

WRIT PETITION NO.500 OF 2023

Versus

Mr. Mukul Kulkarni, Advocate for the petitioners.
Mr. Amol Sawant, Advocate for respondent No. 1.
Mr. Pramod Mayure, Advocate for respondents No. 2 and 3.

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DATE : 17th MARCH, 2023

ORDER :

2. The petitioners/original plaintiffs filed Regular Civil Suit No. 74 of 2020 seeking simplicitor injunction in respect of suit property i.e Plot No. 41, out of Survey No. 69/5, admesuring 2700 sq.feet. It is the claim of the petitioners that the said suit

property is self acquired property of husband of petitioner No. 1 who purchased it by way of registered sale deed in the year 1963. Thereafter, by obtaining necessary permission he construed the house in western portion of the said property. The eastern portion is a open plot. The defendant No. 1 is the real brother of husband of plaintiff No. 1. By joining hands with the revenue authorities he entered his name to the eastern half open portion of the suit property in the year 1991. Thereafter, without having any right, he sold the said half portion to defendants No. 2 and 3. Since, defendants No. 2 and 3 obstructed the plaintiffs, the plaintiffs filed suit for injunction.

3. In the said suit, plaintiffs filed application Exhibit-5 for temporary injunction. Defendants appeared and resisted the claim of the plaintiffs by filing written statement. Defendant No. 1 denied all the contentions in the plaint and claimed that the suit property was partitioned in the year 1991 and eastern portion of the suit property has come to his share and accordingly mutation entry no. 10511 was certified on 25.06.1991 and since then he is in peaceful possession of the said property. Till the death of Mahadeo, husband of plaintiff No. 1 in the year 2001, the mutation entry was not challenged in any

Court of law. Since the mutation entry record is a public document, the same proves possession of defendant No. 1.

4. Defendants No. 2 and 3 also filed their written statement and adopted the contentions of defendant No. 1. They claimed that they are bonafide purchaser for good consideration without notice. They have claimed to be in possession of half eastern portion of the suit property, since the date of their purchase in the year 2013.

5. The Trial Court after hearing the parties rejected the application Exhibit-5 holding that on the basis of mutation entries on record, prima facie possession of defendant No. 1 over the suit property cannot be denied and he appears to be in possession of the suit property since 1991 till execution of sale deed in favour of defendants No. 2 and 3 on 30.03.2023 and the plaintiffs have failed to prove that they are in possession over the entire suit property.

6. Being aggrieved, plaintiffs filed Miscellaneous Civil Appeal No. 34 of 2022, which is dismissed by the Appellate Court. Hence, the present petition.

7. Heard the learned advocate for the petitioners, learned advocate for respondent No. 1 and learned advocate for respondents No. 2 and 3 at length. Perused the grounds raised in the petition, documents filed with the same, impugned orders, affidavit in replies filed by the respondents and citations relied on by both the sides.

8. It is apposite to consider relevant provisions before considering the rival submissions.

(i) **Section 44 of Transfer of Property Act, 1882.**

44. Transfer by one co-owner.— Where one of two or more co owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

(ii) **Section 4 of the Partition Act, 1893.**

4. Partition suit by transferee of share in dwelling-

house.- 1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

9. After due consideration of the submissions made by the learned advocate for the parties and the provisions applicable to the facts of the present case, this Court is of the opinion that the impugned orders are unsustainable for the following reasons.

10. It is a matter of record that husband of plaintiff No. 1 purchased the suit property in the year 1963 by way of registered sale deed. Thereafter, he has obtained loan for construction of portion of suit property, by mortgaging the suit property. The photographs placed on record by the petitioners, prima facie, indicate possession of petitioners on the suit property. There is a chain link fencing to the entire suit property

and there is only one gate for entry. There is nothing on record to indicate that the suit property is partitioned and there is fencing in between suit property and open plot on eastern side.

11. Prima facie there appears substance in the arguments of the petitioners that except a bare statement of Defendant No. 1 that he is in possession of the suit property from the date of mutation, there is nothing on record to show his possession over the suit property. The mutation entry does not confer any right, title or interest in the property.

12. It is settled legal position that '*without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share.*'

'Now, it is well settled that the purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. His only right is to sue for partition of the property and ask for allotment to him of that which, on partition, might be found to fall to the share of the coparcener whose share he had purchased.' [Vide **M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors.**, (1966) 1 SCR 628].

