

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5115 OF 2016

Ramesh Ramdas Shelke ... Petitioner
Vs.
Abasaheb Shankar Shinde (decd) and others ... Respondents

Mr. Shriram S. Kulkarni for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : MARCH 07, 2017

P.C. :

Heard Mr. Kulkarni, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.1', has challenged the judgment and order dated 14.03.2016 passed by the learned District Judge-2, Niphad in Civil Miscellaneous Appeal No.4 of 2014. By that order, the learned District Judge allowed the appeal preferred by respondents No.1 to 4, hereinafter referred to as 'plaintiffs', and quashed and set aside the judgment and order dated 07.12.2013 passed by the learned Civil Judge, Junior Division, Yeola below exhibits 16 and 20 in Regular Civil Suit No.227 of 2012. The learned District Judge allowed the application exhibit-16 filed by the plaintiffs and rejected the application exhibit-20 filed by the defendant No.1. The learned District Judge issued injunction restraining defendant No.1 from alienating the suit property to anybody else as also from creating any third party interest in the suit property till the decision of the Suit.

3. In support of this Petition, Mr. Kulkarni submitted that respondent No.5, hereinafter referred to as 'defendant No.2', had executed the sale deed on 10.03.2010. In that sale deed, he sold specific

portion of his undivided share in Gat No.221. Since then, defendant No.1 is in possession. He submitted that defendant No.1 is the owner of Gat No.220, which is adjacent to Gat No.221. On 16.06.2011, defendant No.2 again sold specific portion of his undivided share in Gat No.222A/1 along with 1/3rd share in the well water situate therein. He submitted that in fact, earlier, Gat No.222A/1 was sold to defendant No.1 by conditional sale. Defendant No.1 thereafter re-conveyed the property in favour of defendant No.2 and finally, by document dated 16.06.2011, defendant No.2 sold the property to the defendant No.1. This is an out and out sale transaction.

4. Mr. Kulkarni invited my attention to the averments made in paragraphs 12 to 14 of the written statement dated 31.07.2012 filed by the defendant No.1. In paragraph 12, defendant No.1 contended that the transaction made by the defendant No.2 with defendant No.1 was with the consent of the plaintiffs and they were aware of these transactions. In fact, at the time of execution of the sale deed, defendants No.1 and 2 were personally present. Defendant No.1 had paid consideration to plaintiffs No.1, 2, 4 and defendant No.2 in the presence of witnesses. The transaction was made because of the legal necessity. In paragraph 14, defendant No.1 contended that on 16.06.2011, defendant No.2 executed sale deed in favour of defendant No.1, and on the same day, out of the consideration received by the plaintiffs, plaintiffs have purchased land bearing Gat No.73. In other words, the consideration paid by the defendant No.1 was utilized by the plaintiffs for purchasing other property. Since then, defendant No.1 is in possession of specific portion of share of defendant No.2.

5. Mr. Kulkarni invited my attention to the prayers made in the application exhibit-16 made by the plaintiffs. Plaintiffs sought

injunction restraining defendant No.1 from creating any third party interest as also creating charge over the suit property. In other words, plaintiffs also accepted that defendant No.1 is in possession of the suit property. He also invited my attention to the prayers made by the defendant No.1 in application exhibit-20. Defendant No.1 prayed for injunction restraining plaintiffs from obstructing his peaceful possession over the suit property. By order dated 07.12.2013, the learned trial Judge rejected plaintiffs' application exhibit-16 and allowed defendant No.1's application at exhibit-20 and restrained plaintiffs from obstructing peaceful possession and cultivation of defendant No.1 over the suit property till the decision of the Suit.

6. As against this, the learned District Judge allowed the appeal of plaintiffs. He has taken me through paragraphs 9 and 10 of the impugned order. In paragraph 9, the learned District Judge referred to Section 44 of the Transfer of Property Act, 1882 (for short 'Act'). He submitted that the first paragraph of Section 44 lays down that where two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, **the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same.** In the present case, defendant No.2 is legally competent to transfer his share in the suit property. In view of the first paragraph of Section 44, defendant No.1 is entitled to right to joint possession in the suit property. The learned District Judge was, therefore, not justified in allowing the appeal. In any case, he submitted that liberty may be reserved to the defendant No.1 to file application in the trial Court for injunction restraining the plaintiffs from creating third party interest.

7. I have considered the submissions advanced by Mr. Kulkarni. I have also perused the material on record. A perusal of the sale deeds dated 10.03.2010 and 16.06.2011 unequivocally shows that prima facie, defendant No.2 had sold his undivided share in Gat No.221 and 222A/1. In view of Section 44 of the Act, the remedy of the purchaser is to institute Suit for partition. In the present case, plaintiffs have already prayed for partition as also for cancellation of sale deeds dated 10.03.2010 and 16.06.2011. In the case of ***Gajara Vishnu Gosavi Vs. Prakash Nanasahed Kamble***, 2009 (6) ALL MR 983, the Apex Court referred to decisions in ***Ramdas Vs. Sitabai***, (2009) 7 SCC 444, ***M. V. S. Manikayala Rao Vs. M. Narasimhaswami***, AIR 1966 SC 470 and ***Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh***, AIR 1953 SC 487, wherein the Apex Court held that a purchaser of a co-parceners's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property.

8. In view thereof and for the reasons recorded in paragraphs 9 and 10 of the impugned order, I do not find that the learned District Judge has committed any error in passing the impugned order as basically defendant No.1 cannot claim to be in joint possession of the suit property. Hence, Petition fails and the same is dismissed reserving liberty to the defendant No.1 to file application in the trial Court for injunction restraining plaintiffs from creating third party interest in the suit property. All contentions of the parties in that regard are expressly kept open. Order accordingly.

(R. G. KETKAR, J.)