

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.464 OF 2014
WITH
CIVIL APPLICATION NO.542 OF 2014
IN
APPEAL FROM ORDER NO.464 OF 2014**

Shri Ramdas Shrihari Dagade and
Ors.

...Appellants

Versus

Jaban Bala Dagade & Ors.

...Respondents

.....

Mr. Rajshekhar V. Govilkar for the Appellants/Applicants.
Mr. Vipin Kamdi i/b. Mr. Prashant G. Pandey for the Respondent
No.33.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 4th/5th JULY, 2017.

Judgment :

Mr. Vipin Kambli, the learned Counsel for the Respondent No.33 waives service. By consent of the Appellants and the Respondent No.33, being the only contesting respondent, the Appeal from Order is taken up for final hearing at the stage of admission.

2. The Appellants herein have challenged the order dated 11th February, 2014 whereby the learned Civil Judge, Senior Division,

Pune, dismissed the application for temporary injunction filed by the aforesaid Appellants in Special Civil Suit No.1192 of 2012.

3. The appellants were the Plaintiffs and the Respondents were the Defendants in the suit. For the sake of convenience they shall be hereinafter referred to as “the Plaintiffs” and “the Defendants” respectively.

4. The subject matter of the suit is the property under Survey No.339, Hissa No.10 at Village Mauje Bavadhan Budruk. The said property shall be hereinafter referred to as the suit property.

5. The case of the Plaintiffs is that the suit property is Hindu Undivided Family (HUF) property, originally owned by Dhondiba Arjuna Dagade. Said Arjun Dagade had two sons viz. Bala @ Balaji and Savala. Upon the death of said Dhondiba, the suit property devolved upon his two sons. The Plaintiffs and the Defendant Nos.22 to 32 are the descendants of Savala, whereas the Defendant Nos.1 to 21 are the descendants of Balaji.

6. The Plaintiffs claim that the suit property was vatan land . The vatan holder failed to pay the price within the stipulated time,

hence the rights were forfeited and the land was recorded in the name of the Government. That upon the Defendant No.1 paying the price, the property was re-granted to the father of the Plaintiff and the Defendant No.1. The Plaintiffs have stated that the suit property is a joint ancestral Hindu Undivided Family property. The suit property has not been partitioned and that the name of the Defendant No.1 is recorded in survey records as Karta of Hindu Undivided Family (for short 'HUF').

7. The Plaintiffs have alleged that on 14th December, 1995, the Defendant No.1 and others, with an intention of misappropriating half share of the Plaintiffs, sold the suit property to one Ashok Dattatray Abdagiri. The Plaintiffs therefore lodged objections before the survey authorities and pursuant to the said objections; Mutation Entry No.2493 in favour of Ashok Abdagiri was cancelled. The Plaintiffs claimed that Defendant No.16-Vinayak and others had no right to execute any sale deed in favour of Ashok Abdagiri.

8. The Plaintiffs have further claimed that on 23rd June, 2011 the Defendant No.1-Jaban Dagade, without their consent, sold the suit property to the Defendant No.33-M/s. Goyal Ganga Developers (India

Pvt. Ltd.). The Plaintiffs have claimed that the suit property being Hindu Undivided Family Property, the Defendant No.1 had no right to sell the property without their consent. Hence, the said sale deed, to the extent of half share of the Plaintiffs, is null and void. The Plaintiffs also alleged that Defendant No.33, has threatened to transfer the suit property to third person. The Plaintiffs therefore, filed a suit for declaration that the sale deed dated 23rd June, 2011 executed by the Defendant No.1 and others in favour of the Defendant No.33 is not binding on them to the extent of their half share. The Plaintiffs also sought relief of permanent injunction to restrain the Defendant No.33 from transferring, alienating or creating third party rights in respect of the suit property and further from interfering with their possession in respect of the suit property. The Plaintiffs also filed an application for temporary injunction to restrain the Defendant No.33 from transferring, alienating, or creating third party rights in respect of the property and/or disturbing his possession in respect of the suit property.

