

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5475 of 2014

Tryambak Namdev Mali,
Died through his legal representatives :

1.1) Rajbai wd/o Tryambak Mali,
Age 62 years, Occ. Household.

1.2) Ananda s/o Tryambak Mali,
Age 39 years, Occ. Agriculture.

1.3) Arjun s/o Tryambak Mali,
Age 34 years, Occ. Agriculture,
All r/o. Bhamer Tq. Sakri,
Dist. Dhule.

1.4) Manisha Himmat Desale,
Age 30 years, Occ. Household,
R/o. Nijampur, Tq. Sakri,
Dist. Dhule.

... **Petitioners.**

VERSUS

1) Smt. Jijabai Bhatu Sonar,
Age 61 years, Occ. Household,
R/o. Jautane, Tq. Sakri, Dist. Dhule.

2) Smt. Surekha Satish Sonar,
Age 41 years, Occ. Household,
R/o. Chadvel Korde, Tq. Sakri,
Dist. Dhule.

3) Sunanda Satish Sonar,
Age 35 years, Occ. Household,
R/o. Near Shivaji Putala, Dondiaicha,
Dist. Dhule.

4) Babytai Bhatu Sonar,
C/o. Sau. Vanita Govind Wankhade,
Age 30 years, Occ. Household,
R/o. Deendayalnagar, Behind Tulja
Bhavani Mandir, Near Sane Guruji
College, Shahada, Tq. Shahada, Dist.

Nandurbar.

- 5) Sunita Harish Wagh,
Age Major, Occ. Household,
R/o. Surat, Vishnunagar, Pandesara,
Tq. & Dist. Surat (Gujrath)
- 6) Hemantkumar @ Namdev Bhatu Sonar,
Age 40 years, Occ. Service,
R/o. Pandesara, Vishnunagar,
Tq. & Dist. Surat (Gujarath).

... Respondents.

Formal Parties :

- 1) Ashok Namdev Mali,
Age 52 years, Occ. Agriculture.
- 2) Rajendra Namdev Mali,
Age 48 years, Occ. Agriculture.
- 3) Smt. Nirmala Khandu Mali (Ahire)
Age 58 years, Occ. Household.
- 4) Smt. Mirabai Bapu Mali,
Age 43 years, Occ. Household.
- 5) Smt. Sunandabai Mansram Mali,
Age 37 years, Occ. Household,
R/o. Methi, Tq. Sindkheda, Dist.
Dhule.
- 6) Bhaskar Krushna Sonar,
Age 65 years, Occ. Agriculture.
- 7) Prabhakar Krushna Sonar,
Age 68 years, Occ. Agriculture.
- 8) Madhukar Krushna Sonar,
Age 62 years, Occ. Agriculture.
- 9) Shantaram Krushna Sonar,
Age 60 years, Occ. Agriculture.
Respondents No. 1 to 4 are
R/o. Bhamer, Tq. Sakri, Dist. Dhule.

10) Devidas Krushna Sonar,
Age 45 years, Occ. Agriculture,
R/o. Taharabad, Tq. Satana,
Dist. Nasik.

... Respondents.

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Advocate for the Petitioners : Mr. A.P Bhandari h/f Mr. R.R.
Sancheti.

Advocate for the Respondent Nos. 1 to 4 : Mr. V. C. Solshe h/f Mr. M. H.
Patil

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 07.06.2022.

PRONOUNCED ON : 14.06.2022.

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. With the consent of both the sides, the matter is heard finally at the stage of admission.

2. The facts leading to the filing of the writ petition are as under :

(i) One Bhatu was the husband of respondent No. 1 Jijabai and father of respondent Nos. 2 to 6. Their family had ancestral and joint family properties bearing Gat Nos. 163/1, 163/2, 14/1 and 14/2. By a sale-deed dated 26.12.1989 Bhatu sold land Gat No. 163/1 admeasuring 1-H 58-Are to the original petitioner Tryambak's father Namdeo. Tryambak died during pendency of the petition which is now being prosecuted by his legal representatives.

(ii) The respondent Nos. 1 to 4 filed Regular Civil Suit No. 19/1990 seeking a declaration that they were the co-owners of the land Gat No. 163/1 and for possession, by arraying Bhatu as defendant No. 1 and Namdeo as defendant No. 2. The suit was decreed and the decree has

been confirmed up to the Supreme Court in the form of dismissal of Special Leave to Appeal No. 36334/2013.