13. In *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh and Ors*, [1954] 1 SCR 177, it is held, '*All that (vendee) purchased at the execution of sale, was the undivided interest of coparcener in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He would work-out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour.*'

14. In *Ramdas vs. Sitabai and Ors.*, (2009) 7 SCC 444, considering the aforesaid rulings, it is held, '*In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court.*'

15. '*There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that*

the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger/outsider does nothing after purchasing the share.'

'The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share, yet the Legislature did not provide that the right for pre-emption could be exercised " in any Suit for Partition". The Legislature only provided for such right when the "transferee sues for partition". The intention of the Legislature is clear. There had to be initiation of proceedings

or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption.' [Vide **Gautam Paul Vs. Debi Rani Paul and Ors.**, (2000) 8 SCC 330].

16. The observations in the aforesaid rulings support the case of the petitioners. There is substance in the contention of the petitioners that in view of aforesaid provisions and enunciation of law in the aforesaid rulings, petition deserves to be allowed.

17. Learned advocate for the respondents strongly relied on provisions of Section 157 and 158 of Maharashtra Land Revenue Code, 1966, to contend that, revenue entries in favour of respondent No. 1 prima facie, prove their possession, since, mutation entries have presumptive value. They further contended that since public notice is issued, at the time of effecting sale in favour of defendants No. 2 and 3, the plaintiffs had knowledge about the sale transaction is intended to be entered between defendant No. 1 and defendants No. 2 and 3.

They further claimed that even husband of Plaintiff No. 1 during his life time has not challenged the mutation entry effected in the year 1991 and for the first time the mutation entry in favour of defendant No. 1 and defendants No. 2 and 3 were challenged by plaintiffs in the year 2014 and the present suit is filed in the year 2020. They further claimed that plaintiffs have not even claimed a relief that the sale deed executed by defendant No. 1 in favour of defendants No. 2 and 3 be set aside. They have supported the impugned orders passed by the Trial Court as well as by the Appellate Court. Reliance is also placed by them on *Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another*, AIR 1995 SC 1728, to contend that factum of partition between two brothers, the entries in records of rights maintained in official course of business is relevant piece of evidence to prove the partition and it is not necessary that partition should be effected by registered partition deed.

18. There is no merit in these contentions raised by the respondents for the simple reason that mutation entries do not prove the possession. Secondly, in view of citations referred supra, the legal position is settled. Fact remains that in the mutation entry also joint possession is mentioned. It will be for

the parties to prove their respective contentions during the trial that there was partition and Defendants No. 2 and 3 may adopt appropriate remedy as available in law if they are so advised.

19. Trial Court as well as the Appellate Court have ignored the legal position enunciated in the rulings referred supra and have passed the impugned orders by relying on irrelevant factors. Without there being any basis the Trial Court has recorded a finding that there are clouds over the possession of the plaintiffs. Further erroneous finding is recorded that on the basis of mutation entries on record, prima facie, possession of defendant No. 1 over the suit property cannot be denied and after the execution of sale deed on 30.03.2013, defendants No. 2 and 3 are in possession of the suit property. Merely, because on western half portion house of the plaintiffs is constructed, on that basis the Trial Court has recorded a finding that eastern side of the suit property is open plot and therefore, plaintiffs had failed to prove that they have possession over the suit property.

Non application of mind on the part of Trial Court and the Appellate Court is clear on the face of record. They have failed to consider that prima facie plaintiffs appear to be in possession of the suit property and balance of convenience lies

in their favour and irreparable loss would be caused to the plaintiffs if injunction is not granted in their favour. The impugned orders are therefore unsustainable in law and facts of the present case.

20. In the result, writ petition is allowed in terms of prayer clause 'A', which reads thus:

"A. The Hon'ble High Court may be pleased to issue a writ of certiorari or any other appropriate writ, direction or order in the nature of writ and thereby quash and set aside:

(i) the judgment and order dated 01.07.2022 passed by the learned 2nd Joint Civil Judge Junior Division, Dhule below Exhibit 5 in Regular Civil Suit No. 74 of 2020 and;

(ii) the judgment and order dated 12.10.2022 passed by the learned District Judge 4, Dhule in Misc. Civil Appeal No. 34 of 2022 and may further be pleased to allow the application at Exhibit 5 preferred by the Petitioners in Regular Civil Suit No. 74 of 2020 and issue appropriate order for the said purpose;"

21. Considering the fact that the suit is of the year 2020 and the pleadings of the parties are complete and issues are framed, the Trial Court is directed to expedite the suit and

complete the trial of the suit in any case within one year from the date of receipt of writ of this order.

22. Needless to state that the observations in this order are prima facie and Trial Court shall not be influenced by them at the time of deciding the suit on merits.

[NITIN B. SURYAWANSHI, J.]