be noted that the Defendant No.1 has in terms stated in his

Written Statement that in view of the fact that the Plaintiff was not looking after the Defendant No.1, that he was constrained to sell the properties to the Defendant No.5 who is his brother and who is the third party purchaser in the suit. The question whether the property was sold for the necessity of the Defendant No.1 can obviously be gone into at the trial of the suit. The question that arises whether the Defendant No.5 can be said to be in possession of the suit property. The Lower Appellate Court has recorded a finding against the Defendant No.5 on the ground that though he claims to be in exclusive possession, he has not produced any material on record. In the said context, it is required to be noted that the Respondent No.1/Plaintiff has also not produced any material that he is in possession and that he has cultivated sugarcane which was there at the time filing of the suit. In the said context, it is required to be noted that the Defendant No.1 in his Written Statement has unequivocally stated that he has sold the suit property along with sugarcane crop that was standing in the land in question. This therefore fortifies the case of the Defendant No.5 that he is in possession of the suit property. It is also required to be noted that even if the Plaintiff ultimately succeeds in the suit, the Defendant No.1 would be held entitled to a share of 15 Ares out of the total land holding of the family. This would suffice to take care of the 12 Ares land that the Defendant No.1 has sold to the Defendant No.5,

assuming that the theory propounded by the Defendant No.1 is not accepted by the Trial Court. It is therefore not a situation which is irreversible for the Plaintiff in the sense that if the injunction is not granted, then prejudice would be caused to the Plaintiff. In my view, therefore, it would be just and proper to set aside the order passed by the Lower Appellate Court and substitute the same by the injunction granted by the Trial Court. The order passed by the Lower Appellate Court is accordingly set aside and substituted by the operative part of the order passed by the Trial Court. The injunction granted by the Trial Court to the extent mentioned in the said order dated 03.01.2015 would continue to operate pending the suit. This would in my view would take care of the interest of both the parties. The Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs.

[R.M. SAVANT, J]