(iii) Since the decree reached finality the respondent Nos. 1 to 4 have put it to execution by filing Regular Darkhast No. 7/2005.

(iv) The petitioners objected to the execution of the decree by preferring an application under Order XXI Rule 97 read with Section 151 of the Code of Civil Procedure. By the order dated 13.05.2014 the objection raised by them was rejected.

(v) In the meantime, the petitioners once again approached this court and preferred a Review Petition in their Second Appeal No. 409/2013 which was already dismissed on merits by the judgment and order dated 21.08.2013. While dismissing the Review Application by the order dated 25.02.2014 it was apparently expressed that the sale-deed executed by Bhatu in favour of Namdeo was declared to be not binding on the share of the respondent Nos. 1 to 4 and the petitioners could consider a step for effecting partition.

(vi) In tune with such observations the petitioners have filed a suit for general partition bearing Regular Civil Suit No. 33/2014 against the respondent Nos. 1 to 6 in respect of all the properties of the joint family of Bhatu namely Gat Nos. 163/1, 163/2, 14/1 and 14/2. It appears that the respondent Nos. 1 to 6 having sold some of the properties to the respondents who are shown to be formal parties in the petition, have also been added as defendants. The petitioners claiming that Bhatu had 1/3rd undivided share

in all the properties seek it to be separated and have further prayed that the land Gat No. 163/1 sold by him to their predecessor Namdeo be allotted to his share.

(vii) In the backdrop of such state of affairs, the petitioners submitted application (Exh.16) in their suit (Regular Civil Suit No. 33/2014) and claimed temporary injunction restraining the respondent Nos. 1 to 6 from executing the decree passed in Regular Civil Suit No. 19/1990. Whereas, the respondent Nos. 1 to 6 submitted application (Exh. 52) in the execution Regular Darkhast No. 7/2005 and prayed for issuance of possession warrant. By the common order challenged in this Writ Petition the petitioners' application for temporary injunction (Exh. 16) has been rejected and the respondents' application (Exh. 52) for possession warrant has been allowed.

3. The learned advocate Mr. Bhandari for the petitioners vehemently submitted that Bhatu during his life time had effected a partition of all the properties on 16.05.1983 evidenced by mutation entry No. 707 wherein he had allotted land Gat No. 14/1 to his mother Dhanubai, land Gat No. 14/2 and land Gat No. 163/2 to his wife respondent No. 1- Jijabai and had retained land Gat No. 163/1 to himself which after such partition he had sold to Namdeo and delivered its possession under the sale-deed by accepting a valid consideration. Since he was the sole surviving coparcener he had not only the right to effect partition but even had a right to sell a joint family property. Even the trial court while deciding Regular Civil Suit No. 19/1990 had recognized his such right in paragraph No. 12. He would submit that even otherwise, even if it is held that it was not a partition but merely a family arrangement, at the most the sale of land Gat No. 163/1 would not be binding on the respondents but would be binding on Bhatu.

4. Mr. Bhandari would submit that in view of the observations of this Court while deciding the Review Application No. 537/2014 and in the light of long standing position of various decisions and the principles of law discussed and decided by the Privy Council as referred to and discussed in the commentary in Mulla's Hindu Law Para 259, the petitioners' predecessor Namdeo being a purchaser of, may be an undivided share of Bhatu, the petitioners being purchasers have filed a suit for general partition in the form of Regular Civil Suit No. 33/2014 and being in possession of land Gat No. 163/1 having parted with a valuable consideration, the petitioners have a *prima facie* case and balance of convenience in their favour and would be put to irreparable loss if in the meantime, till the partition takes place the decree is allowed to be executed in which case they would lose possession of the land which has been in their exclusive possession since the date of sale-deed. He would place reliance on the decisions of this Court in the matter of **Hanmandas Ramdayal and others Vs. Valabhadas Shankardas; 1918 (20) Bombay Law Reporter 472** and **Parappa Ningappa Khaded and anr. Vs. Mallappa Kallappa and Others; A.I.R. 1956 Bombay 332**. Mr. Bhandari would submit that the trial/executing court has clearly overlooked the position as is obtaining in Hindu Law in the peculiar facts and circumstances and has illegally refused to grant temporary injunction and has directed the possession warrant to be issued.

