

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9321 OF 2024

Kathod Kalu Ware and Another ...Petitioners

vs.

Yogesh Waman Thakare and Others ...Respondents

VISHAL
SUBHASH
PAREKAR

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Mr. Sagar Talekar, for the Petitioners

Mr. C.G. Gavnekar a/w. Mr. Rohit Parab, Mr. Nikhil M. i/b. Mr. Prasanna Sahane, for Respondent Nos. 1 to 6.

Mr. Jeet Gandhi a/w. Mr. Rahul Arora and Mr. Pinakin Modi, for Respondent nos. 53 and 54.

CORAM : N. J. JAMADAR, J.

DATE : JANUARY 21, 2025

P.C:

1. This petition calls in question the legality, propriety and correctness of the judgment and order dated 5th February, 2024 passed by the learned District Judge, Kalyan in Civil Appeal No. 48 of 2022 whereby the appeal preferred by the petitioners/ plaintiffs against an order passed by the learned Civil Judge, Kalyan rejecting application for temporary injunction, preferred by the plaintiffs in Special Civil Suit No. 180 of 2020, came to be dismissed.

2. A suit was instituted with the assertion that the predecessor in title of the plaintiffs acquired land bearing survey No. 143/12, more particularly described in paragraph No. 1 of the plaint, under a registered Sale Deed dated 26th June, 1953. Out of the said land, some portion was sold by the plaintiff and defendant Nos. 5 to 52 to

defendant No. 54 under a Sale Deed dated 10th November, 2010. Likewise, another portion was sold to defendant No. 53. An area admeasuring 1H 15R remained with the plaintiff and defendant Nos. 5 to 52 as a joint property. The said area of land (the suit property) is under the joint possession and enjoyment of the plaintiff and defendant Nos. 5 to 52.

3. An oral partition was effected and the memorandum of partition titled 'Vatap Patra' was prepared on 22nd March, 2010 whereunder an area admeasuring 40 guntha was allotted to the plaintiffs. Yet the defendant Nos. 5 and 6, without the consent of the co-sharers, sold 80 R to the defendant No. 4, under a registered Sale Deed dated 3rd October, 2019. Hence, the suit for a declaration that the Sale Deed executed by defendant Nos. 5 and 6 in favour of defendant Nos. 1 to 4 is illegal and void.

4. The plaintiffs also sought temporary injunction to restrain defendant Nos. 1 to 6 from creating third party interest in the suit property. By an order dated 9th February, 2022 the learned Civil Judge rejected the application for temporary injunction. The learned District Judge did not find any reason to interfere with the discretionary order passed by the trial Court.

5. Mr. Talekar, learned counsel for the petitioners, would submit that the Courts below have committed an error in non-suiting the

plaintiffs on the ground that the plaintiffs have not instituted the suit for partition. The defendant Nos. 5 and 6, being the co-owners, could not have sold a definite portion of the suit property. Partition by metes and bounds had not taken place. It was, therefore, imperative to restrain the defendant Nos. 1 to 4 from creating third party interest in the suit property.

6. The submissions of Mr. Talekar do not merit acceptance.

7. The Courts below have correctly noted the position in law that among the co-owners, there is community of interest and unity of possession. No co-owner is entitled to sell a specific portion of the property in contradistinction to his undivided interest therein. However, in the facts of the case, the Courts below have found that the plaintiff failed to make out a prima facie case of the oral partition in the year 2010. Nor there was material to show that the plaintiffs were in joint possession with the defendant Nos. 5 and 6. On the contrary, the plaintiffs had sold portions of the suit land in favour of the defendant Nos. 53 and 54 by executing instruments to which defendant Nos. 5 and 6 were not the parties. At one breath the plaintiffs were claiming that there was a prior partition and at another breath the plaintiffs were seeking partition on the premise that the suit property was still joint.

8. The fact that the plaintiffs have not prayed for partition

assumes significance in the aforesaid context. Thus, the exercise of discretion by the Courts below not to grant injunction cannot be said to suffer from such infirmity as to warrant interference in the exercise of supervisory jurisdiction by this Court.

9. The petition thus stands dismissed.

(N. J. JAMADAR, J.)