

Spl.C.S. No. 07/2019
Praful Deshmukh & Ors. Vs. Adwait
Deshmukh & Ors.

ORDER BELOW EXH - 05

01. Heard the learned Advocates Mr. Jamkar for plaintiff, Mr. U.G. Megde and Mr. Aralekar for defendants No.01 to 03. Perused the plaint, written-statement, affidavits, documents and entire record. A brief statement of facts relevant for adjudication of the application is delineated in a few forthcoming sub-paragraphs:

02 A. **Admitted facts:** The suit properties consisting of property under sale in question was belonging to deceased Ramrao, the husband of defendant No.04, brother of defendant No.03 and father of husband of plaintiff No.04. Plaintiffs No.01 to 03 are sons of plaintiff No.04; whereas defendants No.01 and 02 are grand sons of defendant No.03. Defendants No.05 and 06 are sisters of deceased father of plaintiff No.01 to 03 i.e. daughters of deceased Ramrao and defendant No.4. Plaintiffs have chosen not to proceed with the application against defendants No.04 and 06.

B. **Case of Plaintiffs:** a) By virtue of family arrangement, plaintiffs got certain properties as described in paragraph No. 03 of plaint, namely, Agricultural land in Block No.02, 05, 172 and 239; whereas defendant No.06

was allotted a plot at Ayodhyanagar and defendant No.05 was given an amount of eighteen to twenty lakhs out of sale proceeds of house at Naigaon sold out by deceased Ramrao. By the said family arrangement, plaintiffs were under obligation to look after defendant No.04. Block No.05 was mutated in the name of defendant No.04 just as the mark of respect. The family arrangement was acted upon by way of mutations effected in terms of family arrangement aforementioned. Defendants No.05 and 06 also got their names entered into 7x12 extract regarding the suit property Block No.05.

b) In the life time of deceased father of plaintiffs No. 01 to 03, defendant No.04 had executed two different consent-deeds dated 07.11.2012 and 15.06.2013 consenting mutations in favour of plaintiff, and accordingly, entries No.912 and 985 in the names of plaintiff came to be recorded in the Record of Rights (ROR for short). Defendants No.05 and 06, in the greed of property, filed a civil suit bearing RCS No.11/2016 claiming partition and the court was also pleased to issue interim injunction against alienation of the property left behind by deceased Ramrao. Will and conscience of defendant No.04 was dominated by defendants No.05 and 06 and the son of defendant No.03, namely, Dr. Mahesh used to treat her ailment of *arthritis*. All of them dominated her conscience and defendant No.03 conspired to grab the property in Block No.5, which was in the name of defendant No.04

initially. By getting executed power of attorney from defendant No.04, he applied before the revenue authorities, namely, the Sub. Divisional Officer, Biloli, who set-aside the mutation taking entries in favour of plaintiffs. The Additional Collector, Nanded confirmed the decision of the Sub Divisional Officer, Biloli and the Additional Revenue Commissioner, Aurangabad stayed the execution of orders of both the lower revenue courts. An entry in the name of defendant No.04 was taken in revenue records by deleting plaintiffs' name from 7/12 extract in disobedience to the stay order of the Additional Revenue Commissioner, and suit sale-deed was got executed from defendant No.04 in favour of defendants No.01 and 02 represented by the same power of attorney, namely, defendant No.03. Defendant No.04, even after having entered the names of plaintiffs in ROR, had never been in possession and she could not have given possession of the suit property, although recitals to that effect appear in the sale-deed. Defendant No.03, by taking the mis-advantage of this sale-deed, is obstructing plaintiffs' possession. Hence, the suit and and this application for preventing apprehended dispossession.

C. **Case of Defendants No.01 to 03 :** A) The suit property was belonging to defendant No.04, which has been purchased by defendants No.01 and 02 by paying the consideration amount of Forty-

five lakhs by an electronic mode of payment, and therefore, they are the now owners and possessors of the suit property Block No.05 by virtue of the said registered sale-deed. The entire case put by plaintiffs regarding family arrangement and the consent statements given by defendant No.04 with the revenue authorities is false and fabricated. Plaintiffs have no concern with the suit property owned and possessed by defendant No.04, which was sold by her to defendants No.01 and 02. Defendants No.01 and 02 are the lawful owners and possessors of the suit property, and hence, the application is liable to be rejected.

