

Baburao and Others Vs. Tukaram and Others

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Court : Mumbai Aurangabad

Decided On : Mar-19-2014

Judge : A.I.S. Cheema

Appeal No. : Appeal From Order No. 4 of 2014 With Civil Application No. 274 of 2014

Appellant : Baburao and Others

Respondent : Tukaram and Others

Judgement :

1. This Appeal from Order is by the appellants/ original plaintiffs (hereinafter referred to as plaintiffs). Regular Civil Suit No.100/2000 filed by the plaintiffs against respondents (original defendants) was for declaration and permanent injunction. During the pendency of the suit, respondent Nos.4 and 5 (hereinafter referred to as the "subsequent purchasers") purchased part of suit property and thus, they were added in the suit as defendants No.4 and 5. The suit of the plaintiffs was dismissed on 2.9.2013. The plaintiffs filed Regular Civil Appeal No.298/2013 before the District Judge, Ahmednagar. In the appeal, plaintiffs filed application for injunction pending the appeal. The application came to be rejected on 18.11.2013 and hence, the present Appeal from Impugned Order against rejection of Temporary Injunction application.

2. Original plaintiff No.1 Baburao Namdeo Nalwade expired during the pendency of the suit and his legal representatives are on record. Plaintiff Nos.2 and 3 are his children. Defendant No.1 Tukaram Keshav Nalwade, defendant No.2 Bajirao Sonu Galande and defendant No.3 Kondabai Sonu Galande also expired during the pendency of the suit and their legal representatives were brought on record. I will refer to these original defendants No.1 to 3 as "defendants". The family tree as recorded by the trial Court in its judgment dated 2.9.2013 shows these parties claiming inheritance from Bhimabai w/o Rama. It appears, Bhimabai had four daughters, Parubai, Sarubai, Krishanabai and Thakubai. Plaintiff Baburao was son of Thakubai while deceased defendant No.1 Tukaram was son of Parubai and deceased defendant No.2 Bajirao was son of Sarubai. Deceased Kondabai was daughter of Sarubai. Judgment of the trial Court shows that, the original plaintiff No.1 brought the suit claiming that suit property situated at Wangdari, Taluka Shrigonda came to him while other properties had gone to Sarubai and Parubai. Plaintiffs claimed that defendants never resided at Wangdari. It was claimed that, for last about 50 years the suit property was in possession of plaintiffs. Suit property is in possession of plaintiffs and names of defendants remained in the ownership column. Suit was amended and the plaintiffs contended that defendant Nos.4 and 5 are subsequent purchasers from defendants during pendency of the suit. In spite of the sale deeds, the possession of suit property is with the plaintiffs. Plaintiffs claimed that, the sale deeds executed in favour of subsequent purchasers are not binding on the plaintiffs.

3. The judgment of the trial Court further shows that, stand taken by the defendants in written statement was that, all the heirs of Krishnabai and Thakubai had not been made party. The properties were of the four sisters. On the death of Bhimabai, there was joint ownership and possession of the four sisters, and after the death of the sisters, it was joint possession of the plaintiffs and defendants. There was no reason for separate possession of plaintiffs. Original defendants claimed that the suit property is ancestral property of plaintiff No.1 and defendants and they have undivided share in the same. Defendants claimed that, it was difficult to take care of properties by remaining outside the village and so, it was decided that somebody should stay at Wangdari and so, plaintiff No.1 started residing at Wangdari. Defendants and plaintiff No. 1 constructed house in the suit

property and they were all jointly in possession. The possession of plaintiffs and original defendants was and is joint.

4. The parties went to trial with such pleadings, and for reasons recorded by the trial Court, suit came to be dismissed. In para 26 of the judgment, it was found that, the possession of plaintiff was on behalf of all and that the plaintiff did not prove that he was independently in possession and that his possession.

5. In the impugned order- para 9, District Judge referred to the conclusions reached by trial Court that appellants failed to prove their exclusive possession or that they were exclusive owners. District Judge observed that this means that the possession of plaintiffs or the appellants is common with the other co-owners. District Judge observed that, the respondent Nos.1 to 3 are not in possession of suit land as they have already sold the same to respondent Nos.4 and 5 and, therefore, if there would be any disturbance from the parties, that may be from respondent Nos.4 and 5 only. District Judge appears to have been impressed by the arguments that, co-owners cannot be restrained from entering or enjoying the property to the extent of their share.

