



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 319 OF 2012
WITH
INTERIM APPLICATION NO.274 OF 2024

1. Alka Baburao Dhanawade Alias
Alka Vikas Gadkari
Age-50 Yrs., Occ. Household
R/o. Danoli, Taluka Shirol District Kolhapur

2. Sujit Vilas Gadkari
Age-Adult Occ. Agriculturist
R/o. Danoli, Taluka Shirol District Kolhapur

3. Sou. Sujata Ramesh Adulkar D/o
Vilas Gadkari
Age-Adult Occ. Household
R/o. Kasba Bawada, Kolhapur

4. Sou. Vaishali Sanjay Chavan D/f
Vilas Gadkari
Age-Adult Occ. Household
R/o. Kurundwad, Taluka Shirol
District Kolhapur

**... Appellants/
Applicants**

Versus

1. Sulochana Shankar Gadkari
Age-46 Yrs., Occ. Agriculturist
R/o. Danoli, Talika Shirol, District Kolhapur

2. Laxmi Vasant Biranje
Age- Adult Occ. Agriculturist
R/o. Yenechvdi, Taluka Gadhinglaj
District Kolhapur

3. Suman Vilas Gadkari
Age-Adult Occ. Agriculturist
R/o. Danoli, Talika Shirol,
District Kolhapur

4. Sou. Varsha Manoj Shaha
Age-Adult Occ. Agriculturist
R/o. Masur, Taluka Karad,
District Satara

5. Rajendra Mahaling Pise
Age-45 Occ. Agriculturist R/o.
Danoli, Talika Shirol, District Kolhapur

6. Satish Bajirao Shinde
Age-30 yrs. Occ-Agriculture
R at Danoli. Tal. Shirol, Dist. Kolhapur.

...Respondents

Adv. Ashutosh Gole for the Appellants/Applicants.

Adv. V. V. Tapkir i/b S. M. Sabrad for Respondent Nos. 1 to 4.

Coram : Sharmila U. Deshmukh, J.
Reserved on : March 21, 2024.
Pronounced on : April 12, 2024.

JUDGMENT :

1. The Appellants before this Court are the original Defendant Nos. 1 to 4 who are dissatisfied by the Judgment dated 23rd August, 2011 passed by the Appellate Court in Regular Civil Appeal No. 10 of 2007 allowing the Appeal of the Plaintiffs and restraining the Defendant Nos. 1 to 4 from obstructing the Plaintiffs possession over the suit property and from entering into the suit property. Vide order dated 21st June, 2013 the Appeal was admitted by this Court. For the sake of convenience, the parties are referred to by their status before the Trial Court.

FACTUAL MATRIX :

2. Regular Civil Suit No. 161 of 2003 was instituted by the Plaintiffs seeking perpetual injunction from disturbing the Plaintiffs possession and from entering the suit property. The Plaintiffs came with a case that the Plaintiff Nos. 1 and 2 and Vilas are the daughters and son respectively of Shankar Dhondi Gadkari who expired on 15th October, 1976. Plaintiff Nos. 3 and 4 are the wife and daughter of Vilas. Vilas expired on 17th May, 2003 leaving behind him the Plaintiffs as legal heirs. Defendant No. 1 claims to be the wife of Vilas and Defendant Nos. 2 to 4 claim to be children of Vilas, however, they have no concern with suit property or Vilas.

3. The suit land was tenanted land which was being cultivated by Shankar during his lifetime and thereafter by Vilas, Shankar's wife and Plaintiff Nos. 1 and 2. As Vilas was the male member of the family, his name was entered into the crop cultivation column. The suit property is in the possession of the Plaintiffs since their ancestors under the tenancy laws. As the land was Inam land and not re-granted, proceedings under Section 32G of the Bombay Tenancy and Agricultural Lands Act, 1948 were deferred. The original landlord by suppressing the fact that the suit land was not re-granted obtained order in his favour in Section 32G proceedings on 13th April, 1977.

