

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

**WRIT PETITION NO.4998 OF 2022
WITH CIVIL APPLICATION NO.12661 OF 2022
IN WRIT PETITION NO.4998 OF 2022**

Kalyan s/o Yashwantrao Barkase;
Age:- 60 yrs; Occ: Agri and Business;
R/o:- Opp. Kannya Prashala, Paithan,
Tq. Paithan, Dist. Aurangabad

... Petitioner

Versus

1) Sachin s/o Madhukarrao Muley;
Age:- 52 yrs; Occ:- Business
R/o:- Gut No.41, Golwadi,
Paithan road, Aurangabad.

2) Thakabai w/o Kisan Katbane,
Age:- 38 years, Occ.: Agril,
R/o: Paithan, Tq. Paithan
District Aurangabad.

3) Kachru s/o Kisan Katbane,
Age: 45 years, Occ.: Agril,
R/o: As above.

4) Yamunabai w/o Dagdu Katbane,
Age: 60 years, Occ.: Agril,
R/o : As above

... Respondents

...

Mr. Ameet R. Vaidya, Advocate for Petitioner
Mr. M.R. Sonawane, Advocate for Respondent No.1
Mr. M.R. Wagh, Advocate for Respondent Nos.2 to 4

...

CORAM : NITIN B. SURYAWANSHI, J.

**RESERVED ON : 18th APRIL, 2023
PRONOUNCED ON : 27th APRIL, 2023**

ORDER :

1. This petition filed under Article 227 of the Constitution of India takes exception to the judgment and order dated

05/04/2022, passed by the learned Adhoc District Judge-2, Aurangabad, in Misc. Civil Appeal No.100/2021.

2. Petitioner/original plaintiff filed Regular Civil Suit No.103/2021 for declaration that he is owner of land admeasuring 3 Hectares 86 R, from Gut No.159 of village Dhangao, Tq. Paithan, Dist. Aurangabad, in view of sale deeds dated 22/05/2006 and 21/08/2006. Petitioner also sought a relief of perpetual injunction and a relief that defendant Nos. 1 to 3 should not alienate and/or create third party interest, in the portion of land purchased by plaintiff. Along with the suit, plaintiff filed application Exhibit-5 for temporary injunction. Defendants appeared and resisted the suit by filing their respective written statements. Application Exhibit-5 was allowed by the trial Court, thereby temporarily restraining defendants from causing obstruction to the possession of plaintiff over the suit property till disposal of the suit and restraining defendants from alienating the suit property.

3. Respondent No.1/defendant No.5 challenged the order of trial Court by filing Misc. Civil Appeal No.100/2021, which is allowed by the impugned order, thereby setting aside order of the trial Court passed below Exhibit-5. Petitioner is aggrieved by the said order.

4. Heard learned advocate for petitioner, learned advocate

for respondent No.1 and learned advocate for respondent Nos. 2 to 4. Perused the memo of writ petition, annexures thereto, the impugned order and citations relied upon by learned advocate for petitioner.

5. Trial Court while allowing application Exhibit-5 filed by the plaintiff has placed reliance on the copies of two sale deeds relied upon by the plaintiff. By sale deed dated 23/05/2006, plaintiff purchased 2 H 66 R land out of Gut No.159 from Sachin Gaikwad and vide sale deed dated 21/08/2006, plaintiff purchased 1 H 20 R land out of Gut No.159 from Hanif Shah Ibrahim Shah. Trial court has, therefore, held that plaintiff has established his title to the suit land. Defendant No.3 has not disputed that he along with defendant Nos. 1 and 2 executed sale deed in favour of Sachin Gaikwad and Ibrahim Shah.

6. Trial Court rejected contention of the defendants that plaintiff had possession over the suit property and in execution of decree said possession was taken away. Trial Court has also taken into consideration that in 7/12 extract of Gut No.159/1 name of the plaintiff is mutated for area admeasuring 2 H 44 R, by Mutation Entry No.1661. Electricity bill placed on record by the plaintiff and permission granted in favour of the plaintiff to receive water in Gut No.159 from Jayakwadi project, is also taken into consideration by the trial Court.

7. It is a matter of record that defendant Nos. 1 to 3 filed Regular Civil Suit No.100/1977 for ownership and possession of the suit property, which was decreed in their favour. R.D. No.02/1987 was filed for execution of the said decree. In the execution proceeding, they received possession of suit property in the year 2012. It is further clear from record that the sale deeds executed in favour of plaintiff are prior to the execution of decree. The decree passed in R.C.S. No.100/1977 was challenged in Regular Civil Appeal No.137/1982. In said appeal shares determined by the trial Court in R.C.S. No.100/1977 were modified and the share of defendant Nos. 3 and 4 were determined as 2/7th each. Accordingly, the executing Court sent precept under Section 54 of the Code of Civil Procedure to the Collector for effecting partition. The Collector directed Tahsildar to effect the partition amongst the shareholders as per decree. Thereafter, measurement was carried out in the year 2011 and map was prepared to effect the partition by metes and bounds and the shareholder were put in possession of their respective shares. Notice of measurement for execution of decree was also issued to the plaintiff, which is stated by the plaintiff in paragraph No.5 of his application Exhibit-5. Record further reveals that actual possession was handed over to the respective shareholders on 13/06/2012. Before that, notices were issued to all the persons interested in the land. Panchanama and possession

receipts of handing over of shares to the respective shareholders and putting them in possession, were prepared on the spot. As per the panchanama and possession receipt, land admeasuring 4 H 20 R towards northern side was handed over to defendant No.4. At the time of preparation of panchanama plaintiff objected to the action of delivery of possession and he disagreed with the said action.

