

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.173 OF 2022
WITH
INTERIM APPLICATION NO.1153 OF 2022

Meenakshi Vilas Patil & Anr. .. Appellants

Versus

Murlidhar Madhukar Mhatre & Ors. .. Respondents

...

Mr.Rohan Sawant with Mr.J.M.Joshi for the Appellants.

Mr.Anil D'souza for the Respondents.

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CORAM: BHARATI DANGRE, J.

DATED : 19th APRIL, 2022

P.C:-

1. The appeal call in question the order rejecting Exh.5 passed by the learned Civil Judge, Senior Division, Vasai in Special Civil Suit No.11 of 2018, filed by the plaintiffs (appellants herein). The application filed under Order XXXIX Rule1 and 2 came to be rejected by holding that the plaintiffs have failed to make out prima facie case and balance of convenience lies in favour of the defendants (respondents herein) and further that the plaintiffs would not suffer irreparable loss, if the relief of injunction is not granted.

2. Heard the learned counsel Mr.Rohan Sawant with Mr.J.M.Joshi for the Appellants and the learned counsel Mr.Anil D'souza for the Respondents.

3. The plaintiffs instituted a suit under Section 34 of the Specific Relief Act, seeking a declaration to the effect that each of the plaintiff has 1/5th undivided right, title, interest and joint possession over the suit property set out in para 3 of the plaint as property located in Survey No.144, Hissa No.3/A admesasuring 0-37-4 and Hissa No.3/B admeasuring 0-37-3 alongwith defendant Nos.1 to e. The plaintiffs claimed that by decree of partition, the plaintiff undivided share may be partitioned and separated from share of defendant Nos.1 to 4 by metes and bounds. Several other ancillary reliefs were also sought in the said suit.

4. The reliefs in the suit were sought in the background of the pleadings that one Smt.Shimgubai Kalya Patil, who is the grandmother of the plaintiffs expired on 07/11/1999, leaving behind her two daughters, namely, Smt.Anubai and Smt.Hirabai. Smt.Anubai is the mother of plaintiff Nos.1 and 2 as well as that of defendant Nos.1, 2 and 3. Smt.Anubai died on 29/08/2017, leaving behind her heirs who are the plaintiffs and defendants Nos. 1 to 3. The claim of the plaintiffs is to the effect that on demise of Smt.Shimgubai, her daughters, Smt.Anubai and Smt.Hirabai were equally entitled to the area of Survey No.144, Hissa No.3B by virtue of succession and accordingly, the names have been recorded in the revenue

record of village Juichandra, Taluka Vasai, Dist. Palghar by effecting mutation entry No.6098. The plaintiffs claim that their mother Smt.Anubai was sufficiently and solely entitled to area of Survey No.144, Hissa No.3A of village Juichandra, Taluka Vasai by virtue of partition and family settlement and their mother and defendant No.4 were equally entitled to area of Survey No.144, Hissa No.3B.

5. It is also pleaded that during the lifetime of Smt.Anubai, she was sole owner of said separated Survey No.144 Hissa No.3A and 50% owner of undivided area of Survey No.114 Hissa No.3B and during her lifetime, the names of the plaintiffs and defendant Nos.1 to 3 were not mutated in the revenue record as against the property belonging to her.

6. The cause for the plaintiffs to institute the suit was a document in form of deed of release dated 29/02/2016 alleged to have been executed by Smt.Anubai in favour of defendant Nos.1 and 2 and thereby obtaining her alleged rights from the suit property in their joint favour, being the releasee by purportedly showing that defendant Nos.1 and 2 are having undivided common rights in the suit property with Smt.Anubai and other family members whose names are appearing on 7/12 extract. The said deed is pleaded to be an unlawful and sham document and not binding upon the plaintiffs. It is further asserted that on the basis of the purported deed of release dated 29/02/2016, defendant Nos.1, 2,3 and 4 executed two separate lease agreements in respect

of the suit property with defendant Nos.5 and 6 for periodic monetary consideration for use of the suit property and, lease agreement being dtd.22/05/2017 in respect of Hissa No.3A, the lease deed has been executed from 15/05/2017 to 14/05/2022, for ready mixture concrete plant. Another lease agreement dated 17/10/2017 is projected to be a document executed between defendant Nos.1 and 2 and defendant No.4 where the property in Hissa No.3B is leased out in favour of defendant No.5 i.e. M/s.Spark Civil Infraprojects for a period of five years for ready mixture concrete business on deposit of Rs.2,00,000/- and monthly compensation amount of Rs.1,20,000/- for the first twelve license months with topping of 5% every year. The said lease agreements are also assailed in the plaint by the plaintiffs by submitting that they are based on fraudulent deed of release and even these documents are bogus and not binding on the plaintiffs.

