

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 463 OF 2024
WITH
INTERIM APPLICATION NO. 9641 OF 2024

Ganesh Bhiva Mhaskar and Ors. ...Appellants
Versus
Bhagwan Barku Mhaskar and Ors. ...Respondents

Mr. Bharat Gadhavi a/w Aniket Shitole for the Appellants.
Mr. Sumedh Modak for Respondent No.3.
Mr. Piyush Raheja a/w Mr. Aakash Loya a/w Manan Bhindora i/b M/s.
Makrand Ghandi and Co. for Respondent Nos. 4 to 9.

CORAM : M.M. SATHAYE, J.
DATE : 13th JANUARY 2025

P.C. :

1. Learned Counsel for the parties were heard on 17.12.2024 and the appeal is placed today for passing order.

2. The Appellants are Plaintiffs and Respondents are Defendants. The appeal is filed challenging the judgment and order dated 20.03.2024 passed below Exhibit 5 in Special Civil Suit No. 356 of 2022 by Civil Judge, Senior Division, Kalyan. By the said impugned order, the application filed by the Appellants below Exh. 5 is rejected, which was filed seeking interim injunction against Respondent Nos. 1 to 9 from creating 3rd party interest in the suit property and not to disturb alleged possession and interim injunction against Respondent No.10/Municipal Council from granting permission for construction on the suit property.

3. The said suit is filed for declaration that the Appellants have 8/9th undivided right, title and share in suit property i.e. land survey No. 52, Hissa No. 4 admeasuring 10870 sq. m. situated at village Pale, Taluka Ambarnath, District Thane. Prayers of declaration are made that the Agreement of Sale dated 21.09.1991 and first registered Sale Deed/conveyance dated 18.02.1993 from Respondent No. 1 to Respondent No. 2, subsequent registered Gift Deed dated 11.11.2020 from Respondent No. 2 to Respondent No. 3, subsequent registered Sale Deed/conveyance dated 31.12.2020 from Respondent No 3 to Respondent Nos. 4 to 6 of 5920 sq.m. plot and further subsequent registered Sale Deed/conveyance dated 12.02.2021 from Respondent No. 3 to Respondent Nos. 7 to 9 of remaining 4950 sq.m. plot, are all illegal and not binding on the Appellants. Prayers for cancellation of said documents are also made. Then a prayer for appointment of the Court Commissioner to effect partition of the suit property is also made. Perpetual injunction is sought restraining Respondent Nos.1 to 9 from creating 3rd party interest or selling suit property or encumbering it or developing the same. Perusal of the plaint shows that as many as 25 prayers are made in the plaint numbered as prayer clause (a) to (y). The suit is filed in October 2022.

4. The Appellants' case is as under.

4.1) They claim to have share in the ancestral / joint family suit property. It is claimed that the Appellants and Respondent No.1 are legal heirs and representatives of late Shri. Barku Shiva Mhaskar, the earlier owner ('late Barku' for short).

4.2) Respondent No.2 has purchased the suit property from Respondent No.1.

- 4.3) Respondent No.2 has thereafter gifted the suit property to Respondent No.3.
- 4.4) Respondent No 3 has sold part of it to Respondent Nos. 4 to 6 who are are partnership firm and its partners.
- 4.5) Respondent No 3 has sold remaining part of it to Respondent Nos. 7 to 9 who are also partnership firm and its partners.
- 4.6) Respondent No.10 is the local Municipal Council.
- 4.7) The Appellants claim that one Vishnu Phadke was the landlord and owner of Suit property and late Barku had filed Tenancy Case before the appropriate Authority under the provisions of Bombay Tenancy and Agricultural Land Act, 1948 ('BT&AL Act' for short), who purchased the same became owner under certificate dated 30.11.1981 issued under Section 32(M) of the BT&AL Act.
- 4.8) Late Barku's name came to be recorded under Mutation Entry (M.E.) No. 752 dated 11.01.1982.
- 4.9) On 23.08.1992, late Barku died intestate leaving behind his legal heirs.
- 4.10) On 18.02.1993, Respondent No. 1 sold suit property to Respondent No. 2 without any authority, claiming to be exclusive owner.
- 4.11) Thereafter, on 20.03.1993, names of legal heirs of late Barku were brought on record vide M.E.No 984.
- 4.12) It is contended that Respondent No.1 got his exclusive name recorded vide M.E. No. 985 on 10.04.1993.
- 4.13) Thereafter on 15.04.1993, the Respondent No. 2 in collusion with Respondent No. 1 got her name entered vide M. E. No. 986 without the knowledge and consent of the

Appellants.

4.14) All Mutation Entries are disputed on the ground that they are effected without any service of notice upon other heirs.

4.15) It is contended that after the death of late Barku, Respondent No.1, at the most, had 1/8th share in the suit property and therefore, he had no right to execute Agreement or Sale Deed in favour of Respondent No.2.

4.16) Consequent transactions of registered gift deed of January 2020 & registered Sale Deeds of December 2020 & February 2021 in favour of Respondent Nos. 4 to 6 & 7 to 9 in respect of 2 plots/portions are also disputed.