03. Following are the points for determination alongwith my findings thereon for the reasons ensuing:

	POINT	FINDING
1.	Whether plaintiffs have made out a <i>prima facie</i> case ?	Yes.
2.	Whether balance of convenience lies in plaintiffs' favour ?	Yes.
3.	Will plaintiffs suffer an irreparable loss, in case injunction is refused ?	Yes.
4.	What order ?	Application is allowed in terms of final order.

REASONS

04. **Point No. 01:** Obviously, defendants No.01 and 02, who are

claiming to be the owners and possessors of the suit property by virtue of sale-deed, are the strangers to the family of plaintiffs and defendants No. 4 to 6. It is equally true that the family arrangement claimed by plaintiffs can not be assertively endorsed unless evidence in that regard is recorded and plaintiff becomes successful in proving the same. However, the fact remains that the pleading of family arrangement that certain block numbers were assigned to plaintiffs excluding block No.05 in question, which was placed in the name of defendant No.04, is consistent with the Record of Rights maintained by Revenue Authorities. There is no reason, if there was no family arrangement, why other properties excepting the property block No.05 were mutated in the name of plaintiffs as per the terms of averred family arrangement set out by plaintiffs stated to have been acted upon as manifested by longstanding revenue record acquiesced by defendant No.04 herself.

05. Whether there was family arrangement is, *of course*, a question to be resolved on recording of evidence, however, an obvious and manifest fact remains that the origin and source of title of either plaintiffs or defendant No.04 claimed by any of them to any or all part of the property was the holding of deceased Ramrao and the initial mutation (which was not produced by the plaintiffs; but produced by Mr. Megde, just before passing the order) reveals that the source of title of defendant

No.04, through whom, defendants No. 1 and 2 are claiming as purchasers, was the *claim to the property on account of inheritance*. The concerned Revenue Officer, in that mutation, had also recorded that deceased Ramrao left behind him plaintiff No.4 and defendant No.04 to 6 as the successors and widow of deceased Ramrao i.e. defendant No.04 was mentioned to be in possession. This implies that defendant No.04 was holding the property as a *tenant-in-common* and possessing it for herself as well as on behalf of the other *tenants-in-common* in view of Section 19 of the Hindu Succession Act, 1956, who happened to be the class-I heirs of deceased Ramrao inheriting his property as per Section 8 of the Hindu Succession Act, 1956. Defendants No.01 to 03 have observed eloquent silence in never commenting on the source of ownership on defendant No.04 in their reply.

06. A lame attempt appears to have been made by Mr. Megde in canvassing a pale argument that defendant No.04 got the property in lieu of maintenance from her husband, which can not gather any moss for the following reasons:

a) This argument is without any averment to that effect in their reply to this application.

b) The revenue record also shows that defendant No.03, the power of attorney of defendant No.04, was agitating the cause of defendant

No.04 by basing existence of her right upon the theory of inheritance on account of demise of her husband. There is no whisper anywhere in any of the previous litigations that defendant No.04 got the property in lieu of maintenance from her husband in his lifetime.

c) This theory of grant property in lieu of maintenance by her husband deceased Ramrao is contrary to the first ever mutation of property deleting the name of deceased Ramrao due to his demise with insertion of the names of his Class-I heirs with the name of defendant No.04 as one of the successors.

d) There is no reason why mutation in favour of defendant No.04 was not got carried out in Record of Rights (ROR) on the basis of her acquisition of property as a grant in lieu of maintenance by her husband in his life time.

07. Defendants No.01 and 02, the sons of defendant No.03 (who acted as power of attorney holder for defendant No.04 in revenue proceedings and also acted as power of attorney holder for defendants No.01 and 02 for purchasing the suit property), either themselves or through defendant No.03, ought to have, before purchasing the property, enquired into the title and status of the property whether it was exclusive property of defendant No.04 or joint with other co-shares, more intensely, when the 7x12 extract soon after the demise of deceased

Ramrao revealed the names of other legal representatives of deceased Ramrao in the 7x12 extract, and more prominently, when the entry in the names of plaintiffs alone came to be recorded in pursuance of consent statement given by defendant No.04, which was *subjudice* in several revenue proceedings. No prudent man, without taking thorough search and conducting an enquiry when the record was revealing otherwise, could have indulged himself into such transaction merely on the basis of a singular entry in the exclusive name of vendor (defendant No.04), that too, only for one year, that too, an entry which was taken despite the stay order granted by the Revenue Commissioner. The vendees defendants No.01 and 02 can not be said to be unaware of the litigations on revenue side when they are represented by the same power of attorney holder, namely, defendant No.03, who was representing defendant No.04 in revenue litigations and was conscious of the fact of that the taking of entry of deletion of names of defendant No.01 to 03 was stayed by the Revenue Commissioner.