7. On hearing the learned counsel for the appellants and on perusal of the plaint in the background of the impugned order, refusing the injunction to the plaintiffs, it can be discerned that defendant Nos.1 to 3 appeared and filed their written statement in the suit and admitted the relationship inter se. They, however, submit that their mother Smt.Anubai had received the suit property from Smt.Shingubai, their grandmother, under family partition and she had given the said property to defendant Nos.1 and 2 on her wish and relinquished her right in the suit property. In the wake of the said deed dated 29/10/2016, defendant Nos.1 and 2 have become legal owners of the suit property and they are entitled

to dispose off the same as per their own wish and the plaintiffs have no claim in the suit property. On becoming the owners of the suit property, which covered Hissa Nos.3A and 3B both, they executed registered lease deed in favour of defendant Nos.5 and 6 and from whom they are getting license fees and monthly rent.

8. When the pleadings in the plaint are read along with the most crucial document i.e. release deed dated 29/02/2016, which is placed on record, the claim of the plaintiffs prima facie appears to be worthless. The deed dated 29/02/2016 is between defendant Nos.1 and 2 and Smt.Anubai and the property described is property from Survey No.144, Hissa Nos.3A and 3B. The said property was in joint ownership with her sister since 10 to 12 years. It was partitioned and the property in respect of Survey No.144 Hissa No.3A and 3B to the extent of 50% has come to the share of Smt.Anubai. Since, she is the owner of the said property described under the deed and was capable of disposing off the said property, she had relinquished her rights in favour of defendant Nos.1 and 2.

Based on this very document, the plaintiffs have also pleaded in the plaint that their grandmother Smt.Shimgubai was the original owner in respect of Survey No.144, Hissa Nos.3A and 3B and during her lifetime, the property was mutually partitioned between Smt.Anubai and Smt.shimgubai by virtue of family settlement and the effect of partition was confirmed on 14/12/1993 by a certified mutation entry No.5626 of the village. The plaintiffs have themselves pleaded

that as per the said partition and family arrangement, the area of Hissa No.3 came to be bifurcated in two separate parts as Hissa Nos.3A and 3B. Hissa No.3A came to share of Smt.Anubai and Hissa No.3B came to the share of Shimgubai. On death of Shimgubai, her succession opened in favour of Smt.Anubai and Smt.Hirabai, who were equally entitled to area of Hissa No.3B and their names came to be mutated.

9. By the release deed dated 29/02/2016, Smt.Anubai has relinquished her share in Hissa No.3A as well as in Hissa No.3B in favour of defendant Nos.1 and 2 and this release deed is questioned by the plaintiffs by filing the suit for declaration. At present, by virtue of the release deed, the property of Smt.Anubai has come to the share of defendant Nos. 1 and 2 and who have further created interest in the property in favour of defendant Nos.5 and 6.

10. In the backdrop of the aforesaid fact, the trial court has considered the application filed by the plaintiff below Exh.5 and on facts, has recorded that since the property is received by Smt.Anubai in partition, she became absolute owner of the suit property and when she is referring the suit property as joint family property of all members of the joint family, she is intending to be the property of her mother as well as of her own. Whether Smt.Anubai has brought the suit property in common hotch potch is the issue which is required to be determined at the time of trial. Recording that in absence of any pleadings to that effect, prima facie case was not found in favour of the plaintiffs.

11. I am in complete agreement with the order dated 24/11/2021, since the claim of the plaintiffs qua the suit property would succeed only at the end of the trial, on discharging the burden to the effect that Smt.Anubai had brought her entire property in common hotch potch.

In the wake of the above, the three parameters for grant of interim injunction not found to be favourable to the plaintiffs, application (Exh.5) has been rightly rejected.

Upholding the same, the Appeal from Order is dismissed.

12. In view of the dismissal of the Appeal from Order, pending application does not survive and stands disposed off.

(SMT. BHARATI DANGRE, J.)