

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13643 OF 2016

Mr. Amir Gaffar Shaikh

...Petitioner

Versus

Mrs. Isfrabai Avelin Nun

And Ors.

...Respondents

....

Mr.Sandesh Patil i/b. Ms. Anusha Amin, Advocate for the
Petitioner.

Mr. Piyush M. Shah, Advocate fro Respondents No.1 to 7.

Mr. C.P. Deogirikar, Advocate for Respondents No.9 & 10.

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CORAM : R. G. KETKAR, J.

DATE : 01st FEBRUARY, 2017

P.C.

1. Heard Mr.Sandesh Patil, learned Counsel for the
petitioner, Mr.Piyush M. Shah, learned Counsel for
respondents No.1 to 7 and Mr.C.P. Deogirikar, learned
Counsel for respondents No.1 to 7, at length.

2. Mr. Patil orally applies for deleting respondents
No.1 to 7. On the oral application made by Mr.Patil, leave to
delete respondents No.1 to 7 is granted. Amendment shall

be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the judgment and order dated 14.1.2015 passed by the learned Jt. Civil Judge, Senior Division, Thane below Exhibit-5 in Special Civil Suit No.252/2012 as also the judgment and order dated 24.11.2016 passed by the learned District Judge-4, Thane in Misc. Civil Appeal No.219/2015. By these orders, the Courts below rejected the application made by the plaintiff for injunction restraining defendants No.9 and 10 from (1) creating third party interest, (2) carrying out any construction activities, (3) disturbing and interfering with the possession of the plaintiff, (4) dispossessing the plaintiff, (5) restraining defendants No.1 and 2 from sanctioning any construction plan in favour of defendants No.9 and 10 for carrying out construction in Survey No.129/10 corresponding to new Survey No.10/2/A part, admeasuring 0H-51R-2P situate at Mouje Chowk, Uttan,

Dongri, Bhayander, Tal and Dist Thane within the municipal limits of Mira Bhayander Municipal Corporation (for short, 'suit land').

4. In support of this Petition, Mr. Patil submitted that the learned trial Judge while rejecting the application filed by the plaintiff failed to appreciate that defendants No.9 & 10 did not adduce reliable and cogent evidence as regards partition of the property of Pillip Anto Munis and allocation of the suit land to the exclusive share of Degu. The learned trial Judge held that the defendants No.8/1 to 8/4 were not entitled to convey entire suit land in favour of defendants No.9 and 10. The learned trial Judge held that defendants No.8 & 9 are not bonafide purchasers without notice. The learned trial Judge, however, rejected the application on the ground that defendants No.1 to 7 through their power of attorney have executed sale-deed in favour of the plaintiff. The said power of attorney is un-registered instrument. The learned trial Judge, therefore, held that as the sale deed is executed in favour of the plaintiff on the basis of

un-registered power of attorney, *prima facie* he has not got title over the suit land. At the time of execution of the sale deed in favour of the plaintiff, he was aware that the entire suit land was sold to defendants No.9 and 10 and, therefore, the plaintiff is not bonafide purchaser without notice.

5. As against this, the learned District Judge held that defendants No.9 and 10 have *prima facie* established partition in the family of L.Rs of Philip Munis and further held that defendants No.9 and 10 have purchased the entire suit land. The learned District Judge also held that the power of attorney does not require registration and consequently the sale deed in favour of the plaintiff cannot be said to be bad of that score. The learned District Judge accepted the case of partition at *prima facie* stage and accordingly District Judge dismissed the appeal.

6. Mr. Patil also invited my attention to :

(1) Mutation entry No.2015 which was certified on

1.11.1976 in respect of land situate at village Dongri, District – Thane. The suit land is also included in that mutation entry. The mutation entry was made for bringing L.Rs of Philip on record as he expired on 1.4.1975.

(2) Mutation entry No.2390 which was certified on 27.6.1985 in respect of various lands including the suit land situate at village Dongri, District-Thane. That mutation entry was made for bringing L.Rs. of Degu Philip who died on 4.5.1985.

(3) prayers made in the suit, genealogy of Philip as also Mutation entry No.3408. Mr. Patil relied upon the decision of Apex Court in the case of ***Rajni Tandon vs. Dulal Ranjan Ghosh Dastidar and another, (2009) 14 SCC 782.***

7. On the other hand, Mr. Deogirikar supported the impugned orders. He submitted that the Courts below have concurrently rejected the application. He submitted that it

is not in dispute that defendants No.9 and 10 have purchased the suit land on the basis of registered sale deed dated 8.1.2007 executed by defendants No.8/1 to 8/4. In view of Section 54 of the Transfer of Property Act, 1882 (for short, 'Act'), defendants No.8 and 9 have become absolute owner of the suit land. The plaintiff claims to have purchased the suit land from defendants No.1 to 7 on 26.8.2010. As title is already passed in favour of defendants No.9 and 10, the plaintiff cannot acquire any title. He submitted that in view of Section 3 of the Act, the plaintiff had constructive notice of the sale deed executed in favour of defendants No.9 and 10. He submitted that after appreciating the material on record, the learned District Judge has *prima facie* observed that the partition was effected in the family of Philip and that the suit land had fallen to the share of defendants No.8/1 to 8/4. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered rival submissions advanced by

learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that defendants No.8/1 to 8/4 have sold the suit land to defendants No.9 and 10 by registered sale deed dated 8.1.2007. It is also not in dispute that defendants No.1 to 7 through their power of attorney have executed sale deed in respect of their 2/3rd share in respect of the suit land in favour of the plaintiff herein on 26.8.2010. *Prima facie* as defendants No.9 and 10 are claiming on the basis of registered sale deed, at this stage, the plaintiff cannot claim any interest on the basis of the sale deed which was admittedly executed subsequently on 26.8.2010. Perusal of the written statement filed by defendants No.9 and 10 shows that they have given details of the properties that were allotted during the partition. Defendants No.9 and 10 relied upon the Mutation Entry No.3408. Perusal of Mutation Entry No.3408 shows that it was certified on 19.6.1982 which recorded that vardi was given on 23.1982 as regards partition effected between Degu Philp and L.Rs.

of Isfas Nun. Said Mutation Entry also recorded that in pursuance of the partition the respective sharers have separated 20 to 22 years back and that they are in possession of their respective shares and are paying the land revenue and also collecting income generated therefrom.

9. The learned District Judge has *prima facie* held that the partition was effected in the family of Philip and that long standing mutation entries were not challenged by defendants No.1 to 7. Perusal of discussion from paragraph-11 of the District Court judgment shows that the learned District Judge has referred to mutation entries and ultimately in paragraph-14 observed that *prima facie* at least at this stage it can be inferred that there is likelihood of effecting partition in between Degu, Isfrabai and the heirs of deceased Anubai long back pertaining to the properties left behind by Philip.

10. In view thereof, I do not find that the Courts below committed any error in rejecting the application for

injunction filed by the plaintiff. Merely because on the basis of material on record another view is possible, that itself is no ground for setting aside the impugned orders. It cannot be said that the Courts below have exercised the discretion arbitrarily, capriciously or perversely. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. “

11. In view thereof, the petition fails and the same is dismissed. It is made clear that the steps that may be taken by defendants No.9 and 10 shall be subject to the outcome of the suit. The learned trial Judge will decide the suit on the basis of material on record on its own merits and in accordance with law uninfluenced by the observations made herein. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)