

(2018) 10 BOM CK 0129
In the Bombay High Court
Case No : Writ Petition No. 159 Of 2018

Udai Raj singh Chauhan

APPELLANT

Vs

Rds. Cdr. Ashok Kumar Sharma And Ors.

RESPONDENT

Date of Decision : 09-10-2018

Acts Referred:

Constitution of India, — Article 227
Code of Civil Procedure, 1908 — Order 41 Rule 21

Citation : (2018) 10 BOM CK 0129

Hon'ble Judges : Nutan D. Sardesai, J.

Bench : Single Bench

Advocate : Prasheen Lotlikar, Bharga Khandeparkar

Final Decision : Allowed

Judgement

1. Heard forthwith with the consent of the learned Advocate for the parties.
2. Rule.
3. Shri B. Khandeparkar, learned Advocate waives service of notice on behalf of the respondents.
4. The petitioner who is the original plaintiff seeks to quash the order passed by the District Court, Margao dated 18/12/2017 by invoking the jurisdiction of this Court under Article 227 of the Constitution of India which had upheld the order of the Trial Court rejecting his relief for injunction.
The parties would be referred to as the petitioner and the respondents for brevity's sake hereinafter.
5. It was the contention of Shri P. Lotlikar, learned Advocate for the petitioner that he had purchased a flat bearing No.143/B/G-2 at Alto Dabolim pursuant to the Sale Deed dated 05/08/2003 and was allotted a stilt parking space situated at the basement of the said building. The respondent Nos.1

and 2 were the lawful owners in possession of the flat bearing No.243/B/S-1 situated in the same building. The respondents had purchased the same by a Deed of Sale dated 06/08/2003 but were not allotted any parking space in the basement of the said building. They had sold their flat to the respondent Nos.3 and 4 by a Deed of Sale dated 15/06/2015 alongwith the stilt parking which was allotted to the petitioner at the basement of the said building and that they were since then illegally and unauthorisedly occupying the stilt parking space. It was further his contention that on carrying out a search in the office of the Sub-Registrar, Mormugao he traced a Sale Deed dated 06/08/2003 and learnt that they were allotted a parking space in an open to sky area and not in the basement of the building and accordingly filed the suit for the relief of permanent injunction alongwith an application for temporary injunction. The same came to be dismissed pursuant to the order of the Trial Court and thereupon he preferred an appeal which too was dismissed by the order of the District Court. It was his contention that there was no basement plan available with the authority as per the letter issued by the Mormugao Planning and Development Authority in response to his query under the Right to information Act.

6. Shri P. Lotlikar, learned Advocate for the petitioner further contended that the letter of the Mormugao Planning and Development Authority dated 16/11/2016 was to convey to him that the authority could not confirm who had made the insertion of the word "basement" in the approved plan dated 09/10/2000 and by slashing the word "generator room" by hand in the absence of any initials near the insertion. This letter when read with the approved plan would clearly indicate that there was no basement parking. He also invited attention to the letter of Mormugao Planning and Development Authority dated 13/02/2017 pursuant to which it was apparent that the building block A having stilt parking on ground and three upper floors and compound wall was existing in the property bearing Survey No.58/3-L and 3-N in Dabolim Village but there was no development permission in respect of the compound wall. He had produced the relevant documents before the Appellate Court by recourse to Order XLI Rule 21 CPC but which were not at all considered by the learned District Court and which is apparent from the fact that there was no reference to these documents in the order under challenge which had been allowed pursuant to the order of this Court dated 12/04/2017. The impugned order reflected a

total non-application of mind both by the Trial Court and the Appellate Court. This was a fit case to reverse the order and quash and set aside the

same in exercise of the supervisory powers of this Court under Article 227 of the Constitution of India. It was his further contention that the Planning

Authority was the only authority to decide on the type of parking and in the absence of any contemporaneous record, the learned Trial Court as well

as the Appellate Court was in error to hold against the petitioner. Insofar as the declaration cum undertaking was concerned, it was his contention that

this declaration issued 10 years after the Sale Deed could not be attached with any importance when the sale transaction did not refer to any parking

benefit in favour of the respondent Nos.1 and 2 who had thereafter transferred the flat in favour of the respondent Nos.3 and 4.

7. Shri B. Khandeparkar, learned Advocate for the respondents submitted that the plan annexed to the Sale Deed showed stilt parking as also

basement parking. The respondent Nos.3 and 4 were supported by the declaration executed in their favour alongwith the plan. He relied in Ramdas

v/s. Sitabai [2009(7) SCC 444] and in Syscon Consultants Pvt. Ltd. V/s. Primella Sanitary Products Pvt. Ltd. and Another [2016(10) SCC 353] and

pressed for the dismissal of the petition.

8. i have considered their submissions, the judgment relied upon and the orders under challenge to better appreciate their submissions.

9. The petitioner had clearly carved a case that he was the owner not only of the flat bearing No.143/B/G-2 situated in the building known as Dabolim

Crest alongwith the parking space situated in the basement pursuant to the Deed of Sale dated 05/08/2003 but also that he was using the space for

parking of his vehicle without any interference from anybody till the respondent Nos.3 and 4 unauthorizedly and illegally started occupying the

basement parking space belonging to him. The respondent Nos.3 and 4 had primarily relied upon the Sale Deed executed in favour of the respondent

Nos.1 and 2 dated 05/08/2003 apart from the Sale Deed in their favour and the undertaking cum allotment dated 26/06/2013 executed almost 10 years

later to substantiate their right to the stilt parking. The learned Trial Judge found favour with the case of the petitioner that he was given a stilt parking

area of one car and a scooter and at the same time observed that the respondent Nos.1 and 2 were provided with parking for one car and a scooter

apparent from their Sale Deed by which they had sold a flat to the respondent Nos.3 and 4. The Trial Court was however unduly swayed and carried away by a declaration cum undertaking executed by the original vendor of the flat almost 12 years later in 2013 pursuant to which he was stated to have allotted, granted and handed over to the respondent Nos.1 and 2 exclusive parking slot in the basement area as shown in the plan. The Trial Judge for that matter going purely by such a declaration held against the petitioner and dismissed the application for injunction.

