

Sequeira

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

SECOND APPEAL NO.419 OF 2014

Uttam Jotiram Nikam & anr. .. Appellants

Vs

Khashaba Sakharan Nikam

(deceased by his heirs)

1a) Hanmant Khashaba Nikam & ors. .. Respondents

Mr.P.B.Gujar, for Appellants.

Mr.Vaibhav Gaikwad, for Respondent No.1-(a).

Coram : N.M.Jamdar, J.

Date : 4 May 2017.

Oral Order :

The Appellants – original Plaintiffs have challenged the dismissal of the Suit and Appeal by the learned Civil Judge, Junior Division, Satara and the learned District Judge, Satara.

2. The Appellants filed a Suit bearing No.109 of 1997 seeking an injunction against Respondents-Defendants in respect of their possession. According to the Appellants, the suit property Gat No.1494 situate at Mouje, Apshinge, taluka and district Satara was purchased jointly on 1 August 1955, by both the Appellants and Respondents. It is the case of Appellants that Appellants and Respondents are co-owners to the tune of 50 paise i.e. half the share. The learned Civil Judge held that the parties are joint owners of the

suit property, however the case of the Appellants that they have 50 paise share in the suit property was negatived. The learned Civil Judge accordingly dismissed the Suit by judgment and order dated 28 March 2008. Appeal bearing No.127 of 2008 was filed by the Appellants in District Court, Satara. In the Appeal the learned District Judge negatived the contention of the Appellants that the Appellants are having 50 paise share i.e. half the share in the suit property. The learned District Judge held that the Appellant was entitled to one fourth share in the suit property and the additional one fourth share has been obtained by the Appellants by force. The learned District Judge held that possession of the Appellants to the extent of one fourth share i.e. one half portion is unlawful and accordingly dismissed the Appeal by judgment and order dated 7 January 2014.

3. The fact that the Appellants and Respondents jointly purchased the property by the Sale deed on 1 August 1955, is not in dispute. The Appellants did not produce the Sale deed, which is their title deed. In the plaint it was so sought to be contended that the original Sale deed is with the Respondents. The Appellants did not even enter the witness box and examined the Power of attorney. So the position as regards the claim of the Appellants to the suit property of having half share in the suit property is not fortified by their producing the original Sale deed on record nor stepping in witness box and offering themselves to cross-examination. The learned

District Judge has taken note of this conduct of the Appellants. The Sale deed has been placed on record by the Respondents and it is proved in evidence. It is sought to be contended that the contents are not proved. The Sale deed which is on record, copy of which is shown indicates that the share of the Appellants is one fourth and not one half. So the Appellants have merely sought to criticise the failure of the Respondents, but have offered no evidence in support of their own case which the Appellants ought to do as the Appellants are the Plaintiffs.

4. That the Appellants are in possession of the suit property along with the Respondents is also not in dispute, but the question is regarding the extent of share. Both the Courts have rendered a finding that the Appellants are in one fourth share of the suit property. Since an order of injunction is sought, a general omnibus injunction cannot be granted as contended by the learned counsel for the Appellants, when the title deed of both the parties has demarcated their share. If the Appellants were to restrict the claim to the share specified in the Sale deed, there ought not to have been any difficulty in granting an order of injunction. However the Appellants have sought to claim something more than what they are entitled which has led to refusal of grant of injunction. Even in this Court query was put to the learned counsel for the Appellants as to whether the Appellants are restricting their claim to one fourth share in the Sale deed and if such a statement is made an order of injunction can be

granted in their favour. Appeal was adjourned for that purpose. However, learned counsel for the Appellants has expressed his inability. The finding of fact has been also recorded by the learned District Judge that the Appellants have forcibly taken possession of more than what they are entitled to.

5. As far as the reliance placed by the learned counsel for the Appellants on the decision in the case of *KochKunju Nair Vs Koshy Alexander and others – (1999) 3 Supreme Court Cases 482*, is concerned the facts are not identical. Firstly, in the present case the parties have acquired rights in the suit property by way of specific Sale deed which indicates the shares therein. This is not a case where the property is purchased jointly without indicating any shares. Since the shares have been indicated in the Sale deed there is no question of partition of the suit property and therefore, even though the finding has been recorded by both the Courts that there has been no partition of the property, it is not necessary in view of the clear recitals in the Sale deed.

6. In the circumstances, in view of the stand taken by the Appellants for seeking a relief more than what they are entitled, the Appellants have been rightly non-suited by both the Courts. In the circumstances, no question of law arises. Second Appeal is accordingly dismissed.

(N.M.Jamdar, J.)