9. The case of the Defendant No.33, in brief, is that the property was re-granted to the Defendant No.1-Jaban Dagade as 'Vatandar' as per the Mutation Entry No.1204. Said Jaban Dagade paid

Nazrana amount to the Government and that the suit property was allotted to him in his individual capacity and not as Karta of HUF. The Defendant No.33 contended that the father of the Plaintiffs had no right to the property and that neither the names of the Plaintiffs nor the name of his father was recorded in the revenue records. The Defendant No.33 claims that they have purchased the suit property from Defendant Nos.1 to 21, who were the exclusive owners, on payment of consideration of Rs.1,50,00,000/-. The Defendant No.33 claims that they are the owners in possession of the suit property and as such the Plaintiff is not entitled for the relief of injunction as claimed.

10. The learned Trial Judge, after considering the case put forth by the respective parties, held that that the Plaintiffs have *prima facie* failed to prove that the suit property was purchased by their predecessor as 'Watandar' and that they are in possession of the suit property. The learned trial Judge further held that the suit property is standing in the name of the Defendant No.1-Jaban Dagade since 1953-1954 and that the Plaintiffs had not objected for the said entry. They had neither challenged the Mutation Entry nor sought partition of the property. The learned Judge further held that the Defendant No.33

has purchased the suit property from the Defendant Nos.1 to 21 for consideration of Rs.1,50,00,000/-. The learned Judge further held that grant of interim relief as prayed by the Plaintiffs would cause irreparable loss to the Defendant No.33. The learned Judge in short, held that the Plaintiffs had not proved the prerequisites essential for grant of interim relief and hence, dismissed the application for injunction. Aggrieved by the said order, the Plaintiffs have preferred this Appeal from Order.

11. Mr. Govilkar, the learned counsel for the Plaintiffs has submitted that the suit property was initially granted to Dhondiba Dagade, predecessor of the Defendants as well as the Plaintiffs. He has further submitted that it was re-granted to Defendant No.1-Jaban Dagade not in his individual capacity but as a Karta of HUF . He contends that the suit property being joint family property, the burden was on the Defendants to prove that it was a self acquired property. The learned counsel submits that the Defendants have not discharged this burden.

12. The learned Senior Counsel for the Plaintiffs submits that the learned Judge failed to consider that the suit property is

recorded in the survey records, in the name of Defendant No.1-Jaban Dagade as karta (HUF) and that said revenue entry would not confer any title on the Defendant No.1. The learned counsel submits that the Plaintiff continues to be in possession of the suit property despite the sale in favour of Ashok Abdagiri. He has submitted that the learned trial Judge failed to appreciate that the Defendant No.1, who was holding the suit property as Karta of HUF, was not competent to sell the property to the Defendant No.33. He has submitted that the Plaintiffs have raised issues which need to be adjudicated on merits. Until such time the subject matter of suit is required to be maintained in status quo. He has submitted that the impugned order is arbitrary, illegal and cannot be sustained.

13. Mr. Vipin Kamdi, the learned counsel for the Defendant No.33 has submitted that the Plaintiffs have prima facie failed to prove that the suit property was allotted to the Defendant No.1 as Karta of HUF and that the same is Hindu Undivided Family property. The suit property was re-granted to the Defendant No.1 and the Nazrana in respect of the suit property was paid solely by the Defendant No.1. Furthermore, the suit property is recorded in the revenue records in the name of the Defendant no. 1. He claims that the Defendant No.33

has purchased the property from the Defendant Nos.1 to 21 by paying consideration of Rs.1,50,00,000/- and that he is in possession of the suit property. He has submitted that the Defendant No.33 has developed the suit property along with several other adjoining properties. The Defendant No.33 has constructed several buildings in the said properties after obtaining permissions and sanctions from the concerned authorities. He has submitted that some of the flats /apartments constructed in the suit property have already been transferred in favour of third parties and that they are in possession of the same. The learned counsel for the Defendant No.33 has submitted that the Plaintiffs have approached the Court after considerable delay and that the delay in approaching the Court does not justify grant of equitable relief.