Appeal was preferred by Plaintiffs which was allowed by Maharashtra Revenue Tribunal and the Tribunal passed an order of payment of re-grant amount and to commence the Section 32 G proceedings.

4. The original landlord in collusion with the Defendant Nos. 1 to 4 and by taking advantage of the liquor addiction of Vilas prepared a forged and fabricated compromise deed which was registered bearing No. 1707 on 3rd May, 2003. On the basis of the compromise deed, the original landlord claims to have sold half share of the suit land to Defendant No. 5 by sale deed dated 9th July, 2003, which is in violation of the Tenancy Act. For the purpose of challenging the sale deed, the Plaintiffs have instituted Regular Civil Suit No. 113 of 2003. The Defendant Nos. 1 to 4 on the advice of the Defendant No. 5 and the original landlord are obstructing the possession of the Plaintiffs over the suit property. Hence the suit for perpetual injunction.

5. The suit came to be resisted by Defendant Nos. 1 to 4. It was contended that Defendant No. 1 is the legally wedded wife of Vilas and Defendant Nos. 2 to 4 are his children. The name of Defendant No. 1 is recorded in the Ration Card and the Voter List as wife of Vilas and in the school documents, the name of Vilas is shown as the father of Defendant Nos. 2 to 4. The Plaintiff No. 3 is not the legally wedded wife of Vilas and taking advantage of certain acquaintance, claims to

be the wife of Vilas. Plaintiff Nos. 1 and 2 are married and residing elsewhere. Plaintiff No. 3 is residing with her brother and Plaintiff No. 4 is residing at her matrimonial house. Vilas and original landlord had entered into compromise terms under which $\frac{1}{2}$ share being the western portion of the suit property was given to Vilas and $\frac{1}{2}$ share being the eastern portion was retained by landlord. The original landlord sold his half share of the suit property to Defendant No. 5 by registered sale deed and Defendant No. 5 is in possession of the same. Vilas expired suddenly on 17th May, 2003 and the western portion of the suit property is in possession of the Defendants as the legal heirs of Vilas. There was no joint family between the Plaintiffs and the deceased Vilas and after the death of Shankar the property was being cultivated by Vilas as tenant and Vilas was entitled to the suit property under the tenancy laws.

6. Defendant No. 5 filed his written statement supporting the case of Defendant Nos. 1 to 4. It was contended that Defendant Nos. 1 to 4 are in possession of the western portion of property whereas the Defendant No. 5 is in possession of the eastern portion of the property. It was contended that before purchase of the property the Defendant No. 5 had made proper enquiry about the ownership rights and claimed to be the *bonafide* purchaser for value without notice.

7. After amendment was carried out to the written statement by Defendant No. 5, the Plaintiffs filed a rejoinder contending that the Defendant No. 5 had full knowledge of the tenancy proceeding and the transaction of Defendant No. 5 is illegal.

8. Parties went to trial. The Trial Court vide judgment dated 4th November, 2006 dismissed the suit and negated the issue of possession and obstruction.

9. As against dismissal of the RCS No. 161 of 2003, the Plaintiffs filed Regular Civil Appeal No. 10 of 2007 to which the Original Defendant Nos. 1 to 4 filed their cross objections. Against the judgment of the Trial Court passed in RCS No. 113 of 2003, RCA No. 9 of 2007 was filed. In RCS No. 161 of 2003, the parties with consent had adopted the evidence adduced in RCS No. 113 of 2003. Both suits were decided on the same day by different judgments, and two separate Appeals had been filed and were heard on same date. The Appellate Court noted that Defendant No. 5 had sold out his share to Defendant No. 6 who has been added as the Respondent No. 6 in the present Appeal. The Appellate Court noted that in the connected Appeal No. 9 of 2007, the Appellate Court has decided common issues and relied upon the findings in Appeal No. 9 of 2007.

FINDINGS OF APPELLATE COURT :

10. The Appellate Court on consideration of evidence adduced by the parties held that Plaintiff No. 3 is the legally wedded wife of Vilas and Plaintiff No. 4 is their daughter. Defendant Nos. 2 to 4 are the illegitimate children and have a right in the share of Vilas in the suit property.

