



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

WRIT PETITION NO. 14305 OF 2023

Bharatrao Shripatrao Ghodke
Since deceased through His L.Rs.
Anant Bharat Ghodke .. Petitioner

Versus

Sulochanabai Mohanrao Ghodke
and others .. Respondents

Shri Mohit R. Deshmukh, Advocate for the Petitioner.
Shri Mukul S. Kulkarni, Advocate for the Respondent No. 5.

CORAM : SHAILESH P. BRAHME, J.
DATE : 14TH DECEMBER, 2023.

FINAL ORDER :

. Heard Mr. Mohit S. Deshmukh, learned counsel for the petitioner and Mr. Mukul Kulkarni, learned counsel for the respondent No. 5. Admittedly, the respondent No. 5 is the contesting party so far as application Exhibit 176 is concerned. Application Exhibit 176 was opposed by the respondent Nos. 5 and 6, hence I am of the view that the necessary parties are represented before this Court to decide present petition.

2. The petitioner is assailing concurrent findings of facts recorded for rejecting application for temporary injunction. The petitioner is the original plaintiff, who has filed suit for declaration and injunction. The respondent Nos. 1 to 6 are the

members of the family of the petitioner, who are defendant Nos. 1 to 6 and remaining persons are purchasers, remaining defendants in the suit.

3. The petitioner has filed Spl. C.S. No. 08 of 2011 along with application Exhibit 05 U/O 39 Rule 1 and 2 of the Code of Civil Procedure (for short "Code"). By order dated 20.01.2012, application Exhibit 05 was rejected on merits. Being aggrieved, the petitioner had preferred Misc. Civil Appeal No. 142 of 2012. It was dismissed in default. Thereafter, on 17.12.2015, application Exhibit 176 was filed for identical relief of temporary injunction, which had suffered adjudication. It was contended that due to change in circumstances and recurring alienations at the instance of the respondent No. 5, the relief of injunction was necessary. The said application is rejected by the Trial Court, which is confirmed by the lower Appellate Court.

4. It is the case of the petitioner that by sale deed dated 05.09.1977 subject matter that is land gut No. 88 admeasuring 4H 55R situated at Tuljapur was purchased by the petitioner/Bharatrao, the respondent No. 1/Sulochanabai, the respondent No. 2's wife/Rukminibai and the respondent No. 6, jointly. It is not an ancestral property of the family, but jointly purchased property of four individuals. By the passage of time, the land in question got non agricultural potential, converted into plots and few plots are sold out. The respondent No. 5 is not the exclusive owner of the land, which is converted into plots and

not entitled to alienate the same. The mutation entry No. 1063 may not enure to the benefit of the respondent No. 5 because there is no separation of the share amongst the owners. The respondent No. 5 indulged into repeated alienations is the cause to approach the Court by application Exhibit 176.

5. The learned counsel submits that both the Courts below have committed an error of jurisdiction in holding that there was no change in circumstances and the successive application for temporary injunction is not permissible. The findings regarding *prima facie* case and balance of convenience have been erroneously recorded.

6. The learned counsel for the petitioner would submit that both the Courts below failed to appreciate the irreparable loss, which is being caused to the petitioner. The alienation has led to the complications and multiplicity. Even if the petitioner succeed in the suit, the decree would be unexecutable. It would be paper decree only. Therefore, the alienation should have been prevented by granting injunction.

7. My attention is invited to the findings recorded by the lower Appellate Court to demonstrate that the merits of the application have not been dealt with. Though it was argued that the respondent No. 5 has no authority to sell and the alienations are void, there is no consideration. According to the learned counsel this is failure to exercise the jurisdiction. Therefore,

according to him both the order and the judgment are perverse and unsustainable.

8. Per contra, the learned counsel for the respondent No. 5 submits that the successive applications for self same relief are not permissible. Having suffered adjudication of application Exhibit 05 on merits, there was no reason to again file application Exhibit 176. The learned counsel submits that both the Courts below are justified in holding that there is adequate protection U/Sec. 52 of the Transfer of Property Act. My attention is invited to the findings recorded by the Trial Court in its order dated 20.01.2012 for rejecting earlier application, Exhibit 05. The findings recorded for rejecting the application have reached finality and cannot be reopened in this manner.