6. Learned counsel for the appellants/ plaintiffs submitted that dispute relates to S.No.7, later S.No.2, then Gat No.49 and then numbered as Gat No.33 of Wangdari. The revenue record clearly shows that since many years the original plaintiff No.1 has been in possession of the suit property, but in the ownership column in addition to name of Thakubai, the mother of plaintiff No.1, there was also name of other heirs of Bhimabai. According to the learned counsel, defendant Nos.4 and 5 are admittedly subsequent purchasers and even if earlier defendant Nos.1 to 3 were said to be co-owners, the subsequent purchasers cannot be allowed to disturb possession of the plaintiff. According to the learned counsel, the documents show that the original plaintiffs are still in possession of suit property. The learned counsel referred to the sale deeds which were executed in favour of defendant Nos.4 and 5 to show that the vendors of defendant Nos.4 and 5 themselves mentioned that, in the possession column, names of plaintiffs are there and if objection is raised regarding possession, the responsibility will be on the vendor and vendee both. It has been argued that, the appellants filed R.T.S.

Appeal against the mutation entires made in view of the sale deeds in favour of defendant Nos.4 and 5 and names of the defendant Nos.4 and 5 have been kept in other rights column. The Second Appeal filed by the defendant Nos.4 and 5 has been rejected and the defendant Nos.1 to 3 and defendant Nos.4 and 5 had filed revision to Additional Commissioner. According to the learned counsel for appellants, the plaintiffs had filed application Exh. 5 to restrain defendants from creating third party rights. However, the trial Court had rejected the application and directed defendant Nos.2 and 3 not to make alienation of suit property in excess of their share i.e. 1/4th share of suit property and that they "should not make alienation of any specific property" out of suit property till final disposal of the suit. Learned counsel submitted that, in spite of such directions, the defendants Nos.1 to 3 executed sale deeds in favour of defendant Nos.4 and 5. It is argued that, there is nothing to show that plaintiffs were ever dispossessed. The submission is that, even if it is held that the property was jointly owned as ancestral property, still if any of the defendant Nos.1 to 3 having joint ownership, sold their share, the purchaser cannot forcibly enter without seeking partition. Reliance is placed on the case of Ramdas Vs. Sitabai and ors., reported in 2009 AIR (SC) 2735 and the judgment in the matter of Gajara Vishnu Gosavi Vs. Prakash Nanasaheb Kamble and ors., reported in 2009(10) SCC 654. Learned counsel also relied on the case of Rame Gowda (D) by L.Rs. Vs. M. Varadappa Naidu (D) by L.Rs., reported in 2004 AIR (SC) 4609 to argue that when possession of plaintiffs is settled possession since long, the same is required to be protected till the rights are finally decided.

7. Learned counsel for the respondents submitted that, even before the temporary injunction application was decided, defendant Nos.4 and 5 had got the sale deed executed. According to the learned counsel, the trial Court held the parties to be co-owners. The learned counsel referred to Exhibit B, filed with Civil Application No.273/2014 to state that, in the 7/12 extract, against names of the sisters, 72 R was mentioned and thus, how much land was of each sister was clearly on record in the ownership column. According to the learned counsel, only because one of the co-owner was in possession on record does not mean that the co-owners were not in possession. It is her submission that, the defendant Nos.4 and 5 got possession in view of the sale deed and no injunction could be issued against a

co-owner whether or not the co-owner was in possession. The learned counsel submitted that, the judgments relied on by the learned counsel for appellants relate to possession of coparceners. It is her submission that, in the appeal, there was no apprehension to claim temporary injunction. Whatever orders the revenue authorities have passed are subject to orders of civil suit. The learned counsel relied on the case of Kashi Math Samsthan and anr. Vs. Srimad Sudhindra Thirtha Swamy and anr., reported in 2010 AIR (SC) 296 to submit that if the parties fail to prove prima facie case to go for trial, it is not open to the Court to grant injunction in favour of such party even if balance of convenience or irreparable loss or injury is shown. Learned counsel also relied on the case of Best Sellers Retail (india) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and ors., reported in 2012 AIR (SC) 2448 to submit that, even if prima facie case is there, balance of convenience and irreparable injury has to be shown. Thus, according to the learned counsel, there is no reason to grant temporary injunction during pendency of the appeal before the appellate Court.

8. In view of the record and arguments, the points for my determination are:-

(1) Whether the appellants/ plaintiffs prove a prima facie case for temporary injunction during pendency of appeal?

(2) Whether plaintiffs would suffer irreparable loss if temporary injunction is not granted in their favour?

(3) Whether the balance of convenience lies in favour of the appellants ?

My findings to all these points for consideration are in affirmative.

9. There is no dispute regarding the fact that for many years the name of the original plaintiff Baburao Namdeo Nalwade, reflected in the 7/12 extract as in possession of the suit property. Name of his mother Thakubai was in the ownership column. On behalf of other sisters Krishnabai, Sarubai and Parubai, the possession earlier was of Thakubai and after her death, name of original plaintiff No.1 Baburao Namdeo Nalwade appeared in the possession column since 1954-55. The possession was as per "Reet1", which indicates as owner. Copies of the

7/12 extract have been filed with Civil Application No.274/2014.