08. Defendants No.01 and 02, who are the transferees, under the law of transfer of property, are supposed to conduct due enquiry into title of the vendor and if it is the contention of defendants that due enquiry was made, they ought to have put forth their case as to how defendant No.04 was the exclusive owner of the suit property block No.05. Even on

accepting, for a moment, the stand of defendant No.04 against the theory of family arrangement excluding her from property as proposed by plaintiff, that she got property by virtue of inheritance, in such case also, after devolution of interest by virtue of Section 8 of the Hindu Succession Act, 1956 there ought to have been some pleadings as to how the tenancy in which plaintiffs and defendant No.04 were *tenants-in-common* came to be ruptured by allotment of possession of respective share on partitioning the property by metes and bounds so as to justify how defendant No.04 became the exclusive owner of her share, namely, the land in block No.05. It was duty of the purchasers, namely, defendants No.01 and 02 to get assured that such thing happened and defendant No.04 became the exclusive owner of the suit property for being competently sold under Section 54 of the Transfer of Property Act, 1882.

09. No doubt there is oath against oath in support of rival cases. However, the facet that the revenue record showing majority of the property in the name of plaintiffs gives an implication of acting upon of the family arrangement so contended. If there was no such family arrangement, there is no reason why defendant No.04 had never agitated such entries showing majority of the property standing in the name of plaintiffs. Thus, the existence of plaintiffs' case of there being a family

arrangement, by virtue of which, the parts of property of deceased Rama were allotted to the respective members of the family with the property Block No.5 having been kept in the name of defendant No.4, merely, as the mark of respect and to remind plaintiff of their obligation to look after her, is more probable than defendants' baseless case of defendant No. 4 having been the exclusive owner of the property Block No. 5, that too, by virtue of inheritance, that too, without there being any act of parties like partition or alike making her exclusive owner of this part of property. The case and the material consistent with the case placed on behalf of plaintiffs outweighs the illogical case put forth by defendants and, thus, at this stage of prima facie considerations, passes the ***test of preponderance of probabilities.***

10. Even on relying upon, for the moment, an averment of defendants No.01 to 03 that defendant No.04 got the property by virtue of inheritance as aforesaid, in absence of theory of partition in the inherited property, defendant No.04 could not become an exclusive owner although she could assume possession, which is, obviously, the possession held by her on behalf of all ***tenants-in-common*** in the property. In such situation, no doubt, the ***undivided interest*** vested in her could be sold out, the sale being governed by the provisions Sections 44 to 47 of the Transfer of Property Act,1882. However, there being

unity of possession in case of a **tenancy of tenants-in-common** created as the incident of inheritance under Section 8 of the Hindu Succession Act, 1956, purchaser could not have been inducted in possession by one of the **tenants-in-common** unless except upon partition, and in such contingency, the only remedy available for such purchaser from one of the co-sharers (**co-tenant-in-common**) is to file suit for general partition and get separated the share of his predecessor-in-title for recovering possession of such share. Authoritative pronouncement, if, at all, required for lending support to this proposition, can be found in the judgment of the Hon'ble Supreme Court in the case of **Ramdass Vs. Sitabai** delivered by the Hon'ble Shri. Justice Mukundakam Sharma reported in **2009 (7) SCC 444** and reliance can also be placed upon previous chain of judgments on this legal issue reiterated, referred to and relied upon in that case. In paragraph 17 of the aforementioned judgment, the Hon'ble Supreme Court held :

“17. In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court.”

11. This judgment in the case of **Ramdas** (*supra*) has been further relied upon and followed by the Hon'ble Supreme Court in the case of **Gajara Vishnu Gosavi Vs Prakash Nanasaheb Kamble** reported in **(2009) SCC 654**, wherein the law in this regard has been reiterated with the following observations in paragraph No. 11 of the judgment :

"11. Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a co-parcener can be a subject matter of sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers."

12. Both these judgments have been relied upon and followed in a subsequent case in Hon'ble Bombay High Court involving a similar legal issue, namely, Baburao and others Vs. Tukaram and Others A.O. No.04/2014 with C.A. No. 274/2014 decided on 19/03/2014.

