

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5562 OF 2023

Tulashiram Laxman Lade & Ors

...Petitioners.

Versus

Balasaheb Revanna Rathod

..Respondent.

Mr. Prasad P. Kulkarni i/b Mr. Vikrant Phatate for the petitioner.
Mr. Anil S. Kalekar for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : June 28, 2023.

P. C. :

1. Heard learned counsel appearing for the respective parties.
2. The challenge in the petition is to the order dated 13th January 2023 passed by the appellate Court in Miscellaneous Civil Appeal No.122 of 2022 allowing the appeal and reversing the order passed by the 5th Joint Civil Judge, Senior Division, Solapur in Regular Civil Suit No.596 of 2022 below Exhibit-5. The respondent claiming to be the purchaser pursuant to a partition stated to have taken place between the vendors of petitioners herein, filed a suit being RCS No. 596 of 2022, for perpetual injunction restraining the petitioners herein from obstructing his peaceful possession. An application for

temporary injunction came to be filed and by the order dated 23rd August 2022, the trial Court rejected the application, which finding has been reversed by the appellate Court.

3. Learned counsel appearing for the petitioners submits that the settled position in law is that the purchaser of an undivided share in a joint family property is not entitled to possession of what he has purchased and the only right which the purchaser obtains is a right to sue for partition and to ask for the allotment of a share, which on partition would fall to the share of coparcener whose share he has purchased. He would urge that the trial Court has rightly appreciated the position in law and would assail the finding of appellate Court. He would further submit that the respondent has not produced any evidence on record to *prima facie* establish his possession over the property and the burden is upon the respondent to *prima facie* establish his case. He draws the attention of this Court to the judgment dated 2nd September 2013 passed in Civil Appeal No.175 of 2007 in which a finding has been recorded that there was no partition of land Gat Nos.48 and 61 in between the coparceners. He would further submit that a suit for partition being RCS No.626 of 2004 is pending and it is open for the respondent to implead himself in the same and to challenge the same.

4. *Per contra*, learned counsel for the respondent has pointed out the admissions of petitioners in the reply to Exhibit-5 application in which the petitioner has stated that in the year 1979, their father Laxman had partitioned the property in unequal proportions between the children and on the basis of illegal partition, the illegal mutation entry bearing No. 229 has been effected. He has also pointed out the submission of petitioners in Regular Civil Appeal No.120 of 2012, which was an appeal challenging the judgment in RCS No.626 of 2004, where it is submitted by the petitioner that defendant no.1 has orally partitioned the suit property amongst himself and his sons and accordingly mutation entry No.229 was effected on 15th March 1980. It is further recorded in the judgment dated 20th April 2015 that the suit bearing RCS No. 626 of 2004 was filed as the partition was not equal and proper and, as such, the declaration and partition was sought.

5. The genealogy which is produced on record by the petitioner is not disputed. The vendor of respondent is coparcener Mahadeo who had sold the northern portion of suit property to Jalindar on 11th February 2022 and the southern portion of property to the other legal heir Machindra on the same day. Machindra has sold the southern side of property to the present respondent. As there was obstruction

to the possession of respondent, who claims to have been put in possession pursuant to the sale-deed executed between himself and Machindra, the suit came to be filed.

6. The petitioner has not filed any proceedings seeking to challenge the sale deed, which has been executed by Machindra and the present respondent or even the sale deed which was executed by Mahadeo selling the northern side of property to Jalindar and the southern side of property to the other son Machindra. The objection of petitioners seems to be that there was no partition and, as such, the only right which accrues to a purchaser of the undivided portion of the ancestral property is to sue for partition. He draws support from the judgment dated 2nd September 2013 which states that there was no partition of land Gat Nos.48 and 61, however, if the mutation entry No.229 is perused, it shows that as regards land Gat No.48/1 there was partition. This mutation entry is of the year 1980. No doubt, this mutation entry has been challenged. However, the position remains that the petitioner himself has filed a suit bearing RCS No.626 of 2004 claiming that the oral partition which has been executed by their father Laxman was illegal and improper. It appears that partition was effected pursuant to the oral partition.

7. Considering the admissions which have been given by the

petitioners in their reply to Exhibit-5 application as well as the submissions which are recorded in judgment dated 20th April 2015, *prima faice* it appears that there was an oral partition of the suit properties, which led to Mutation Entry No.229, which was executed on 15th March 1980. It is not disputed by the petitioner that there has been a sale-deed which has been executed between Machindra and the present respondent. The appellate Court has taken into consideration the fact that 7/12 extract of suit property since the year 1979 shows the long-standing entries of Mahadeo who was the vendor of Machindra as well as the sale deed as a proof of the *prima facie* possession of property. The appellate Court has considered the mutation entry No.229 which shows that the petitioner was in possession of plot No.61/2 and also the absence on the part of the petitioner to file any affidavit to say that such partition had not taken place. Based on this, the appellate Court has come to a conclusion that the plaintiff *prima facie* establishes that he is in lawful possession of the suit property on the basis of registered sale deed. Once the fact of execution of registered sale deed is not disputed, the only question which remains is whether any *prima facie* case of partition is made out. In the present case, as indicated above, the suit which has been filed by the petitioner is to challenge the oral partition which was effected in the year 1979 leading to the mutation entry No. 229.

Coupled with the admissions made in the reply to Exhibit-5 application in which it is claimed that the oral partition was not in equal proportion, *prima facie*, it can be said that there was an oral partition between the parties. It is also not disputed that Mahadev had sold the subject property, i.e., Survey No. 48/1 to Machindra, which sale deed has not been challenged by the petitioners.

8. It is trite that possession follows title unless proved otherwise. In the present case, the petitioners have not been able to show that in spite of the sale deed, the respondent was not in possession of the suit property and that the suit property was being cultivated by them. This is also apparent from the fact that the long-standing 7/12 extract which show the names of Mahdadeo in respect of the suit property pursuant to Mutation Entry No. 229.

9. In view of the above, in my opinion, a *prima facie* case has been made out by the respondent for grant of order of temporary injunction. It is a matter of trial as to whether the partition was effected by metes and bounds. But at this interim stage, it cannot be said that the respondent has not been in possession of the suit property. As it is held that the respondent has *prima facie* established the case in his favour, the balance of convenience is in favour of the respondent as he has parted with valuable consideration for the

purchase of property and, as such, irreparable loss will be caused if his possession is not protected.

10. There is no quarrel with the proposition of law as held by the trial Court in its order. But in the present case, the petitioners own admissions are that there was oral partition which according to the petitioner was not legal and proper. In such event, it cannot be said that the only right which accrued to the respondent is the right to sue for partition and not for protection of his possession.

11. Reliance is placed by learned counsel for the petitioner on the decision of the Apex Court in ***Ram Pat v. State of Haryana [(2009) 7 SCC 614]***. The proposition of law which was observed by the Apex Court is that it is well settled law that the purchaser of coparcener's interest in the joint family property is not entitled to possession of what he has purchased. However, considering the facts of the present case, *prima facie* a case of oral partition is established by the respondent and, as such, the said decision has no application in the present case.

12. In view of the above, there was no infirmity in the order of the appellate Court. Writ petition stands dismissed.

13. Needless to state that the observations made hereinabove are only for the limited purpose of deciding the validity of order passed by the appellate Court. The trial Court to decide the matter on its own merits and uninfluenced by the observations made hereinabove.

[Sharmila U. Deshmukh, J.]