4.17) It is contended that in February 2021, the Appellants came to know from the office of concerned Talathi about application to effect M.E. Nos. 2441 and 2442 in respect of two portions of suit property and thereafter, the Appellants have lodged their objections.

4.18) In short, the case of the Appellants is based on contention that Respondent No.1 was not having right to alienate the suit property and the Appellants have 8/9th share therein and therefore, all the subsequent transactions are disputed.

4.19) A blanket stand is taken that the Appellants were not aware of transactions and mutation entries.

5. Respondent No.1 has filed written statement, plainly admitting the case of the Appellants. He has contended as under. That he is illiterate person and Respondent Nos. 2 & 3 have cheated him and have got executed bogus documents and he was unaware of the

contents thereof. That other legal heirs of late Barku had not released their share in the suit property. That mutation entries are wrongly recorded. That he had sold only his share. That he had no authority to sell entire suit property. He has ultimately prayed for decreeing the suit.

6. Respondent No.3 & 4 to 9 has filed written statement /reply raising various defences, contending as under. That the suit suffers from principles of delay, waiver, acquiescence and estoppel. That the suit is filed by Appellant No. 12 Omkar Dattu Mhaskar for himself and on behalf of other Appellants as their Constituted Attorney. That the suit is not valued property and it is ex-facie barred by limitation, as the first / foundational registered Sale Deed is executed in February 1993 and the suit is filed in 2022. That the suit is filed by the Appellants and Respondent No.1 in collusion of each other, for extracting illegal gain from Respondents, in as much as, Respondent Nos. 4 to 9, have after getting the plans and permission sanctioned and approved from Respondent No.10/Municipal Council, have started construction activity which is completed upto 10th slab. It is denied that the Appellants and Respondent No.1 had unity of possession and community of interest. It is specifically contended that on the date of first Sale Deed itself, Respondent No.1 had granted peaceful vacant and actual possession of the suit property to Respondent No.2 and the same is transferred by subsequent Gift Deed/Sale Deeds in favour of Respondent Nos. 3, 4 to 7 respectively. The alleged share of the Appellants is denied. That from the documents made available, it is seen that Respondent No.1 Bhagwan Barku Mhaskar was living separately from his family and having separate food/mess and worship and therefore, it was decided to grant him separate property as his share and that is how Respondent No.1 was put into exclusive and vacant possession of the suit property.

7. It is contended that by Vardi application under family arrangement, the suit property was transferred in the name of Respondent No.1 vide M.E. No. 985 and he was put in exclusive possession thereof. That therefore, from the date of M.E. No. 985, the Appellants had no right, title, interest or share in the suit property. That Respondent No.1 represented to Respondent No.2 and her husband that suit property is exclusively given to his share and the same was agreed to be sold for total consideration of Rs.1,22,000/- at the relevant time, and advance of Rs.50,000/- was given and Agreement of Sale dated 21.09.1991 was executed in favour of Respondent No.2. Thereafter, Respondent No.2 spent from her own pocket and a Sale Deed was executed in her favour, after Respondent No.1 obtained sale permission from the office of SDO, Ulhasnagar as well as from concerned Authority under Urban Land (Ceiling and Regulation) Act, 1976. That after obtaining necessary permission, payment of remaining consideration was made and ultimately on 18.02.1993, the Sale Deed/conveyance was executed and registered by Respondent No.1 in favour of Respondent No.2. That basis thereon, the application for necessary mutation entry was made by Respondent No.2 and after following due process of law, M.E. No. 986 was certified in her favour. That thereafter, Respondent No.2 applied to the office of Taluka Inspector Land Record (TILR) for necessary measurement and notices were issued to all concerned, in June 1997, to which none of the Appellants raised objections. That after waiting for statutory period, the certified copy of map of the measurement was handed over to Respondent No.2 in September 1997. That only objection that was received at the relevant time was in respect of boundary of the suit property.

8. It is contended that therefore all the Appellants were aware of

sale deed executed in favour of Respondent No.2 by Respondent No.1 way back in 1993 and therefore, suit filed in the year 2022 is clearly barred by limitation. That in various mutation entries after the death of legal heirs of late Barku, nowhere the suit property is mentioned and therefore, it indicates that suit property was not considered as property jointly held by the family. That the Appellants are joint owners of adjacent land survey No. 46, Hissa Nos. 1, 2 and 3, which is land adjacent to the suit property and in December 2019, notices were received by Respondent No.2 from Deputy Superintendent of Land Records as being owners of adjoining land, for fixation of boundaries. It is further contended that Respondent No.3 had applied for conversion of suit property into Non Agriculture (NA) property in January 2021 and accordingly, it is converted into NA land. That during the said process nobody including the Appellants have lodged any complaint or objection. The case of the Appellants about necessary notices under Section 150 of the Maharashtra Land Revenue Code, 1966 (MLRC) not given, is denied. It is contended that the documents of sale deed/gift deed/conveyance challenged in the suit are registered documents and the challenge is hopelessly time barred.