11. On aspect of possession, the Appellate Court noted the 7/12 extracts produced by the Plaintiffs for the years 1953-1954 to 1975-1976 showing the name of Shankar Gadkari and from 1976-1977 to 1997-1998 showing the name of Vilas and 7/12 extract of the year 2002-2003 showing the name of the Plaintiffs as owner of suit property by virtue of Mutation Entry No. 7388 and that the crop cultivation column is blank. The Appellate Court noted that the 7/12 extract for the year 2005-2006 shows the possession of the Plaintiffs over the suit property. The Appellate Court noted the evidence of Plaintiff No. 1 establishing that the suit property was cultivated by Plaintiffs which is demonstrated from 7/12 extracts. The Appellate Court noted that Section 32M purchase certificate is in the name of the Plaintiffs by virtue of which Mutation Entry No. 7388 has been effected in favour of the Plaintiffs. The Appellate Court held that possession of the Plaintiff No. 1 is possession on behalf of all the

Plaintiffs as they are co-owners.

12. The Appellate Court noted that to establish their possession, the Defendant No. 1 has examined one witness, who was not cross examined by the Plaintiffs, however, in RCS No. 113 of 2003, the certified copy of the Affidavit of Evidence of the witness is produced, which cannot be read in evidence. In RCS No. 161 of 2003, the Defendant No. 1 examined witnesses to prove their possession over the suit property which evidence was disbelieved by the Appellate Court. It was noted that it is improbable that the said witnesses who have their own properties were working as laborers in the suit property and were being paid by the Defendants.

13. The Appellate Court noted the report of Court Commissioner appointed in RCS No. 161 of 2003 stating that at the time of site inspection, the Defendant No. 1 had abused and threatened to assault the Court Commissioner. The Appellate Court held that as against the oral evidence adduced by the Defendants, the documentary evidence produced by the Plaintiffs is to be believed and held the Plaintiffs in possession of the suit property.

14. On the issue of legality of compromise deed, the Appellate Court held that the issue lies within the jurisdiction of tenancy court

and appeals are pending. However as of date, the compromise deed has been declared illegal by the Competent Court. Thus, the tenancy rights of Vilas over the entire property has been established and the alienation by the original landlord in favour of Defendant No. 5 is illegal. The Appellate Court held that Defendant No. 5 is not bonafide purchaser for value.

15. The Appellate Court held that the Plaintiffs have established their possession over the suit property and the Defendant Nos. 2 to 4 have not established their possession. The Plaintiffs being co-owners of the property, the possession by one co-owner is possession on behalf of all the co-owners. The Appellate Court held that the report of Court Commissioner shows obstruction by the Defendant No. 1 and the Plaintiffs are entitled to order of perpetual injunction. The Appellate Court by the impugned judgment set aside the judgment of Trial Court and dismissed the cross objections. The Appellate Court passed an order of perpetual injunction restraining the Defendant Nos. 1 to 4 from obstructing the possession of Plaintiffs over the suit property and from entering the suit property.

SUBSTANTIAL QUESTION OF LAW :

16. The present Second Appeal has been admitted on the following

substantial question of law framed:

“(k) Whether the learned lower Court could have granted permanent injunction against at least the appellant nos. 2-4 as they were declared as co-owners by the learned lower Court ?”

SUBMISSIONS :

