

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13396 OF 2016

Mr Amol Mahadeo Dhumal	...Petitioner
<i>Versus</i>	
Shri Pandit Khanu Vidhate	
And Ors.	...Respondents

....

Mr.Ajay Joshi, Advocate for the Petitioner.
Mr. Dilip Bodke, Advocate for Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 07th MARCH, 2017

P.C.

1. Heard Mr.Ajay Joshi, learned Counsel for the petitioner and Mr.Dilip Bodke, learned Counsel for respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.9' has challenged the judgment and order dated 30.9.2016 passed by the learned District Judge-1 at Barshi in Misc. Civil Appeal No.17/2016. By that order, the learned District Judge allowed the appeal preferred by respondents, hereinafter referred to as the 'plaintiffs' and quashed and set aside the judgment and

order dated 17.3.2016 passed by the learned Jt. Civil Judge, Senior Division, Barshi below Exhibit-5 in Special Civil Suit No.18/2016. The learned District Judge issued injunction restraining defendant No.9 from making any construction over the suit premises till the final disposal of the suit.

3. In support of this Petition, Mr. Joshi submitted that defendant No.9 has purchased the shares of the branch of Maruti, Ramchandra and Manohar under sale deeds dated 22.11.2013 and 2.12.2013. He submitted that the property purchased consisted of open space and structures. One of the structures was in dilapidated condition. The plaintiffs are residing in another structure in the suit property. He invited my attention to map at Exhibit-178 and submitted that the plaintiffs are residing in the existing structure shown in that map. As far as other structures are concerned, they have been demolished. Defendant No.9 has obtained permission from the concerned Grampanchayat and completed the construction of ground+1st floor and construction of 2nd floor was in progress. At that stage, the plaintiffs instituted suit on 2.2.2016. Defendant No.9 contended that there was oral partition in the family of the plaintiffs and defendants No.1 to 8 and said fact is

borne out from the documents which are produced at Sr. Nos.4/3 and 4/4. The document at Sr. No.4/3 i.e. extract of village form No.8 shows that the area admeasuring 198 sq. ft. was allotted to the plaintiffs. The extract at Sr. No.4/4 shows that an area admeasuring 595 sq. ft. was allotted to the plaintiffs. In all the property admeasures 2836 sq. ft. Thus, *prima facie* the oral partition in the family of the plaintiffs and defendants No.1 to 8 is established. The learned trial Judge also considered the decision of Apex Court in *Mandali Ranganna and others v. T. Ramchandra and others, AIR 2008 SC 2291* and observed that as the plaintiffs have instituted suit in the year 2016 and the sale deeds were executed in the year 2013, they have not established *prima facie* case and balance of convenience also does not lie in their favour. He also relied upon the decision of this Court in the case of *Ramchandra Shankar Randive and others vs. Uttam Marutrao Randive and others, 2003(3) Mh.L.J. 797* and in particular paragraph-11 thereof.

4. Mr. Joshi submitted that as against this, the learned District Judge did not consider the documents produced at Sr. Nos.4/3 and 4/4 and observed that *prima facie* oral partition is

not established. In view of Section 44 of the Transfer of Property Act, 1882 (for short, 'Act') as also in view of the decision of Apex Court in *Ramdas vs. Sitabai and others*, AIR 2009 SC 2735 defendant No.9 cannot claim possession over a particular part of the premises unless the suit property is partitioned by metes and bounds. He submitted that the learned District Judge did not consider the stage of the construction as also the documents. The impugned order, therefore, deserves to be set aside.

5. On the other hand Mr. Bodke supported the impugned order. He submitted that while rejecting the application also the learned trial Judge observed in paragraph-12 that there is no documentary evidence on record to show that the suit property is partitioned. The learned trial Judge observed in paragraph-13 that defendants No.1 to 8 have sold their respective shares to defendant No.9 by mentioning specific four boundaries by sale deeds dated 22.11.2013 and 2.12.2013. He submitted that the learned trial Judge did not consider the effect of Section 44 of the Act. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. In paragraph-12, the learned trial Judge observed that the substantial question is whether there was an oral partition in between the plaintiffs and defendants No.1 to 8 or not. The learned trial Judge thereafter observed that there is no documentary evidence on record to show that the suit property is partitioned. After considering the documents at Sr. Nos.4/3 and 4/4, the learned trial Judge observed that the oral partition might have taken place by which names of the plaintiffs are recorded in respect of some area out of total area of the suit property. In other words, the findings recorded by the learned trial Judge are based on surmises and conjectures. A perusal of the sale deeds *prima facie* shows that defendants No.1 to 8 have sold their undivided share. The learned District Judge has observed this in paragraph-10 of the impugned order. In view of Section 44 of the Act as also in view of decision in *Ramdas (supra)*, defendant No.9 cannot claim possession over a particular part of the premises unless the suit property is partitioned by metes and bounds.

7. In the case of *Gajara Vishnu Gosavi vs. Prakash*

Nanasaheb Kamble and others, 2009(6) ALL MR 983, Apex Court referred to the decisions in *Ramdas* (supra), *M.V.S. Manikayala Rao vs. M. Narasimhaswami and others, AIR 1966 SC 470* and *Sidheshwar Mukherjee vs. Bhubneshwar Prasad Narain Singh and others, AIR 1953 SC 487*, wherein it was held that a purchaser of a co-parcener'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. Mr. Joshi relied upon the decision of this Court in *Ramachandra Randive* (supra). In that case, the question that fell for consideration before this Court was whether the Courts below could have issued injunction restraining the petitioners from alienating the suit land to the extent of 1/3rd by father of the plaintiffs. It was noted that there was no dispute between the parties that share of the plaintiffs father in the joint family was to the extent of 1/3rd. In view thereof, the reliance placed by Mr. Joshi on the decision of this Court in ***Ramachandra Randive*** (supra), does not advance the case of defendant No.9. In the present case, defendant No.9 who has purchased

undivided share from defendants No.1 to 8. He can not claim to be in possession of a specific portion of the suit premises. For the reasons recorded in paragraph-10 of the impugned order, I do not find that this is a fit case for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed reserving liberty to the parties to apply to the trial Court for disposal of the suit in a time bound manner. If such an application is made, the learned trial Judge will pass appropriate orders. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)