10. The learned District Judge who was seized off the appeal filed by the petitioner had considered the case of the petitioner of having purchased a flat with the stilt parking. She was seized of the fact that the Sale Deed executed by the vendor in favour of the respondent Nos.1 and 2 in respect of their flat No. 243/B/S-1 related to the sale of the flat alone without any parking space in the basement but while effecting the sale in favour of the respondent Nos.3 and 4 in June 2015, the respondent Nos.1 and 2 also sold a parking space in the basement to them. The learned District Judge was not oblivious of the fact that the parking space allotted to the respondent Nos.1 and 2 i.e. the predecessor in title of the respondent Nos.3 and 4 was in an open to sky area and not in the basement. However, the learned District Judge in her wisdom was swayed by the declaration cum undertaking cum allotment executed by the vendor in favour of the respondent Nos.1 and 2 almost 10 years later from the execution of the Sale Deed Dated 05/08/2003 and despite holding that the Sale Deed of the plaintiff indicated that he was given a stilt parking area of one car and a scooter held against the petitioner on the premise that there was a declaration cum undertaking cum allotment executed by the vendor in favour of the respondent Nos.1 and 2 granting exclusive parking slot in the basement area. Despite the directions of this Court pursuant to its order dated 12/04/2017, the learned District Judge did not at all consider the documents placed on record by the petitioner produced pursuant to an application under Order XLI Rule 21 CPC. The learned District Judge did not at all consider the letter of the Mormugao Planning and Development Authority dated 10/05/2016 pursuant to which it was clearly revealed by the authority to the petitioner herein in response to their right to information query that the basement site plan of the block A was not available in their records. The learned District Judge for that matter had also given a convenient go by to another letter of the said

authority dated 16/11/2016 pursuant to which it was conveyed to the petitioner that the insertion of the word 'basement' after slashing the word 'generator room' by hand did not bear initials near the insertion. These documents had to be clearly looked into by the learned District Judge who could not have ignored them and proceeded on the basis of a private document executed between the vendor and the respondent Nos.1 and 2 in the nature of a declaration cum undertaking cum allotment to override the public records of the Planning Authority which indicated a position contrary to that carved on behalf of the respondent Nos.3 and 4.

11. A cursory perusal of the approved plan to which a reference was made by Shri P. Lotlikar, learned Advocate for the petitioner indicates that there was a provision for the stilt car parking in the basement of the block A and that the insertion of the word 'basement' by slashing the word 'generator room' was clearly a case of subsequent manipulation of the records after the approval was granted by the various authorities. It was otherwise also lost on the learned District Judge apart from the Trial Court that the Planning Authority was the only authority which could decide on the type of parking to be provided for the building and the learned Judge could not have ignored these records.

12. In Ramdas (supra), the respondent Sitabai claiming to be a co-sharer to the extent of half share in the said property for the reason that the plaintiff and the defendant No.1 claimed that the Sale Deed executed by the defendant No.1 was void and not binding on her as the transaction was done without her knowledge and consent in favour of the Defendant No.3 i.e. Ramdas. He contested the suit admitting that he had purchased the land from the defendant No.1 by a registered Sale Deed but took a plea that the defendant No.1 had informed him that he was the exclusive owner of the said land, that he had purchased the land for valuable consideration and Sitabai was aware of the transaction. It was his self acquired property and the same was not open for partition being the decree prayed for by the respondent No.1 Sitabai apart from the recovery of the possession.

13. In Ramdas (supra), the Trial Court decreed the suit partly giving rise to an appeal before the District Court which heard the appeal and set aside the judgment of the Trial Court declaring that Sitabai was entitled to a half share in the suit property, the Sale Deed executed by the defendant No.1 in

favour of Ramdas was not binding on her and directing Ramdas to handover the possession of the land purchased by him to the legal heirs of the

defendant No.2 giving rise to a Second Appeal. The High Court of Bombay, Nagpur Bench disposed off the Second Appeal by consent terms

modifying the judgment passed by the Additional District Judge. In that backdrop, it was observed by the Apex Court that without there being any

physical formal partition of an undivided property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to

transfer his undivided share. This judgment with respect does not at all substantiate the case of Shri Khandeparkar, learned Advocate for the

respondents that he is entitled to the parking in the stilt/basement area based on the declaration cum undertaking cum allotment.

14. In Syscon Consultants Pvt. Ltd.(supra), the Apex Court at paragraph 49 considered the judgment in Gajara Vishnu Gosavi v/s. Prakash

Nanasaheb Kamble [(2009)10 SCC 654] where it has been held at paragraph Nos. 9 to 13 as follows:

“9. 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.

10. 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:

6. 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.

11. 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.

12. 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.

13. 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.â??

This judgment too would not at all substantiate the case of Shri Khandeparkar, learned Advocate for the respondents and hence the respectful

departure.

15. Both the Courts below completely fell in jurisdictional error in considering the case of the parties before it and more particularly the learned

District Judge which even went to the extent to exercise the jurisdiction while ignoring the documents produced on record by the petitioner herein. The

impugned order therefore justifies interference and in view thereof, i pass the following

ORDER

1. The petition is allowed.

2. The impugned orders passed by the Courts below are quashed and set aside.

3. The petitioner secured with the order of injunction to restrain them from occupying/using the stilt/basement parking.