17. Heard Mr. Gole, learned counsel for the Appellants and Mr. Tapkir, learned counsel for the Respondents.

18. Mr. Gole, learned counsel for the Appellant has taken this Court through the findings of the Trial Court and Appellate Court in the connected Regular Civil Appeal No. 9 of 2007. He submits that RCS No. 161 of 2003 was filed simpliciter for injunction against Defendant Nos. 1 to 4. Pointing out to the observations of the Appellate Court in the connected Appeal No. 9 of 2007, he submits that the Appellate Court has held on re-appreciation of evidence that the Plaintiffs being the co-owners of the property, the possession of Plaintiff No. 1 is possession on behalf of all the co-owners. He submits that the same analogy would apply to the present Appellants and at-least to the Appellant Nos. 2 to 4 who are legal heirs of Vilas. He submits that the Appellant No. 1 herein had against the connected RCA No. 9 of 2007 filed Second Appeal No. 320 of 2012 which came to be rejected

observing that in the judgment in RCS No. 113 of 2003 injunction is granted only against the purchaser of the half share from the original landlord. He submits that the Appellate Court has mis-appreciated the evidence which has come on record as there is a contrary finding of the Appellate Court that in respect of Mutation Entry No. 7388, the cultivation column is shown blank. Whereas, it is further noted by the Appellate Court that the 7/12 extracts produced by the Plaintiffs for the year 2005 -2006 shows the name of Vilas in the crop cultivation column. He submits that despite evidence produced by Defendants to prove the possession of the suit property, the Appellate Court has ignored relevant evidence.

19. He would further submit that in both the suits i.e. RCS No. 113 of 2003 as well as RCS No. 161 of 2003, the case of Plaintiffs is not of ouster or adverse possession and thus, no injunction could be granted against Appellant Nos. 2 to 4. In support of his submissions he relies upon the following decisions.

- ***Prakash S. Akotkar and Ors. vs. Mansoorkha Gulabkha and Ors. [AIR 1996 BOMBAY 36]***
- ***T. Ramalingeswara Rao (dead) and Anr. vs. N. Madhava Rao and Ors. [(2009) 4 SCC 608]***
- ***B. R. Patil. vs. Tulsa Y. Sawkar and Ors. [2022 SCC OnLine SC 240]***

- ***Sakhahari Parwatrao Karahale and Anr. vs. Bhimashankar Parwatrao Karahale [(2002) 9 SCC 608]***

20. *Per contra*, Mr. Tapkir, learned counsel for the Respondent submits that Section 85 of the Tenancy Act bars the jurisdiction of the Civil Court to decide the issue of tenancy of the suit land. He submits that the Defendants had not inherited the tenancy and it was the Plaintiffs who are cultivating the suit land. He submits that the possession of the Plaintiffs is proved through the evidence of the Court Commissioner and that the Appellate Court has specifically held that at the time when the spot inspection was conducted the Defendant Nos. 1 and 2 were cultivating the suit land by force and had abused the Court Commissioner. He would further submit that the Appellate Court on the basis of the evidence has held that the Plaintiffs are in possession of the suit property.

REASONS AND ANALYSIS :

21. RCS No. 161 of 2003 was filed seeking simpliciter injunction against the Defendants on the premise that the Defendants have no relationship with Vilas. On the basis of evidence on record, there are concurrent findings that Defendant Nos. 2 to 4 are illegitimate children of Vilas. The legitimacy of the Defendant Nos. 2 to 4 qua the share of Vilas in the suit property has been legislatively protected by

reason of Section 16 of the Hindu Marriage Act, 1955. The position is now settled by the Apex Court in case of ***Revanasiddappa & Anr. vs. Mallikarjun & Ors. [2023 SCC OnLine SC 1087]***, where the Apex Court was considering the issue of whether a child who is conferred with legislative legitimacy under Section 16(1) or 16(2) of Hindu Marriage Act, 1956 is by reason of Section 16(3) entitled to the ancestral/coparcenary property of the parents or is the child merely entitled to the self earned/separate property of the parents.

22. The Apex Court formulated its conclusion relevant for our purpose in paragraph 54 (iii), (viii), (ix) and (x) as under:

“(iii) While conferring legitimacy in terms of Sub- Section (1) on a child born from a void marriage and under Sub-Section (2) to a child born from a voidable marriage which has been annulled, the legislature has stipulated in sub-section (3) of Section 16 that such a child will have rights to or in the property of the parents and not in the property of any other person.