5. Per contra, learned advocate Mr. Solshe for the respondents would support the order under challenge. He would submit that the petitioners being the legal representatives of the purchaser Namdeo of a portion of the joint family property, the only remedy which they have is to file a suit for general partition. As against this, so long as the properties are joint, a purchaser cannot claim to retain possession of any specific portion of the joint family property which would be contrary to the very concept of jointness of the property, to the detriment of the respondents who are

the joint owners. The learned advocate would further submit that the decree has reached finality. All the contentions have been considered by the courts and no temporary injunction preventing execution of the decree can be granted.

6. I have considered the rival submissions and perused the papers. As can be appreciated, there does not seem to be much dispute on facts. Bhatu had sold land Gat No. 163/1 to petitioners' predecessor Namdeo for a valuable consideration and it would certainly bind his share. However, the petitioners, by way of temporary injunction are seeking stay to the execution of the decree claiming to be in exclusive possession of the entire land Gat No. 163/1.

7. It is necessary to bear in mind the concept of a Hindu joint family property. A share of a member of the joint family would be ever fluctuating. Bhatu had sold the land Gat No. 163/1 to Namdeo by the sale-deed dated 26.12.1989. The petitioners in their suit for general partition (Regular Civil Suit No. 33/2014) have arrayed the respondent Nos. 1 to 6 herein as the defendant Nos. 1 to 6 claiming them to be Bhatu's wife (Jijabai) and their daughters and even a son. The share of Bhatu in the circumstances on the date of the sale-deed would depend upon the fact as to which of these children were born and even conceived on the date of the sale-deed.

8. Again, there are several other variables which will have to be gone into and decided while ascertaining the shares of each of these individuals in the light of the subsequent amendment in the Hindu Succession Act of the year 2005 and the decision of the Constitution Bench of the Supreme Court in the matter of **Vineeta Sharma Vs. Rakesh Sharma and Ors; A.I.R. 2020 Supreme Court 3717**.

9. In view of such peculiar state of affairs it is indeed very premature to conclude that Bhatu would have got any specific share much less

which would constitute the entire land Gat No. 163/1 sold by him.

10. The petitioners have been seeking temporary injunction and opposing issuance of possession warrant to the extent of the entire land Gat No. 163/1. If all these aspects are considered, though *prima facie* they are entitled to have a proportionate share to which Bhatu would be entitled to, it would be rather premature to conclude that the entire land Gat No. 163/1 would have fallen to his share and to allow the petitioners to retain it. Rather it would cause a serious prejudice and injustice to the respondents inasmuch as in spite of that land being a joint property they would be deprived of having its possession and benefit.

11. The judgment of this Court in the matter of **Hanmandas Ramdayal** (supra) and particularly the decisions of the Privy Council relied upon in that judgment clearly recognizes the long standing principle of Hindu Law wherein the non alienating coparceners have a right to file a suit for possession against the purchaser who has purchased an undivided share of an alienating coparcener. Whereas the remedy for such a purchaser would be to file a suit for general partition. True it is that in that matter execution of the decree was stayed for a period of three months during which the purchaser was granted liberty to file a suit for partition and was allowed to retain possession of the property purchased. However, it is to be borne in mind that in that suit the purchaser had purchased the property at a sale in execution of a decree which in my considered view is a decisive fact and on which the matter in hand can easily be distinguished and stands on the peculiar footings.

12. In view of the peculiar facts and circumstances of the matter in hand, the petitioners who claim through a purchaser cannot be allowed to obstruct the execution and should wait for a decree for partition to be passed and executed.

13. There is one more hurdle in the claim of the petitioners for

temporary injunction. In view of the provision of Section 41 (a) and (b) of the Specific Relief Act, 1963, no injunction can be granted to the execution of a decree.

14. In view of what has been discussed herein above, the petitioners are not entitled to claim any of the reliefs. There is no illegality in the order under challenge.

15. The Writ Petition is dismissed with costs.

16. Hearing of petitioners' suit Regular Civil Suit No. 33/2014 is expedited. The trial court shall decide the suit as early as possible.

(MANGESH S. PATIL, J.)

17. Learned advocate Mr. Sancheti for the petitioners submits that the interim relief has been in operation till date and it may be extended for a reasonable time to enable the petitioners to approach the Supreme Court.

18. Learned advocate Mr. Patil for the respondent Nos. 1 to 4 strongly opposes the request and submits that execution of the decree has been delayed because of the interim relief and the petitioners are prolonging the matter.

19. Taking into account the peculiar facts and circumstances discussed in the judgment when the interim relief has been in operation till date, it would be appropriate to extend it for a reasonable time.

20. Interim relief to continue for a period of four weeks.

(MANGESH S. PATIL, J.)

mkd/-