

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4358 OF 2022

- 1. Mr. Nitin Sitaram Waghmare,**
Age : 47 years, Occ.: Household
and Agriculture.
- 2. Smt. Subhadra Sitaram Waghmare,**
Age : 70 years, Occ.: Household,
R/at: RL-54, Vatslya, Milap Nagar,
Residential area, Near Greens
English School, M.I.D.C.,
Dombivali East, Taluka : Kalyan,
District : Thane.

.. Petitioners

Versus

- 1. Balu Kanha Gawade,**
Age : 58 years, Occ.: N.A.,
R/at: Tukaram Niwas, Veturkar Pada,
Everest Nagar, Kala Talao, Kalyan,
District: Thane.
- 2. Prakash Hemraj Teli,**
Age : 60 years, Occ.: Business,
R/at: Block No. A/304,
Aasha Sadan Co. Hsg. Soc.,
Near Lal Chowki, Kalyan, Dist. Thane.
- 3. Tanaji Waman Bhoir,**
Age : 59 years, Occ.: Agriculture/Business,
C.A. of legal heirs of Waman Kamalu Bhoir
(Drupadi, Shivaji, Netaji, Umaji,
Aasha Anil Patil)
All are R/at: At & Post: Kelni,
Taluka: Kalyan, District: Thane.
- 4. Mrs. Neeta Raman Shinde,**
Age : Adult, Occ.: Household,
R/at: 9 Shanti Apartment, Second Floor,
Shanti Park, Upnagar Takali Road,
Near Mithila Bunglow, Nashik.

.. Respondents

-
- Mr. Chandrakant S. Joshi a/w. Mr. Bhushan C. Joshi, Advocates for the Petitioners
-

CORAM : MILIND N. JADHAV, J.
RESERVED ON : APRIL 13, 2022.
PRONOUNCED ON : MAY 17, 2022.

JUDGMENT:

1. By the present petition, the Petitioner has prayed for the following reliefs:-

- "a) To call the R & P of R.C.S. 537 of 2012 and R.C.S. No. 149 of 2015 from the file of Jt. Civil Judge (S.D.), Kalyan;
- b) To issue writ of certiorari or any other appropriate writ and set aside the Orders dated 29.08.2019 and 09.03.2021 passed by the Jt. Civil Judge (S.D.), Kalyan on Exhibit - 101 and 105 respectively;
- c) Pending hearing and final disposal of this Writ Petition, further proceedings in R.C.S. 537 of 2012 and R.C.S. 149 of 2015 pending on the file of Jt. Civil Judge (S.D.), Kalyan be stayed."

2. RCS No.537 of 2012 has been filed on 05.03.2012 by Respondent Nos.1 and 2 being the plaintiffs therein against the Petitioner No.1 and his father before the Civil Judge, Senior Division, Kalyan for injunction in respect of suit property bearing Survey No.44 Hissa No.(2b) ad-measuring 85 gunthas situated at Taluka Kalyan,

District Thane.

3. RCS No.149 of 2015 has been filed on 02.03.2015 by Petitioner Nos.1 and 2 along with their sister Smt. Neeta Raman Shinde (Respondent No.4 herein) against Drupadi Waman Bhoir, Shivaji Waman Bhoir, Netaji Waman Bhoir, Umaji Waman Bhoir, Aasha Anil Patil and Tanaji Waman Bhoir (Respondent No.3 herein) for a declaration to obtain sale permission in respect of Survey No.44 (2b) ad-measuring 85 gunthas (same property as in Suit No.537 of 2012) and execution of the sale deed in the name of the Plaintiffs therein.

4. As seen, the Plaintiffs in RCS No.537 of 2012 have prayed for injunction on the ground that they are in possession of the suit property whereas the Plaintiffs in RCS No.149 of 2015 have also prayed for a declaration and execution of sale deed in respect of the same property on the ground that they are in possession of the same. Further in RCS No.149 of 2015 Plaintiffs have also alleged that the Defendants therein i.e. 6 family members being legal heirs of Waman Kamalu Bhoir have sold a portion out of the suit property which is subsequently numbered as Survey No.44(2b) to Shri. B.K. Gawade and P.H. Teli for a total consideration of 1,60,000.00 and have challenged the sale deed dated 15.05.2008.