10. If the judgment of the trial Court is perused, it shows that the pleadings of defendant Nos.1 to 3 itself were that, in order to look after the property at Wangdari, it was decided that somebody should stay at Wangdari and so, plaintiff No.1 started residing at Wangdari. (The plaintiff claimed that the suit property has come to him and other properties went to Sarubai and Parubai and so he claimed declaration and injunction.) Against this, defendant Nos.1 to 3 took a stand that the property was ancestral and they had joint ownership in the same and so, they claimed that they were jointly possessing it also. (This dispute now is in appeal.) As per the trial Court judgment, regarding possession, the written statement claimed that defendants and plaintiffs had constructed house in the suit property and were living there jointly. The judgment of the trial Court shows that the Commissioner appointed in the matter had reported that plaintiff was residing in the suit property after constructing a house. Of course the trial Court ignored the evidence on the basis that the Commissioner had not given notice to the defendants.

11. At present, however, my concern is whether the plaintiffs prima facie prove their possession as the rights are to be finally settled in the appeal which is still pending. For this, the documentary evidence as appearing from the record does show that the plaintiff Baburao was in possession of the suit property for long. Admittedly, defendant Nos.1 to 3, who could claim to be joint owners as the property has come down from ancestors, had a right which was different in nature to claim that they should be treated as in joint possession irrespective of the 7/12 record, it was different not to grant injunction against such co-owners as the defendant Nos.1 to 3.

12. However, the position as regards defendant Nos.4 and 5 is different. They are not of the family coming down from deceased Bhimabai. Judgment in the matter of "Ramdas" (supra) dealt with dispute relating to joint property where there are undivided shares. In para 17, observations were:

"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."

13. In the present matter, the original plaintiff No.1 claimed that from the properties of the family, the suit property had come to him while defendant Nos.1 to 3 claimed that it was joint property which had not been divided. In such circumstance, even if defendant Nos.1 to 3 sold what they claimed to be their share to defendant Nos.4 and 5 during the pendency of the suit, possession cannot be handed over by them to the subsequent purchaser without following due procedure of law. In the matter of "Gajara Vishnu Gosavi" (supra), Hon'ble Supreme Court held that:-

"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."

Thus, even if defendant Nos.1 to 3 could originally claim to be in joint possession, the subsequent purchasers cannot simply step into their shoes as far as regards joint possession of the defendant Nos.4 and 5. They would have to seek their own remedy. Once defendant Nos.1 to 3 have admittedly given up their claim of joint possession by executing the sale deed, the possession of plaintiff of the property, as clearly appearing from the long standing 7/12 extracts, will have to be protected. Plaintiffs do make out a prima facie case for injunction in their favour. The appellants- plaintiffs, in the application for temporary injunction to the District Judge, raised apprehension that the defendant Nos.4 and 5 may enter their names into record of rights on the basis of the alleged sale deeds in respect of suit property. The plaintiffs expressed apprehension that they may lose possession of suit property and so, the defendant Nos.4 and 5 are required to be restrained by issuing preventive injunction. Plaintiffs claimed that, balance of convenience is in favour of plaintiffs and in the circumstances, if injunction is not granted, they will suffer irreparable loss.

14. The injunction sought is only against respondent Nos.4 and 5. Looking to the judgments of the Hon'ble Supreme Court as above, such subsequent purchasers cannot simply push in the property. The status of defendant Nos.1 to 3 as joint owners claimed by them was different and cannot be compared with defendant Nos.4 and 5, who may have purchased share of defendant Nos.1 to 3. In fact, the suit of plaintiffs claiming that suit property came to plaintiff No.1 is still in dispute, which is to be decided in the appeal. Defendants themselves appear to have claimed that there are other heirs like those of Krishnabai, who are not made party. Still they appear to have calculated their share and executed sale deed of undivided property. Even the claim of defendant Nos.1 to 3 that suit property is joint, the matter is still to be finally decided and there is no reason why possession of plaintiffs should not be protected. If the plaintiffs lose possession of suit property or part of it, (which has not been divided by metes and bounds), plaintiffs would suffer irreparable injury. In such circumstance, to avoid further litigation and looking to the rival claims, balance of convenience lies in favour of plaintiffs.

15. (A) For the above reasons, the Appeal is allowed with costs. The impugned order passed by the District Judge is set aside. Respondent Nos.4 and 5 are restrained by themselves or anybody on their behalf, from disturbing possession of the appellants in suit property till decision of Regular Civil Appeal No.298/2013. Hearing of the Appeal is expedited.

(B) As Appeal from Order is disposed, Civil Application No.274/2014 does not survive and is disposed of accordingly.

(C) Observations in this judgment relating to facts will be treated as prima facie to decide this Appeal from Order.

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