8. It further appears from record that Gut No.159 is big piece of land. After the sale deeds were executed in favour of plaintiff, partition of Gut No.159 by metes and bounds was effected and it is divided into three parts i.e. 159-A, 159-B and 159-C. Plaintiff pleaded that he has purchased 3 H 86 R land out of Gut No.159 during pendency of the litigation/proceeding for partition and separate possession between defendants and other shareholders. It is, therefore, clear that plaintiff is claiming title and possession over the suit property through defendant Nos. 1 to 3. At the time of execution of sale deeds by defendant Nos. 1 to 3, in favour of Sachin Gaikwad, Suresh Mote and Ibbrahim Shah, partition of the land by metes and bounds was not effected. Defendant Nos. 1 to 3 were having right to transfer their undivided shares, but they had no right to sell specific portion of the land to any person. In terms of section 44 of the Transfer of Property Act, transferee of undivided share can enjoy property jointly with others

and has right of partition. In this view of the matter and considering the settled legal position that possession of one co-sharer/co-owner is possession of all co-sharers/co-owners, the plaintiff cannot claim his exclusive possession over the suit property.

9. Thus, as per record *prima facie* it appears that the portion of land which is purchased by the plaintiff during pendency of partition proceeding had fallen to the share of defendant No.4 and its possession is handed over to defendant No.4 on 13/06/2012. Though the plaintiff has objected to the partition and handing over possession to defendant No.4, that by itself cannot render the partition ineffective. Record indicates that defendant No.4 was put in possession of the suit property on 13/06/2012 and there is nothing on record to show that plaintiff has come into possession of the suit property thereafter.

10. It is also a matter of record that as per order passed by Tahsildar on 10/12/2012, by decreasing area of land of defendant No.3 by 2 H 44 R, plaintiff's name is recorded in respect of land of defendant No.3 in 7/12 extract. It is argued by the respondents that plaintiff is in possession of 2 H 44 R land which had fallen to the share of defendant No.3 Kachru. Electricity bills and water bills relied upon by the plaintiff are in respect of land admeasuring 2 H 44 R, which is recorded in the name of plaintiff.

11. Considering all these aspects, appellate Court has rightly recorded a finding that *prima facie* evidence on record is not sufficient to identify disputed property and plaintiff's possession over the disputed land. Trial Court erred in discarding process of partition lawfully effected by the competent authority and has erroneously relied upon contention of the plaintiff that he had not delivered the possession.

12. Learned advocate for petitioner in support of his submissions relied on ***Ramdev Food Products (P) Ltd. Vs. Arvinbhai Rambhai Patel and Others, (2006) 8 SCC 726***, wherein the Hon'ble Apex Court has held that :-

"125. We are not oblivious that normally the appellate court would be slow to interfere with the discretionary jurisdiction of the trial court.

126. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again. [See for example *Wander Ltd. v. Antox India P. Ltd, (1990) Supp SCC 727*, *Laxmikant V. Patel v. Chetanbhai Shah, (2002) 3 SCC 65*, and *Seema Arshad Zaheer v. Municipal Corporation of Greater Mumbai, (2006) 5 SCALE 263*].

127. The appellate court may 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.

128. However, in this case the courts below proceeded on a prima facie misconstruction of documents. They adopted and applied wrong standards. We, therefore, are of the opinion that a case for interference has been made out."

13. Considering the observations made in paragraph No.128, the ratio in the aforesaid decision is not applicable to the facts of the present case, as in the case in hand there are documents to indicate that in execution of partition decree shareholders were put in possession of their respective shares of land.

14. Learned advocate for petitioner also relied upon ***Baban Anantrao Naik Vs. Sau. Pramila Uttamrao Yenare and Another, 2011 (6) All.M.R. 15***, wherein learned Single Judge of this Court was considering the case that the plaintiff was in possession of the suit property on the basis of leave and licence agreement of seven years. It is held that once it is admitted that plaintiff was inducted in possession of the suit property, then the presumption would be in favour of the continuity of possession unless defendants pleads and proves that plaintiff was dispossessed. Considering the facts and record of the case in hand, said decision is not helpful to the case of the petitioner.

15. In the case in hand, it is clear that plaintiff has failed to make out *prima facie* case and balance of convenience is not in his favour. If the stay is refused, plaintiff is not likely to suffer irreparable loss. In that view of the matter appellate Court's order is just, legal and proper.

16. However, considering the peculiar facts of the present case, the injunction not to alienate and/or create third party interest in the suit property, granted against defendants, is liable to be maintained. Hence, the following order:-

ORDER

- (I) Writ petition is partly allowed.
- (II) Impugned order is modified to the effect that, during pendency of the suit, there shall be ad-interim injunction in terms of clause (3) of the operative part of order dated 07/09/2021, passed by learned Joint Civil Judge, Junior Division, Paithan, below Exhibit-5 in R.C.S. No.103/2021.
- (III) Accordingly, civil application also stands disposed of.

(NITIN B. SURYAWANSHI, J.)