5. In the backdrop of the above facts the Defendants in RCS No.537 of 2012 filed application under Section 24 of the Code of Civil Procedure, 1908 (**CPC**) for clubbing the aforesaid two suit proceedings together and sought to lead common evidence under the provisions of Section 114 read with Order 47 of the CPC. This application was filed on 22.11.2017 before the District Judge, Thane. It was the contention of the Defendants that RCS No.149 of 2015 was filed by them in the capacity of Plaintiffs for seeking declaration and specific performance of contract against the original owner who had allegedly executed the agreement in their favour and had delivered possession of the suit property to them. It was the further contention of the Defendants that since the subject property in the aforesaid two suit proceedings being the same, for the sake of convenience both the suits be clubbed and tried together. This application was resisted by the Plaintiffs in RCS No.537 of 2012 on the ground that the cause of action and relief claimed in both the aforesaid suits was distinctly different, so also the parties to both suits were distinctly different. After considering the submissions of the parties, vide order dated 22.11.2017 the District Judge partially allowed the application and held that RCS No.149 of 2015 be transferred to the Court of Joint Civil Judge, Senior Division, Kalyan where RCS No.537 of 2012 was pending hearing and final disposal. A further direction was given to the said Trial court to decide whether both the aforesaid suits be tried simultaneously or

separately.

6. Before the Trial court, the Defendants in RCS No.537 of 2012 therefore filed an application for clubbing the aforesaid two suits together for trial and for leading common evidence in both the suits. Once again it was contended by the Defendants that they are in possession in the suit property pursuant to the agreements dated 06.07.1994 and 13.05.1995 with the original owners and thus the subsequent sale deed between the Plaintiffs and the original owners dated 15.05.2008 was not binding upon them. The Plaintiffs in turn contended that the subject matter and reliefs in both the suits as well as some of the parties to both the suit proceedings were distinctly different, and both the suits were at different stages of trial; thus the plea of the Defendants to record common evidence be rejected.

7. The learned Trial court perused the pleadings and proceedings in both the suits and vide order dated 29.08.2019 held that the original owner of the suit property was made a party Defendant in RCS No.537 of 2012 but was not made a party Defendant in RCS No.149 of 2015. The learned Trial court further observed that in RCS No.537 of 2012 the evidence of the Plaintiff was already completed. Thus the Trial court on the aforesaid grounds rejected the application and passed an order dated 29.08.2019 holding that when the parties in the suit are not the same and evidence of the

Plaintiff had already been completed in the first suit i.e. RCS No.537 of 2012 and reliefs claimed in both the suits being different, at the most the two suits can be proceeded with simultaneously in the same court. Hence the prayer for leading common evidence was rejected.

8. The Defendants in RCS No.537 of 2012 being aggrieved with the above order filed application for review of the above order before the Trial court. By order dated 09.03.2021 the review application was rejected.

9. The orders dated 29.08.2019 and 09.03.2021 are challenged by the Petitioners (original Defendants in RCS No.537 of 2012) in the present Writ Petition.

10. Mr. Chandrakant Joshi, learned counsel appearing for the Petitioners has reiterated that the suit property in both the suits are inter-connected though the parties are different but there is an involvement of fraud on the part of the Respondents and thus to avoid multiplicity of proceedings both the suits need to be tried together. He submitted that the cause of action and mis-joinder of parties is not important but the common question of law is important while deciding both the suits.

11. The Petitioners have clearly admitted in the petition that save and except the description of the suit property, the parties to both the suits are not identical as also the reliefs claimed in both the suits are distinctly different. It is pertinent to note that in RCS No.537 of 2012 the Petitioners herein (being Defendants therein) have filed a counter claim in the said suit for injunction. Admittedly, RCS No.537 of 2012 is a suit for injunction only whereas RCS No.149 of 2015 is a suit for specific performance, declaration and execution of sale deed.