9. The learned counsel for the respondent No. 5 would submit that though property was purchased in the year 1977, in the year 1988 there was a partition amongst the members of the family of joint family properties including land gut No. 88. Accordingly, record of right was mutated. There was an attempt to challenge mutation entry No. 1063 by filing appeal before the Sub Divisional Officer, Osmanabad, but it was withdrawn on 30.09.1992. It is further contended that there are lapses on the part of the petitioner.

10. The respondent No. 5 claims to be exclusive owner and entitled to alienate the property. The learned counsel would

further submit that both the Courts below rightly exercised the jurisdiction and have arrived at plausible conclusion. He would point out that suit is at the stage of recording of evidence and there is no need to cause any indulgence.

11. Considering the rival submissions of the parties, I prefer to record the glaring aspect that prayer in application Exhibit 05 and in application Exhibit 176 are self same. Application Exhibit 05 was made in the year 2012 and suffered adjudication on merits. It was recorded that there was partition in the family effected in 1988 and there was mutation entry No. 1063 to that effect. The record of right was attempted to be challenged, but failed. The Trial Court found *prima facie* case of entitlement in favour of the respondent No. 5 and ultimately his application was rejected. The challenge to the order was unsuccessful in M.C.A. No. 142 of 2012.

12. The successive applications for self same relief are maintainable, but party applying for has to demonstrate the change in circumstances. Under the garb of change in circumstances, the petitioner has moved application Exhibit 176. Both the Courts below have rightly rejected the same considering the rejection of earlier application at Exhibit 05 and recorded findings against the petitioner. Just because the respondent No. 5 is indulging into alienations of the plots cannot be said to be change in circumstances. Once his entitlement has been concluded by earlier order dated 20.01.2012 passed below Exhibit

05, at this stage of the proceedings, the alienations of the plots at his instance may not give rise to cause to apply for injunction.

13. Both the Courts below have already recorded that there is protection U/Sec. 52 of the Transfer of Property Act and the alienations or the future alienations would be subject to outcome of the suit, is reasonable and proper. The learned counsel for the petitioner vehemently submits that there is irreparable loss due to alienations and if alienations are not prevented, then the decree likely to be passed would be almost redundant. When *prima facie* the entitlement of the respondent No. 5 is proved, no order of injunction can be granted.

14. The learned counsel for the petitioner has criticized the judgment and order passed by the learned lower Appellate Court stating that his submissions on merits regarding the joint ownership acquired by sale deed dated 05.09.1977, validity of partition and absence of any evidence of partition have not been dealt. The learned counsel for the petitioner is right in a way. However, the lower Appellate Court has expressed his concurrence for the findings recorded by the Trial Court as well as the findings recorded in earlier order passed below Exhibit 05. After all Appellate Court's jurisdiction is restricted jurisdiction. Apprehension of fact is not permissible. The scope of the Appellate Court's jurisdiction U/O 43 of the C. P. C. has been laid down by the Supreme Court in the matter of **Wander Ltd. and another Vs. Antox India P. Ltd.** reported in **1990 (Supp) SCC**

727 in para No. 14, which is as follows :

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, 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. 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 the 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. After referring to these principles Gajendragadkar, J. in [Printers \(Mysore\) Private Ltd. v. Pothan Joseph](#) :

... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseption & Co. v. Johnston* the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.

The appellate judgment does not seem to defer to this principle."

15. The learned counsel for the petitioner has submitted that the respondent No. 5 in fact is not a joint purchaser and the property being not ancestral or joint family property has no right to claim it by way of any so called partition. The submission of the learned counsel cannot be countenanced at this stage. The Court at this stage cannot conduct mini trial. The petitioner is entitled to establish the right to property as well as illegalities in the alienations at the conclusion of trial. However, at this juncture it is not possible to prevent the respondent No. 5 from alienations.

16. In that view of the matter, I do not find that there is any substance in the submissions of the learned counsel for the petitioner for criticizing the findings recorded by the lower Appellate Court. Both the Courts below have taken plausible and reasonable view. I do not find any merit in the writ petition. The writ petition is disposed of.

17. However, considering the facts and circumstances the proceedings of Spl. C. S. No. 08 of 2011 are expedited.

[SHAILESH P. BRAHME, J.]

bsb/Dec. 23