(viii) While providing for the devolution of the interest of a Hindu in the property of a Joint Hindu family governed by Mitakshara law, dying after the commencement of the Amending Act of 2005 by testamentary or intestate succession, Section 6 (3) lays down a legal fiction namely that the coparcenary property shall be deemed to have been divided as if a partition had taken place. According to the Explanation, the interest of a Hindu Mitakshara coparcener is deemed to be the share in the property that would have been allotted to him if a partition of the

property has taken place immediately before his death irrespective of whether or not he is entitled to claim partition;

(ix) For the purpose of ascertaining the interest of a deceased Hindu Mitakshara coparcener, the law mandates the assumption of a state of affairs immediately prior to the death of the coparcener namely, a partition of the coparcenary property between the deceased and other members of the coparcenary. Once the share of the deceased in property that would have been allotted to him if a partition had taken place immediately before his death is ascertained, his heirs including the children who have been conferred with legitimacy under Section 16 of the HMA 1955, will be entitled to their share in the property which would have been allotted to the deceased upon the notional partition, if it had taken place;

(x) The provisions of the HSA 1956 have to be harmonized with the mandate in Section 16(3) of the HMA 1955 which indicates that a child who is conferred with legitimacy under Sub-Sections (1) and (2) will not be entitled to rights in or to the property of any person other than the parents. The property of the parent, where the parent had an interest in the property of a Joint Hindu family governed under the Mitakshara law has to be ascertained in terms of the Explanation to sub-section (3), as interpreted above.”

23. The law laid down by the Apex Court is that the child whose legitimacy is protected under Section 16(1) and (2) of Hindu Marriage Act, 1955 will have rights to or in the property of the parents and not in the property of any other person. The Defendant Nos. 2 to 4 though born of void marriage would be entitled to a share in the share of Vilas

upon notional partition being effected.

24. The case of the original Plaintiffs is that the suit property was being cultivated by Vilas jointly with the present Plaintiff Nos. 1 and 2. The Appellate Court has held that by virtue of Section 32M certificate issued, the Plaintiffs have been declared as owners of the suit property as legal heirs of Vilas and that Defendant Nos. 2 to 4 being the illegitimate children are entitled to share in the suit property. The finding of the Appellate Court has not been challenged by the Plaintiffs and rightly so in view of the settled position in law.

25. The suit being filed for injunction, the aspect of possession assumes importance. The Appellate Court while answering the issue on the aspect of possession has correctly held that the possession of the Plaintiff No. 1 is the possession on behalf of all the co-owners. However, the Appellate Court lost sight of the fact that the Defendant Nos. 2 to 4 being entitled to share in the suit property as illegitimate children of Vilas are also co-owners alongwith the Plaintiffs. The same analogy is to be extended to the possession of the Defendant Nos. 2 to 4. Even if the finding of possession is in favour of the Plaintiffs, unless plea of ouster is pleaded and proved the possession by one co-owner would be possession on behalf of all the co-owners.

26. The principles relating to the inter se rights and liabilities of co-sharers have been laid down by the Apex Court in ***Jai Singh vs Gurmej Singh [AIR 2009 SC (supp) 1570]*** as under:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners. (7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.

27. The Apex Court in the case of ***B. R. Patil vs Tulsabi Savkar***

(*supra*) has noted in paragraph No. 27 as under :

"27. The possession of a co-owner however long it may be, hardly by itself, will constitute ouster. In the case of a co-owner, it is presumed that he possesses the property on behalf of the entire body of co-owners. Even non-participation of rent and profits by itself need not amount to ouster. The proof of the ingredients of adverse possession are undoubtedly indispensable even in a plea of ouster. However, there is the additional requirement in the case of ouster that the elements of adverse possession must be shown to have been made known to the co-owner. This is apparently for the reason that the possession of a co-owner is treated as possession of other co-owners. While it may be true that it may not be necessary to actually drive out the co-owner from the property as noticed in Mohd. Zainulabudeen (since deceased) by Irs. v. Sayed Ahmed Mohideen, mere continuance in the possession of a co-owner does not suffice to set up a plea of ouster. The possession of the co-owner will also be referable to lawful title. The possession of the appellant even of the ground floor of the building on the land in question, was entirely in accord with his right as a co-owner."

