

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 926 OF 2019
ALONGWITH
CIVIL APPLICATION NO. 1099 OF 2019

M/S. AMODA PROPERTIES LLP } APPELLANT

V/S.

MR. JOY MRINALKANI BASU
AND ORS. } RESPONDENTS

* * * *

Mr. Abhishek Pungliya, Advocate for the appellant.

Mr. Jehangir Jejeebhoy i/by. Kanga and Co., Advocate for
respondent no.1.

Ms. Ankita Singhania, i/by. Mr. Vevek Sharma, Advocate
for respondents no.2 to 4.

CORAM : SANDEEP K. SHINDE, J.

RESERVED ON : February 22, 2022

PRONOUNCED ON : 28th February, 2022.

JUDGMENT :

1. Defendants no.1, 2 and 3 are the co-owners of the
agricultural land admeasuring about 100 acres, bearing 44

different survey numbers, particulars of which are adequately described in para-1 of the plaint (hereinafter called "the said property"). Defendant no.1 holds $1/3^{\text{rd}}$ undivided share in the, said property. Thus, his share therein is approximately 33.33 acres. Appellant-plaintiff, claims and asserts that, defendant no.1, vide agreement dated 21st December, 2016 ("suit agreement" for short) agreed to sell 10 acres of area, out of his $1/3^{\text{rd}}$ share in the said property for total consideration of Rs.1,74,50,000/- (Rs. One Crore Seventy Four Lakhs Fifty Thousand) and although he paid entire consideration, defendant no.1 declined to execute the sale-deed, which was to be executed within six months from the date of execution of the suit agreement. Plaintiff pleaded, at the relevant time, defendant no.2 was also going to execute similar agreement in respect of 10 acres out of his undivided share in the said land, but at the last minute, he backed out. In para-9, plaintiff pleaded, although he was, ready and willing, to perform his part of the suit agreement, defendant was avoiding the execution of sale-deed and at the same time, defendant no.1 alongwith defendants no.2 and 3 (co-owners) were/are likely to sell the said property or part of it to, other persons under the

brand name "Saaras Smart City" through an entity i.e. defendant no.4. Thus, plaintiff called upon defendant no.1 vide notice dated 26th April, 2018 to perform the suit agreement and execute the sale-deed. Whereafter in June, 2018, plaintiff instituted the civil suit seeking decree of specific performance of the suit agreement dated 21st December, 2018 and possession of land admeasuring 10 acres out of 1/3rd share of defendant no.1 in the said land. The land admeasuring 10 acres, shall hereinafter be called as "the suit land". Pending suit, plaintiff sought an order, to restrain all the defendants from alienating the said property (i.e 100 acres land). However, pending decision, in application for temporary injunction, plaintiff vide application Exhibit-38, restricted his prayer to 1/3rd undivided share of the defendant no.1. Anyway, the learned trial Judge declined the injunction vide order dated 10th December, 2018. That order is challenged in this Appeal under Order 43 Rule 1(r), read with Section 104 of the Civil Procedure Code.

2. Heard learned Counsel for the parties.

3. Before advertizing to the arguments of respective Counsel, let me state in brief, the defence of the defendant no.1. The defendant no.1, in written statement, contended that, he jointly with defendants no. 2 and 3, has right, title and interest in the said lands, situated at Village-Pimpoli, District-Pune. He and co-owners, were and are planning to develop the said land, subject to necessary permissions and approvals. That the partner of plaintiff, Mr. Pinto expressed his desire to check, whether, he can support the planned efforts of the defendants no.1 and 2 in development of the said land. The defendant no.1, would contend that, as per discussion between himself, defendant no.2 and Mr. Pinto (partner of plaintiff), that in order to commence the process, Mr. Pinto would organize liquidity of Rs.6,00,00,000 (Rupees Six Crores) in a planned manner, in agreed timeline and the parties jointly would then discuss to formalize the plan about the entities, to undertake the development work and related activities like financier, architect, contractor and others. Therefore, it is the defence of defendant no.1 that, sum of Rs.1,74,50,000/- was received by him in terms of the understanding, between the partner of the plaintiff and the defendants who was planning to develop the

said land. To put it differently, the defendant no.1 denied that, he had agreed to sell his undivided interest to the extent of Rs.10 crores out of his $1/3^{\text{rd}}$ share in the said lands.

6. Thus, the admitted facts are : the said property (100 acres) is joint property of defendants no.1, 2 and 3. Each of them, have $1/3^{\text{rd}}$ undivided share therein. The, said property consists of 44 pieces of land, bearing 44 different survey numbers. It is 'unpartitioned property' AND defendants no.2 and 3, co-owners, were not party or consenting party to suit agreement dated 21st December, 2016.

7. The question that falls for consideration is, "Whether the order passed by the trial Court declining to restrain defendant no.1, from alienating his $1/3^{\text{rd}}$ share in the said land, calls for interference ?"