SUBMISSIONS

9. Learned Counsel for the Appellants submitted that the impugned order is passed without properly appreciating the *prima facie* evidence. It is submitted that the Appellants have *prima facie* share in the suit property which is admitted by the Respondent No. 1 who has allegedly sold the suit property. It is submitted that the impugned order is passed making certain observations about merits of the matter, especially about the issue of limitation, which are bound to prejudice the Appellants and therefore, interference is required.

10. Learned Counsel for the Respondent Nos. 4 to 9, on the other hand, strongly opposed the grant of any relief in favour of the Appellants. It is submitted that they are bonafide purchasers. It is pointed out that no other property of the joint family of Appellants is made subject matter of the suit and only the present suit property, which is sold by Respondent No.1 way back in 1993, has been made subject matter of the suit, with ulterior motive to place the property under development in litigation and extract money illegally. It is pointed out that Respondent No.1, who has sold the property in 1993, has chosen to file a completely collusive written statement making a prayer that suit be decreed. It is submitted that Appellants, on one hand contend that Respondent No.1 has sold the suit property beyond his right/entitlement, however on the other hand, they choose to stay joint with Respondent No.1 for rest of the joint family properties and this itself indicates collusion. It is asserted that during pendency of the interim application, there was no interim relief in favour of the Appellants and ultimately, the application is rejected. Photographs of the development in the suit property are placed on record. It is therefore, urged that there is no merit in the appeal and this is nothing but a chance litigation. He has relied upon the judgment of **Suresh Dalpatrai Shah Vs. Dnyanu Maruti Jadhav**¹, in support of his contention that the Court should make an attempt to make equitable partition without disturbing sale by co-owner in partition suit.

REASONS AND CONCLUSIONS

11. I have considered the rival submissions and perused the record.

¹ . (2017) 4 Mah LJ 328

12. Learned Counsel for the Respondents have placed on record the copy of notice issued during the measurement of the suit property. The said notice is of the year 2013, showing that it was issued to Dattu Barku Mhaskar who is predecessor of Appellant Nos 10 to 12 including Omkar, who has filed the suit on behalf of all the Appellants. Statements were recorded in April 2013 and measurement was conducted. Perusal of Mutation Entry No. 984 dated 20.03.1993 produced on record, *prima facie* shows that after the death of late Barku, the names of his legal heirs including Respondent No.1 were brought on record. Perusal of Mutation Entry No. 985 dated 10.04.1993 *prima facie* shows that suit property S. No. 52/4 was allotted to share of Respondent No.1 Bhagwan Barku Mhaskar exclusively and his name is accordingly recorded exclusively, since other legal heirs have relinquished/released their rights in person, and have accepted the partition and allotment of suit property in favour of Respondent No.1 alone. This Mutation Entry also indicates that notices were issued, statements were recorded, panchnama was drawn and thereafter the Mutation Entry is certified. Further, perusal of mutation Entry No. 986 dated 15.04.1993 *prima facie* indicates that suit properly is mutated in the name of Respondent No.2 pursuant to Sale Deed dated 18.02.1993. This mutation entry is also certified after issuing notices.

13. It is neither argued nor brought to the notice of the Court that these Mutation entry Nos. 985 and 986 were challenged in time by the Appellants. There is material on record to show that during measurement of the suit property in the year 2013, notices were issued. But no objection about the share in the suit property is shown to have been taken by the Appellants. M.E. No. 1186 on record shows other properties jointly owned by the Appellants and Respondent No.1,

however, they are not made subject matter of the suit. This clearly indicates a targeted approach towards the suit property. The chronology of events narrated above also clearly shows that suit is filed belatedly and challenge to the first / foundational Sale Deed of 1993 is set up as late as in the year 2022 which is after about 30 years. The written statement filed by Respondent No.1 *prima facie* appears convenient, spacious and collusive. Respondent No.1 has chosen to support the Appellants wholeheartedly after having sold the suit property about 30 years ago.

14. All this material, *prima facie* indicates that the present suit is nothing but a chance litigation targeted at the property which is now under development with visible potential and the Court process is sought to be used to obtain some leverage with intentions not so clear. Such efforts must be deprecated and in my view, present suit is nothing but one of such efforts, bordering on the abuse of process of law.

15. Viewed in the light of what is narrated above, when the impugned order is perused, it is seen that the learned Trial Judge has considered the material available on record and has held that there is no *prima facie* case or balance of convenience or irreparable loss in favour of the Appellants. The conclusion drawn by the Trial Court and the reasons recorded therefor, are neither perverse nor is there any error apparent on the face of the record. It cannot be faulted in the facts and circumstances of the present case. Following the settled law in **Wander Ltd. And Another vs. Antox India P Ltd.**² recently re-iterated by Hon'ble Supreme Court in **Ramakant Ambalal Choksi Vs. Harish Ambalal Choksi**³, this is not a fit case to substitute the discretion already

² . 1990 (Supp) SCC 737

³ . 2024 SCC OnLine SC 3538

exercised by the Trial Court. Therefore, there is no merit in the appeal and the same is dismissed with costs.

16. Needless to mention that the suit shall be decided on its own merits, in accordance with law, without being influenced by the observations made in the impugned order or this order.

17. Appeal from Order and pending interim application are disposed of in the above terms. No order as to costs.

18. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)