12. The names of the parties in the cause title of the plaint and the reliefs in RCS No.537 of 2012 are reproduced hereunder:-

"श्री. बाळू कान्हू गावडे आणि श्री. प्रकाश हेमराज गावडे

विरुद्ध

श्री. सिताराम पांडुरंग वाघमारे आणि नितीन सिताराम वाघमारे "

"Prayer:-

9) तरी मे. कोर्टास वादीची विनंती की,

अ) दावा कलम 1 मध्ये वर्णन केलेल्या मौजे केळणी येथील सर्व्हे नं. 44 हिस्सा नं. 2 (व) क्षेत्र 85 गुंठे या दावा मिळकतीवर प्रतिवादींनी अथवा त्यांचेतर्फे नोकरचाकर, आप्त, नातेवाईक अथवा इतर कोणीही वादींचे कब्जा वहिवाटीस, उपभोगास व मालकीस प्रतीवादींनी कोणत्याही प्रकारे हरकत अडथळा करू नये असा तुरतातुरत मनाई हुकूम प्रतिवादीवर दिदी प्रोसेसने बजावावा."

13. The names of the parties in the cause title of the plaint and the reliefs in RCS No.149 of 2015 are reproduced hereunder:-

"Shri. Sitaram Pandurang Waghmare

(since deceased through Legal Heirs)

Smt. Subhadra Sitaram Waghmare & Ors.

Vs

Draupadi Waman Bhoir & Ors."

"Prayer-

- a) to direct the Defendants to obtain sale permission of the land i.e. Survey No.44(2b) at Kelni, Tal. Kalyan, Dist. Thane, admeasuring 85 gunthas on the name of the Plaintiff and execute the sale deed of the said agricultural land on his name and register the same before the Sub-Registrar, Kalyan."

14. Thus, it is seen that in RCS No.537 of 2012 the original owner of the suit property is not a contesting party. Defendant No.1 in RCS No.537 of 2012 has expired and is represented by his wife Subhadra, daughter Neeta and son Nitin. However only Nitin has been impleaded as a party Defendant along with his deceased father Sitaram as Defendants. Contention of the Plaintiffs in RCS No.537 of 2012 is that they are in possession of the suit property. Whereas it is the contention of the Defendants in RCS No.537 of 2012 (as Plaintiffs in RCS No.149 of 2015) that they are in possession of the suit property. There is also a dispute raised by the Defendants about sale of a portion out of the suit property in RCS No.149 of 2015 and carving out a separate Survey No.44(2b) and the concerned sale deed dated 15.05.2008 being under challenge.

15. In view of the aforesaid discussion and findings, it is apparent that in the first instance the parties to both the suits are distinctly different. Admittedly, the cause of action for filing both the suits and the reliefs claimed in both the suits are also different. In the

2012 suit where injunction is sought the reference to the suit property is for the entire 85 gunthas whereas in the subsequent suit of 2015 where declaration, execution and cancellation is sought, reference to the suit property is to a portion out of 85 gunthas with reference to three sale deeds dated 06.07.1994, 13.05,1995 and 15.05.2008. Most importantly, as noted by the learned Trial court the evidence of the Plaintiff in the first suit i.e. RCS No.537 of 2012 has been completed. Hence the learned Trial court has correctly thought it fit to hear both the suit proceedings simultaneously for effective and speedy disposal, in view of the fact that the Plaintiffs in both the suits are asserting their possession to the suit property but with reference to different transactions and different points of time.

16. In view of the above discussion and findings, I am of the considered view that common evidence cannot be recorded in the aforesaid two suits. The findings returned by the learned Trial court in both its order dated 29.08.2019 and 09.03.2021 are correct and do not call for any interference. There is no miscarriage of justice. The learned Trial court shall make an endeavor to dispose of both the suits as expeditiously as possible.

17. With the above directions, the Writ Petition stands dismissed. However, there shall be no order as to costs.

[MILIND N. JADHAV, J.]

18. After this judgment is pronounced Mr. Joshi, learned counsel appearing for the Petitioners submits that this order be stayed for a period of four weeks from today to enable the Petitioners to approach the superior Court. In view thereof, the judgment shall be stayed for a period of four weeks from today.

[MILIND N. JADHAV, J.]