. In view of the provision of Section 44 of the Transfer of Property Act, undivided share in joint property before partition can be transferred by a co-sharer or more than one co-sharer and transferee acquires same right and interest in the property transferred, as of the transferor. The only

exception is that in case of dwelling house belonging to undivided family, such transferee, when not a member of the family or a stranger, cannot claim joint possession or common enjoyment of the dwelling house with the other co-sharers and the remedy is to seek partition. Another condition is that, neither the co-sharer can transfer anything greater than his interest in the joint property nor the transferee acquires any right or interest greater than the transferor had in the joint property, or in other words, the transferee steps into the shoes of the transferor/co-sharer or co-sharers. Therefore, when a co-sharer enters into contract to transfer his interest in the unpartitioned property, such contract can be enforced against such transferee/co-sharer to the extent of his right and interest in the joint property. The Apex Court in the case of **Kartar Singh Versus. Harjinder Singh and Ors, (1990) 3 SCC 517** as held as under :

“As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view, that this is not a legal difficulty. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated.”

In A. Abdul Rashid Khan (dead) and Ors. V/s. P.A.K.A Sahul Hamid and Ors. (2000) 10 SCC 636, the Apex Court has held as under :

“Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property, then, even if other co-sharer has not joined at least to the extent to the extent of his share, he is bound to execute the sale-deed.

9. In the present case, plaintiff asserts, that the defendant no.1 has agreed to sell the land admeasuring 10 acres out of his 1/3rd undivided share in the said property and defendant denies his assertion. As a result, there is “triable issue” which has to be gone into and answered after the parties lead the evidence. Be that as it may, settled law is, “purchaser of undivided interest in the joint property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and asked for allotment of share in the suit property”. Thus, on the backdrop of the law enunciated in the aforesaid authority, the next question falls for my consideration is;

“Whether the appellants-plaintiffs who are, claiming to be purchasers of undivided share of defendant no.1 to the extent of 10 acres, can ask for order to restrain, defendant no.1 from alienating his 1/3rd share?”.

11. Mr. Pungaliya, learned Counsel for the appellant, relying on the judgment of the Apex Court in the case of *Kartar Singh* (cited supra) contended that, when share of defendant no.1 is identifiable i.e. 1/3 share in the said property, there was no impediment, in injuncting defendant no.1, from alienating his 1/3rd share, so as to secure and preserve, plaintiff's interest to the extent of 10 Acres. Submission is that, in absence of restraint order, if defendants no.1, 2 and 3 alienate the said land, including undivided interest of the defendant to third person, it would render the suit infructuous. Mr. Pungliya, therefore submitted, admittedly, defendant has received Rs.1.74 crores, under the suit agreement and therefore, prima-facie, case has been made out and balance of convenience lies in favour of the plaintiff. Thus, argued, to preserve the interest of the plaintiff, equity demands that, the

defendant no.1 be restrained from creating third party right in the suit property or else it would not only frustrate the cause but lead to multiple proceedings. At any rate herein, defendant has denied the suit agreement. His defence is that, amount paid by plaintiffs to him, was under certain arrangements and it was not towards the consideration, for sale of his undivided share to the extent of 10 acres. Therefore, as on the date of instituting the suit, plaintiff's status was not that of "co-sharer". Yet even assuming, that plaintiff is the co-owner to the extent of 10 acres out of 1/3rd undivided share of defendant no.1, but his right to possession would mature only when the properties are partitioned by metes and bounds or by decree of the Court in a partition suit or on settlement between the parties. Therefore, his rights and liabilities cannot be more than, that of defendant no.1-co-owner. Law with regards to rights and liabilities of co-owner is that;

- (a) The co-owner cannot claim an order of injunction against another co-owner with regard to property owned jointly, because possession of co-owner would be treated to be possession of all.

(b) A co-owner has an interest in whole of property and also in very parcel of it (emphasis).

(c) A mere occupation of a larger portion of an entire joint property does not necessarily amounts to ouster, as the possession of one is deemed to be on behalf of all;

(d) the remedy of a co-owner of a share in the joint property is by way of suit for partition or for actual joint possession but not for ejectment.

Thus, even assuming, plaintiff is co-owner, he has no right to claim injunction against other co-owners.

12. Herein, as stated above, although the share of defendant no.1 is quantifiable i.e. $1/3$ rd, but it is not 'identifiable' or 'discernible'. In other words, although, share is perceptible, it is not known which portion out of the 100 acres of land, bearing 44 different survey numbers, constitutes the share of defendant no.1 to the extent of 10 or 33 acres. Therefore, even if injunction is granted, as sought by the plaintiffs, it is not possible to enforce it. That being so, it would amount to granting relief without remedy to enforce it or prevent its breach. Moreover, for want of definite-identifiable,

share of defendant no.1 in the suit property, if injunction is granted, it would affect the rights of other co-owners, who were not a party to the suit agreement. In consideration of these facts, the learned trial Court, has correctly held that, injunction against defendant no.1 would automatically operate against all the co-owners and their rights would be jeopardised. As such, point of 'balance of convenience and irreparable loss' has been correctly answered by the trial Court against the plaintiffs. In the circumstances, the impugned order cannot be faulted with and no interference is called for. Yet, another reason for not interfering with the impugned order is that, it is open for the plaintiff to register the lis-pendens under Section 52 of the Transfer of Property Act, so that decree in the suit, shall bind the subsequent purchaser, if plaintiffs succeed in the suit. For all that reasons, the Appeal fails. It is dismissed accordingly.

12. With dismissal of the Appeal from Order, Civil Application No.1099/2019 becomes infructuous and does not survive. The same is accordingly disposed of.

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(SANDEEP K. SHINDE, J.)