28. The admitted position is that the suit property has not been partitioned and as held by the Apex Court in the case of ***Sakhahari Parvatrao Karhade (supra)*** once a finding is recorded that there was no partition between the members of the joint family which members of the joint family are co-sharers, possession of one is possession of all.

29. Even if it is assumed that the Plaintiffs are in possession of the suit property, there is no plea of ouster of the Defendant Nos. 2 to 4 raised by the Plaintiffs. The case of the Plaintiffs is simply that they are in possession of the suit property and the Defendants have no concern with the suit property as there was no relationship between Vilas and the Defendants. Having being established that the Defendant Nos. 2 to 4 are illegitimate children of Vilas, which finding has attained finality, the Defendant Nos. 2 to 4 are co-owners with the Plaintiffs, and the possession of the Plaintiffs is in the eyes of law possession of all of the co-owners and no injunction could have been granted against the co-owner.

30. The title and possession of a co-owner has been held to be co-extensive with the interest of other co-owners. That being the position, injunction of the nature granted by the Appellate Court restraining the Defendants from even entering the suit property could not have been passed. The effect of the injunction is to exclude the Defendant Nos. 2 to 4 from exercising their rights as co-owners. A learned Single Judge of this Court in case of **Prakash S. Akotkar and Others vs Mansoorkha Gulabkha and others**(supra) has held unless ouster is proved, other co-owners cannot claim injunction of the nature so as to exclude the other co-owners from exercising their

right as co-owners.

31. The decision of the Apex Court in ***T.Ramalingeswara Rao vs N. Madhava Rao & Ors*** (supra) relied upon by Mr. Gole is squarely applicable to the facts of the present case. In that case injunction was sought against the purchasers of undivided share in joint family property. The Apex Court held that in paragraph 16 as under:

"16. In our view, even assuming that the plaintiffs claimed to be in possession of the suit property (which the two courts below did not find in their favour) for claiming injunction, yet they were not entitled to claim injunction against the other co-sharers over the suit property. It is a settled principle of law that the possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period."

32. The Defendant Nos. 2 to 4 stand on a better footing as their legitimacy is protected by Section 16 of Hindu Marriage Act, 1955 and by virtue of Section 16(3) of Hindu Marriage Act, 1955, the Defendant Nos. 2 to 4 are entitled to share in property which will be allotted to Vilas upon notional partition being effected. The Defendant Nos. 2 to 4 being co-owners, no injunction could have been granted restraining them from entering the suit property even if the Plaintiffs are assumed to be in possession.

CONCLUSION :

33. By concurrent findings, Defendant Nos. 2 to 4 having been held to be entitled to a share in the suit property being legal heirs of Vilas, possession of one co-owner raises presumption of joint possession on behalf of all the co-owners. In the absence of any case of ouster pleaded and proved to negative the presumption of joint possession, no injunction of the nature granted by the Appellate Court *qua* the Appellant Nos. 2 to 4 is sustainable in law. The Appellant No. 1 has not established that her marriage with Vilas was lawful marriage and has withdrawn Second Appeal No. 320 of 2012 which had challenged the said finding. The injunction granted by the Appellate Court can be sustained only against the Appellant No. 1. The substantial question of law is accordingly answered in favour of the Appellant Nos. 2 to 4.

34. Resultantly, Appeal succeeds *qua* the Appellant Nos. 2 to 4. The judgment of the Appellate Court dated 23rd August, 2011 *qua* the Appellant Nos. 2 to 4 is quashed and set aside. RCS No. 161 of 2003 is dismissed against Appellant Nos. 2 to 4.

35. In view of the disposal of the Second Appeal, interim applications, if any, does not survive for consideration and stands dismissed.

[Sharmila U. Deshmukh, J.]

Harish

Signed by: Sachin R. Patil

Designation: PS To Honourable Judge

Date: 12/04/2024 17:19:06