

GAJARA VISHNU GOSAVI

v.

PRAKASH NANASAHED KAMBLE & ORS.

(Civil Appeal No. 1292-1293 of 2002)

SEPTEMBER 16, 2009

**[DALVEER BHANDARI AND DR. B.S. CHAUHAN, JJ.]**

*TRANSFER OF PROPERTY:*

*Property in joint and common possession – Partition not effected – A part of the property sold by heir of one of the co-parceners – Purchaser filing suit for possession – Suit dismissed – Held: 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 – In the instant case, all the three courts below have recorded the finding of fact that there had been no partition of the suit property – Such concurrent finding does not require interference as there is nothing on record to show that it was perverse, being based on no evidence or contrary to the evidence on record.*

**Kartar Singh vs. Harjinder Singh AIR 1990 SC 854; Ramdas vs. Sitabai & Ors. JT 2009 (8) SC 224; M.V.S. Manikayala Rao vs. M. Narasimhaswami & Ors. AIR 1966 SC 470 and Sidheshwar Mukherjee vs. Bhubneshwar Prasad Narain Singh & Ors. AIR 1953 SC 487, referred to**

**Case Law Reference:**

<b>AIR 1990 SC 854</b>	<b>referred to</b>	<b>para 9</b>
<b>JT 2009 (8) SC 224</b>	<b>referred to</b>	<b>para 9</b>

A AIR 1966 SC 470 referred to para 9

AIR 1953 SC 487 referred to para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1292-1293 of 2002.

B From the Judgment & Order dated 21.3.2000 of the High Court of Judicature at Bombay in Second Appeal No. 183 of 2000.

WITH

C C.A. No. 1293 of 2002.

Vijay Kumar, Vishwajit Singh for the Appellant.

D The following Order of the Court was delivered

### O R D E R

E 1. These appeals have been filed against the judgment and order of the Bombay High Court dated 21.3.2000 by which Second Appeal No.183 of 2000 filed by the appellant has been dismissed and judgments and orders of the Trial Court as well as the First Appellate Court have been affirmed.

F 2. The facts and circumstances giving rise to this case are that appellant filed Civil Suit No.6/87 seeking declaration that she was owner of the western half part of the suit property, i.e. city Survey no.83 and in actual physical possession thereof, and further for restraining the defendants/respondents to cause any obstruction to her possession over the said property and also for possession of the other part of the property.

G 3. The said relief was claimed on the basis that the entire CTS no.83 was originally owned by Krishna Kamble and Maruti Kamble. Both brothers had been living separately and were using their respective half part in the suit premises. Krishna Kamble was in possession of eastern half part of the said

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property. Krishna Kamble died leaving only one son Shripati who died leaving only heir i.e. daughter Housabai. Maruti had two sons, namely, Genu and Dadu. Dadu died issueless. Genu had three sons, namely Ganapati, Nana and Shankar. Ganapati died issueless. Shri Prakash Nanasaheb Kamble, defendant no.1 is the son of Nana and defendant no.2 Manik Shankar Kamble is the son of Shankar. Appellant/plaintiff purchased the property of Krishna Kamble from legal heir Housabai Sitaram Chavan as she became owner of the said property after the death of her father Shripati. In fact, said Housabai had sold her share to one Anjirabai Guruling Kamble by registered sale deed dated 13.1.1976. After the death of the said purchaser Anjirabai, her husband Guruling Kamble became the owner of the said property and from him the plaintiff/appellant had purchased the same vide registered sale deed dated 4.7.1984. Thus, she claimed the ownership of the property i.e. western half part of the suit property. It is further claimed by the appellant/plaintiff that she had spent huge amount and raised construction of four rooms after taking the permission of the Nagar Parishad. In absence of the appellant/plaintiff, defendant/respondent nos.3 and 4 occupied the suit property at the instigation of defendant/respondent nos.1 and 2 and in spite of several requests the possession of the said property was not handed over to her. Hence, the suit was filed on 4.7.1984 for the aforesaid reliefs.

4. Defendant/respondent nos.1 and 2 contested the suit on various grounds, inter alia, that Housabai was a necessary party. As she had not been impleaded as defendant/respondent, the suit could not be entertained for want of necessary party. The property had never been partitioned. The sale deed executed by Housabai could not be valid and the same was liable to be dismissed.

5. On the basis of the pleadings, the trial Court framed various issues, including whether the plaintiff/appellant was in lawful possession and had valid title over the suit property, and as to whether the defendants/respondents had encroached

A upon the said property. The parties led evidence and after  
considering the same, the trial Court came to the conclusion  
that *no partition had ever taken place*. Therefore, Housabai  
could not claim any specific share in the property. She could  
be a co-sharer in common and joint possession. As the partition  
B had never been effected, the question of handing over of the  
possession either to the present appellant/plaintiff or her  
vendee could not arise. Therefore, her possession was merely  
a forcible possession and was not valid and the suit was  
dismissed vide judgment and decree dated 19.12.1991. The  
C trial Court observed that at the most on the basis of the sale  
deed Anjirabai and thereafter appellant/plaintiff could become  
the owner in common alongwith defendants/respondents in  
respect of the suit property but as there was no partition, the  
appellant/plaintiff could not be in lawful possession.

D 6. The said findings of fact had been affirmed by the First  
Appellate Court in Regular Civil Appeal No.104 of 1992  
decided on 13.8.1999, as well as by the High Court vide  
impugned judgment. Hence, this appeal.

E 7. Shri Vijay Kumar, learned counsel appearing for the  
appellant has raised all the issues which had been raised  
before the courts below and submitted that as the appellant had  
been a bona fide purchaser for consideration and had been  
put in possession by her vendee Anjirabai who had purchased  
the suit property vide registered sale deed from Housabai, the  
F suit ought to have been decreed and has tried to persuade us  
taking through the pleadings as well as the depositions to allow  
the appeals.

G 8. Be that as it may, three courts have recorded the  
concurrent findings of fact that partition had never been given  
effect to in respect of the suit property. Therefore, Housabai  
could transfer her share. But the question does arise as to  
whether without partition by metes and bounds, she could put  
her vendee Anjirabai in possession.

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9. In *Kartar Singh vs. Harjinder Singh*, AIR 1990 SC 854, this Court held that where the shares are separable and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed:

“As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated.”

In recent judgment in *Ramdas vs. Sitabai & Ors.* JT 2009 (8) SC 224 to which one of us (Dr. B.S. Chauhan J.) was a party placing reliance upon two earlier judgments of this Court in *M.V.S. Manikayala Rao vs. M. Narasimhaswami & Ors.* AIR 1966 SC 470; and *Sidheshwar Mukherjee vs. Bhubneshwar Prasad Narain Singh & Ors.* AIR 1953 SC 487, this Court came to the conclusion that a purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property.

10. There is another aspect of the matter. An agricultural land belonging to the coparceners/co-sharers may be in their joint possession. The sale of undivided share by one co-sharer may be unlawful/illegal as various statutes put an embargo on fragmentation of holdings below the prescribed extent.

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

A by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.

B 12. In the instant case, all the three courts below have recorded the finding of fact that there had been no partition of the suit property. Such concurrent finding does not require interference as there is nothing on record to show that it was perverse, being based on no evidence or contrary to the evidence on record.

C 13. In view of the above, we do not find any ground to interfere with the impugned judgment. Appeals are accordingly dismissed.

R.P.

Appeals dismissed.