

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 745 OF 2016
WITH
CIVIL APPLICATION No. 935 OF 2016 IN A.O. NO.745 OF 2016

Krishna @ Kishan Kalu Thakur & Ors.	... Appellants/Applicants
Vs.	
Ramchandra Kalu Thakar (Decd.)	
Nana Ramchandra Thakar & Ors.	... Respondents

Mr. Prathamesh B. Bhargude, Advocate for the appellants.
Mr. U.B. Nighot, Advocate for respondent nos. 1, 3 to 15 and 24 to 29.
Mr. Kalpesh U. Patil, Advocate for respondent nos. 19 to 23.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **12th December, 2017.**

P.C.:

Admit. By consent, the Appeal is heard finally and disposed of at the stage of admission.

2. This Appeal from Order is directed against the order dated 17th February, 2016 passed by the 2nd Joint Civil Judge Senior Division, Pune thereby rejecting the Application Exhibit 5 which is filed by the appellants/original plaintiffs under Order 39 Rule 1 of the Code of Civil Procedure.

3. It is the case of the appellants/plaintiffs that they and

respondents/defendant nos. 1 to 18 are the siblings or the heirs of the siblings. Appellant/plaintiff No. 1 is the son of Kalu Genu Thakar who owned the properties mentioned in paragraph 1 of the plaint. Kalu Genu Thakar had four sons and four daughters. Ramchandra Kalu Thakar, being the eldest son, was the karta of the family and was looking after the ancestral property. It is the case of the appellants/plaintiffs that no partition ever took place between the children of Kalu Genu after his death. Being the eldest son of Kalu Genu Thakar, most of the properties remained in the name of Ramchandra,. The plaintiffs had knowledge that defendant No. 1, son of Ramchandra, has sold the property bearing Survey No. 14, Hissa No. 10 at Village Mann, Taluka Munshi, District Pune to respondent nos. 19 to 23, 24 and 25. Thus, the total land of 52 R is disposed of out of the ancestral property. Hence, the plaintiffs filed Special Civil Suit No. 1167 of 2015 for partition against his brothers/siblings and their legal heirs, so also against the purchasers of the said land. The trial Court refused to grant any relief in Exhibit 5. Hence, this Appeal.

4. The learned counsel for the appellants/plaintiffs has submitted that the trial Court while refusing the relief has mentioned that the

plaintiff has not specifically made out the case that the defendants are alienating the suit property to third person and as nothing is pleaded in that respect, the learned trial Judge refused to grant relief. The learned counsel has submitted that by way of Exhibit 5, the plaintiffs pleaded for the relief that all the defendants should not create third party right or interest or should not alienate, transfer the suit property mentioned in paragraph 1 of the plaint. He submitted that same limited relief is prayed in this Appeal from Order, if not granted, the suit will be infructuous.

5. The learned counsel appearing for respondent no.1, 3 to 15 and 24 to 29 and the learned counsel appearing for respondent nos. 19 to 23 while opposing this Appeal from Order has submitted that the properties mentioned in paragraph 1 of the plaint are self acquired properties of the defendant No. 1 and the partition has taken place between all the children of Kalu Genu Thakar in the year 1974. The learned counsel for respondent No. 1 has submitted that some properties were purchased by plaintiff No. 1 after 1974, however, those properties are not mentioned in the description of the suit properties. It is submitted that defendant No. 1 in the year 1994 purchased the property mentioned at serial No. 5 of paragraph 1 of

the plaint. It is a self-acquired property of defendant No. 1. Out of 52 R of the suit property at serial No. 5, he sold 48 R to defendant nos. 19 to 23 and land of 4R was sold to respondent nos. 24 and 25.

6. The learned counsel appearing for respondent no.1, 3 to 15 and 24 to 29 and the learned counsel appearing for respondent nos. 19 to 23 submitted that they are bonafide purchasers of this property which exclusively stood in the name of defendant no.1 and it is purchased by him in the year 1994.

7. After considering the submissions of both the parties and going through the order and pleadings, prima facie it appears that the properties mentioned in paragraph 1 of the plaint are originally owned by Kalu Genu Thakar except the property shown at serial No. 5. Whether partition took place in the year 1974 or not, is a disputed fact for which the evidence is required. The finding of the trial Court that the plaintiff has not specifically made out a case for alienation of the suit property is incorrect because there is an instances of sale of the property, i.e., at serial No. 5 by defendant No. 1 to defendant nos. 19 to 25. Whether the said property at sr. no. 5 was purchased out of income of the ancestral property or not, is also a disputed fact,

however, at this stage, it prima facie appears that defendant nos. 19 to 25 are the bonafide purchasers. Considering this position, if at all finally the trial Court comes to the conclusion that the property at serial No. 5 was purchased out of the income of the ancestral property, then the said portion of the land, i.e., 52R can be adjusted by the trial Court while apportioning the suit property. Hence, I pass following order :

- (i) The respondents except respondent nos. 19 to 25 shall not alienate, transfer the suit properties and shall not create third party right and interest in any manner in the suit properties described in Part 1A and 1B till the hearing of the suit.
- (ii) If respondent No. 1 or other respondents except respondent nos. 19 to 25 want to sell, transfer, alienate or create third party right in the suit properties, then permission of the trial Court is to be obtained.

8. Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)