14. I have perused the records and considered the submissions advanced by Mr. Rajshekhar Govilkar, the learned counsel for the Plaintiffs and Mr. Vipin Kamdi, the learned counsel for the Defendant No.33.

15. The pleadings prima facie reveal that the Plaintiffs have approached the Court with a specific plea that the suit property is HUF property, a Watan land originally allotted to Dhondiba Arjuna Dagade.

It is not in dispute that Dhondiba Arjuna Dagade had not paid the price in respect of the said allotment and hence the rights were forfeited and the land was recorded in the name of the Government i.e. State of Maharashtra. It is also not in dispute that the Defendant No.1 had paid 'Nazrana' and the property was re-granted in favour of the Defendant No.1 in the year 1950. In the case of Appasaheb Chandgade Vs. Devendra AIR 2007 SCC 218 the Apex Court after considering the previous decisions in **Shrinivas Krishnarao Kango .V. Narayan Devil Kango and Ors. AIR 1954 SC 379**, **Mst. Rukhmabai V.Lala Laxminarayan and Ors. AIR 1960 SC 330**, **Achuthan Nair V.Chinnammu Amma and Ors. AIR 1966 SC 411** **Bhagwant P.Sulakhe V.Digambar Hopal Sulakhe and Ors. AIR 1986 SC 79**, **Surendra Kumar V. Phoolchand (dead) through Lrs. and Anr.AIR 1996 SC 1148** has held thus:

"Therefore, on survey of the aforesaid decisions what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family property and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence."

16. It is thus well settled that the fact that a family is a joint Hindu family does not raise a presumption that the property held by members of a joint family is a joint property. The initial burden of establishing that the property is a joint family property is upon a person asserting such fact. This burden can be discharged by substantiating that the family possessed some joint property which may have formed the nucleus from which the property in question may have been acquired. It is only then the onus shifts to the individual member to establish that it is a self-acquired property. In the instant case there is no prima facie material to prove that the property was acquired with aid of joint family funds or that the land was allotted to the Defendant No.1 in the capacity of Karta of HUF. Thus, prima facie the property cannot be held to be a joint property of Hindu Undivided Family. The Plaintiff has therefore failed to prove prima facie case.

17. It is also to be noted that the pleadings prima facie indicates that sons of the Defendant No.1 and some others had sold the suit property to one Ashok Abdagir sometime in the year 1995 by deed of sale dated 14.12.1995. The Plaintiffs had averred that the said sale deed was executed with an intention of depriving them of their half share in the property. The Plaintiffs were therefore aware that the

Defendant No.1 was claiming the suit property as self-acquired property and was thus disputing the title of the Plaintiffs to the suit property. Despite such assertion, the Plaintiffs have not sought any declaration in regard to the title nor sought partition of the property.

It is also pertinent to note that the property was sold to the Defendant No. 33 by sale deed dated 26th March, 2011. The Defendant has already developed the suit property along with other adjoining properties after obtaining necessary permissions from the appropriate authorities and has already transferred the flats to third parties. Considering all these aspects and the delay in approaching the court, the learned judge was justified in declining to exercise discretion in favour of the Plaintiffs. The order is neither arbitrary nor perverse. Hence does not warrant interference.

18. It is made clear that the above observations are tentative and only for the purpose of disposing of the application for temporary injunction and that the suit has to be decided without being influenced by the observations recorded either in the impugned order or in the order of this Court.

19. The Appeal from order is accordingly dismissed.

20. In view of the disposal of the Appeal from Order, the Civil Application does not survive and hence stands disposed of.

(ANUJA PRABHUDESSAI, J.)