

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.897 OF 2014
WITH
CIVIL APPLICATION NO.1074 OF 2014**

Parvati Uttamrao Kanchan and Others ... Appellants

vs.

Nilesh Pandurang Kanchan and Others ... Respondents

Ms. Lalita Panchkshari, for the Appellants.

Mr. M.S. Karnik i/b. S. Waghmare, for Respondent Nos. 1 to 16.

Mr. P.S. Dani, Senior Advocate i/b. Mr. H.P. Vyas, for Respondent Nos. 21, 21A and 21B.

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

DATE: **7th DECEMBER, 2015**

P.C.:

. In this Appeal from Order, the order dated 16th August, 2014 passed by the Joint Civil Judge, Senior Division, Pune rejecting the application (Exhibit 5) filed by the Plaintiffs is challenged.

2. The Appellants/Plaintiffs have filed a suit for specific performance and also for injunction against the Defendants. Plaintiff No. 1 and 2 who are the mother and son have entered into an agreement of sale of the agricultural land bearing Gut No. 776

admeasuring 2 hector 04 R on 12th April, 1984 for the consideration of Rs. 1,25,000/-. Out of which Rs. 1,10,000/- was paid and the possession of the land was handed over to Plaintiffs at the relevant time.

3. The land originally belong to one Gyanba Baloba Kanchan (deceased), father of Defendant No. 1 and other Defendants. Gyanba died prior to 1984 and the legal heirs of Gyanba had entered into an agreement of sale with Plaintiff No. 1 and 2. The sale deed was executed between the parties though there was continuous persistence by the Plaintiff for the execution. Gyanba had two sons and three daughters. There was a dispute between his legal heirs. One daughter Malan Kanchan filed a suit for partition and separate possession. As per the family partition, 1/15 share was given to three daughters of Gyanba and the same is challenged in the Civil Suit by the daughter Malan. The suit was partly decreed and Malan and other two daughters were given 1/5 share each. Being aggrieved by the said order, the Civil Application No. 826 of 2005 was filed and as per the order passed in the Civil Application No. 826 of 2005 on 17th October, 2011 the share in the property of the daughters was increased from

1/15 to 1/5th share of the total property. The said order was not challenged and it attained finality. Prior to the decision of the civil Appeal, the Civil Suit was decreed deciding 1/15 share of daughters. Therefore, Defendant Malan Kanchan and her legal heirs entered into a registered sale deed with the Plaintiff/Appellant No. 3 Surekha Borkar for their 1/15 share by a registered sale deed on 29th September, 2004. Thus, the Plaintiff No. 3 Surekha has an independent agreement in respect of the 1/15th share in total property i.e. admeasuring 13.60 R land which was fallen to the share of Defendant Malan Kanchan by the decree of the Civil Suit.

4. The Defendants i.e. legal heirs of Gyanba and so also Defendant No. 17 Malan sold all the remaining portion of the land to Respondent No. 21 Developers by two registered sale deeds dated 21st and 22nd May, 2014. Being aggrieved by these sale deeds as the Defendants refused to execute the conveyance in favour of Plaintiff Nos. 1 and 2, a suit for specific performance was filed. The learned Joint Civil Judge, Senior Division, Pune rejected the said application below Exhibit 5. Hence, this Appeal.

5. The learned counsel for the Appellants has submitted that the Appellants are the possessor of the entire suit land admeasuring 2 H 4 R, Gut No. 776 since 1984, as they have paid the major portion of the consideration amount of Rs. 1,10,000/- out of Rs. 1,25,000/-. She further submitted that the Appellants, as per the said agreement are enjoying right to fetch water for cultivation and they are actually cultivating and taking crop/vegetables in the said land. In support of her contention, she produced the receipts of purchase and sale of the vegetables in the market. She submitted that the learned Judge has committed error in not appreciating their evidence of possession of the entire land.

6. Per contra, the learned senior counsel for the Respondents/ Defendants pointed out that the Civil Suit was filed by Defendant Malan for partition and separate possession. So also Malan has specifically mentioned that after the death of Defendant No. 1 Gyanba being Karta of the family, he is in possession of the suit land and the land is cultivated by him and therefore he is enjoying the income of the said land. He submitted that Plaintiff No. 3 claiming the rights through Defendant Malan Kanchan. However, Malan and her

legal heirs have subsequently sold the remaining share of their land which is given to them as per the decision of the Appellate Court i.e. 1/15th to 1/5th share. He submitted that the entire portion of the land except 1/5th share, the remaining land was sold by two registered sale deeds dated 21st and 22nd May, 2014 to Defendant No. 21 and the possession of the land is also handed over to Defendant No. 21 Developer.

7. Perused the order passed by the learned trial Judge. Perused the documents and receipts produced by the Appellants showing their possession of the land. The receipts disclose that the crops of onion and other vegetables were taken by the Appellants from the land Gut No. 776. However, these receipts do not establish *prima facie* whether the land cultivated by the Appellants is the entire land of Gut No. 776 or it is a portion of the said Gut number. Besides, there is nothing to show that the Appellants are in possession of the entire land admeasuring 2 H 4 R. The possession of the Plaintiffs land admeasuring 13.60 R is not disputed by the Respondents as they are in possession of the said land by a registered sale deed dated 29th September, 2004 which is prior to decision of the Appeal which was

decided on 17th October, 2011. Thus, after the Appeal, the share of Defendant Malan and others was increased from 1/15 to 1/5th share and it appears that the enhanced share of the land was sold by Malan and others to Defendant No. 21. Malan Kanchan has filed a civil suit for partition and separate possession. It shows that the possession at the relevant time was with Defendant No. 1 and his legal heirs.

8. In view of this, as the Appellants cannot show the possession of the entire land i.e. land admeasuring 2 H 4 R. Therefore, the order dated 16th August, 2014 passed by the Joint Civil Judge, Senior Division, Pune is hereby maintained.

9. Accordingly, the Appeal from Order stands dismissed.

10. In view of the above, the Civil Application is disposed of.

(MRS.MRIDULA BHATKAR, J.)