



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Appeal Against Order No. 56 of 2023

Smt. Ruby w/o Vinaykumar Sehgal
Aged about 63 years, Occ : Nil,
r/o A-36, Ground Floor,
Shankar Garden, Vikas Puri,
New Delhi – 110018. it is Through
P.O.A. Shri Vishal Arun Nagrare.

.... Appellant

.. Versus ..

- (1) Sanjay s/o Ramvilas Pandey,
Aged 45 years, Occ:- Business,
r/o Plot No. 115, Wardha Road,
Behind Ajit Bakery, NIT Lay out,
Ajni Chowk, Nagpur – 15.
- (2) Shri Anupkumar s/o Gajendranath
Dutta, Age 62 years, Occ :- Business,
Both R/o Block No. A, 448/895,
Lal Chakki, Ulhas Nagar,
Thane- 421001.
- (3) Shri Manoj s/o Nanku Yadav,
Aged 45 Years,
Occupation Business,
r/o 439, behind Mount Carmel
girls School, Prashant Nagar,
Ajni Nagpur.
- (4) Shri Devendra s/o Ramsundar
Shukla, Aged 45 years,
Occ :- Business,
r/o 48-A Vyankatesh City-II,
Besa, Nagpur – 440 034.

(5) Mrs. Ranjana Adhikari Martinez,
Adult, Occ : Household,
r/o U.S.A. 4035, Parkway Drive,
SAN ANTONIO, TX,
U.S.A. 78228

(6) Mrs. Purnima Suphan,
Adult, Occ : Household,
r/o U.S.A. 4035, Parkway Drive,
SAN ANTONIO, TX,
U.S.A. 78228

(7) Mrs. Deepa Adams,
Adult, Occ :- Business
At Jody Hurst & Associates Realty,
11E, 1st Ave, Steel Salah, W A 98942,
U.S.A.
Email deeaadams@msn.com
Wwwyakakimayalley properties.net

.... Respondents

Mr. R. R. Srivastava, Advocate for appellant
Mr. M. D. Samel, Advocate for respondent nos. 1, 3 and 4

CORAM : ANIL L. PANSARE J.

Date of reserving judgment : 18-01-2024

Date of pronouncing judgment : 19-01-2024

JUDGMENT

Heard.

2. Admit.

3. The appellant/original defendant no. 1 is aggrieved by order dated 15-6-2023 passed below Exhibit 7 in Special Civil Suit No. 952/2021 by the 5th Joint Civil Judge Senior Division, Nagpur.

4. The appellant and other defendants (respondent nos. 5 to 7) have been restrained from disturbing the peaceful possession of the respondent nos. 1 to 4 (original plaintiffs) over their 75% undivided share and interest in the suit property till disposal of the suit. (The parties shall be hereinafter referred to by their original nomenclature).

5. The plaintiffs by filing application at Exhibit 7 sought relief of temporary injunction which came to be granted. The case of the plaintiffs is that they are the owners of 75% of undivided share and interest in the land bearing Municipal Corporation House No. 410, Malika Matbuza land admeasuring 976 square meters being portion of the land bearing Khsara No. 405/1, City Survey No. 4062, Sheet No. 85, built up area 418.06 square meters, Ward No. 3, Mouza Sitabuldi, Near Netaji Market, Sitabuldi, Tahsil and District Nagpur (hereinafter referred to as 'suit property'). The defendants are said to be the owner of remaining undivided share of 25%.

6. Thus, the plaintiffs and defendants are owners of undivided share of the suit property. The plaintiffs are seeking partition of their share, meaning thereby that the share of the parties is yet to be demarcated. The plaintiffs claimed that in the year 2015, their predecessors in title and the defendants amicably made mutual arrangement/oral partition and thereby the defendants were allotted the land admeasuring 244 square meters

towards western side, whereas the predecessor in title of plaintiffs retained 732 square meters of land towards eastern side.

7. The trial Court has relied upon various documents. However, none of the documents could substantiate the demarcation of share as claimed by the plaintiffs.

8. Learned counsel for the plaintiffs has invited my attention to registered sale deed dated 10-12-2019 executed by Pritadevi, the predecessor in title of plaintiffs in favour of the plaintiffs.

9. I have gone through the sale deed, more particularly the schedule of the property. Pritadevi has sold to plaintiffs an undivided share of 75% in the suit property. The recitals in the sale deed indicates that the property sold has been given in possession of the plaintiffs. There are, however, no recitals in the sale deed to show that the property sold was admeasuring 732 square meters and that it was towards the western side of the suit property.

10. The impugned order does not indicate that the trial Court has applied its mind to the status of the possession of the property. In fact in the reasons assigned by the trial Court, there is no mention as regards plaintiffs' possession over a particular/specified portion of the suit property.

11. In the circumstance, even if it is to be presumed that the plaintiffs are/were in possession of 75% of the share of the suit property, they are enjoying the possession of an undivided share and until the plaintiffs through document or otherwise establishes their share over a specified portion of the suit property, they may not be entitled to protect possession which they enjoy in the capacity of co-owners with the defendants.

12. Learned counsel for the plaintiffs contends that the defendants, though appeared, did not file reply and, therefore, the trial Court was left with no other alternative but to accept the case put forth by the plaintiffs.

13. I do not find any substance in the aforesaid submission in as much as to arrive at a *prima facie* conclusion that the plaintiffs are in possession of a particular portion of the suit property, the trial Court, even in absence of defendants, will have to come to the conclusion, which should be supported by the reasons, that the plaintiffs are in possession of a specified portion of suit property (in the present case, the plaintiffs are claiming possession over eastern side of the suit property). Mere statement that there was oral partition between the predecessor in title of plaintiff and that of defendants will not be sufficient.

14. Learned counsel for the defendants submits that the defendants have filed written statement as well as reply. The defendants have disputed

the claim made by the plaintiffs as regards their exclusive possession over a particular portion of the suit property.

15. In the circumstances, the purpose will be served if the parties are relegated back to the trial Court to put forth their claims, which shall be decided afresh considering the observations in the body of the order. Hence, following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The order passed by 5th Joint Civil Judge Senior Division, Nagpur below Exhibit 7 in Special Civil Suit No. 952/2021 dated 15-6-2023 is quashed and set aside.
- (iii) The application, Exhibit 7 in Special Civil Suit No. 952/2021 is restored on the file of 5th Joint Civil Judge Senior Division, Nagpur to decide afresh in accordance with law. Needless to say that if the plaintiffs' possession is to be protected, the plaintiffs will have to make out a *prima facie* case of their exclusive possession over the eastern side of the suit plot.
- (iv) The parties shall appear before the trial Court on 5-2-2024 at 11.00 a.m.

16. The appeal is disposed of in above terms with no order as to costs.

(Anil L. Pansare, J.)

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