13 This reasoning, however, is purely an alternative reasoning, which is based upon a hypothetical assumption of truth of the entire case of predecessor of defendant No.01 and 02 i.e. defendant No.04 that she got

the property by virtue of inheritance, the principal reasoning being one lying in justification of the result of test of preponderance of probabilities in plaintiffs' favour.

14. The cumulative consideration of the fact that defendant No.03 happened to be same power of attorney holder for defendant No.04 (the vendor under sale in question) on one hand and also for defendants No.01 and 02 (the vendees under sale in question) on the other hand, the fact of purchase having been made in the background of the previous 7x12 extract having revealed the names of plaintiffs to the exclusion of defendant No.04, and more previous 7x12 extracts having revealed the names of plaintiffs in the "***other rights column***", with a further important fact that defendants No. 5 and 6, too, had claimed the entire property to be joint family property in their suit for partition RCS No. 11/2016, gives rise to an inevitable corollary that defendants No. 1 and 2 are not the *bonafide transferees*, who have either failed to conduct enquiry into title with due diligence or deliberately omitted to conduct the it. Deliberate omission, perhaps, is more consistent with plaintiffs' case.

15. In addition to the foregoing incidents giving implications of omission to conduct enquiry, these defendants have never bothered

about the legal repercussions of the claim of defendants No. 05 and 06 in the suit filed by them against plaintiffs for partition claiming the entire property to be a joint family property. Their claim, whatsoever the fate of its perseverance may be, is indicative of the fact that the property claimed by defendants No.04 to 06 was based upon the theory of devolution of property by virtue of inheritance on account of the demise of deceased Rama. Defendants No.01 and 02 being the persons stepping into the shoes of defendant No.04, can not stay away from the same stand, which defendant No.04, too, had once taken.

16. For the aforesaid reasons justifying the theory of exclusive possession of the property claimed by plaintiffs on the basis of 7x12 extracts soon before the deletion of their names, and also for the reasons justifying existence of joint family property with its members as ***tenants-in-common***, it can not be said that defendant No.04 was in exclusive possession of the suit property in her own right in order to enable her to induct the stranger in exclusive possession of the property. Plaintiffs, therefore, seem to have established the prima-facie case, at least, as regards the disability of defendant No.04 in inducting defendants No.01 and 02 in possession of the property block No.5. The effect of the longstanding entries in the Record of Rights (ROR) aforementioned formulates a feather in cap of consistency in the case of

plaintiffs as regards non existence possession of defendants No. 01 and 02.

17. Accordingly, finding to point No.01 is recorded in the affirmative.

18. **Points No. 02 and 03:** Plaintiffs' apprehension of being dispossessed is germane from the rival claims to possession and ownership so as to justify necessity of addressing imminent urgency. Needless to say, plaintiffs having been held to have established the case of non existence of exclusive possession of defendants No.01 and 02, balance of convenience also tilts in favour of granting of injunction as the non-grant of the same may lead to irreparable loss to plaintiffs.

19. Although it has been argued that there can not be any injunction against co-owner, the injunction has been claimed against defendants No. 01 and 02, who are strangers to the family purchasing the property from one of the family members, namely, defendant No.4. Such an injunction can, definitely, be issued against the purchaser of an undivided interest from a co-owner who can not induct such purchaser in possession of part of joint property without there being partition by metes and bounds.

20. Accordingly, findings to points No. 02 and 03 are recorded in the affirmative.

21. **Point No.04:** In view of findings to points No. 01 to 03, plaintiff is entitled to temporary injunction restraining defendants No. 01 to 03 from interfering into plaintiffs' possession of suit property.

In the conclusion, I pass the following order:

ORDER

- 01. Defendants No. 01 to 03 are hereby temporarily restrained from interfering into plaintiffs' possession of the suit property till final disposal of the suit.**
- 02. Costs in cause.**

Date : 11-07-2019

(D.R. Deshpande)
Civil Judge S.D., Biloli.

CERTIFICATE

I affirm that the contents of this P.D.F. file Judgment are same word to word, as per the original judgment.

Name of the Stenographer : M.F.M. Sayyad

Court Name: Civil Judge Senior Division, Biloli.

Date: 11-07-2019

Judgment signed by the Presiding Officer on 11-07-2019

Judgment uploaded on : 17-07-2019