

MHAU060015982015



IN THE COURT OF CIVIL JUDGE JUNIOR DIVISION, KANNAD, DIST.
AURANGABAD

R.C.S. No.77 OF 2006

Smt. Bijlabai Bhaskarrao Aher & Ors. ... **Plaintiffs.**

Vs.

Shri. Devidas Namdev Zimman & Ors. ... **Defendants**

ORDER BELOW EXH. No.191

The defendant no.7 filed this application for seeking the relief of temporary injunction restraining defendant No.1 from alienating or creating any third party interest in the suit property i.e. survey no.35/1/e/293, plot no.25 admeasuring 3 R till the decision of the suit vide order 39 rule 1 of the Code of Civil Procedure, 1908 (C.P.C.).

2. Facts responsible for the germination of application stated as under ;

The defendant no.7 contended that the suit is filed for partition and separate possession of the 1 to 14 suit properties. The defendant no.7 is added by way of amendment. The suit property no.9 as mentioned in the above para no.1 is in possession of the defendant no.7. The defendant no.7 has filed his written statement below Exh.99 in which he has mentioned that the suit property no.9 i.e. survey no.35/1/e/293,

plot no.25 admeasuring 3 R was given to him by his grand mother namely Kaushalyabai Nabdev Zimman by Will deed dated 9.02.2005. In view of the said will deed the defendant no.7 become the owner and possessor of the said property, in spite of that the defendant no.1 is obstructing him possession and on 22.07.2023 the defendant no.7 came to know that the defendant no.1 trying to sale the said property. At that time the defendant no.1 threatened him that the plot is in his name therefore, he can sale it to anyone. Therefore, the defendant no.7 filed this application.

3. It is contended that the plaintiff has filed the interim injunction application below Exh.5 which was allowed by the Court on 26.10.2007 and granted injunction to not to alienate the suit property against the defendants. The said order is still in existence. In spite of that the defendant no.1 by taking disadvantage of non mentioning the suit properties in the order trying to sold the suit property no.9. In the order of Exh.5 para no.6 the court has mentioned about the suit property no.9. The defendant no.4 has admitted the right of the plaintiff in the said property. In spite of having knowledge of the pending suit the defendant no.1 is trying sold the suit property. The said property no.9 is in possession of the defendant no.7. If the defendant no.1 create third party interest in the suit property no.9 during the pendency of the suit it will caused irreparable loss to the plaintiffs and defendant no.7 and multiplicity of the proceedings. Hence prayed to allow the application.

4. The defendant no.1 filed his say below Exh. 194 and objected the application. It is contended that initially the suit is filed only by the plaintiff no.1, thereafter the defendant no.4 is transposed as plaintiff no.2. This fact is not disclosed by defendant no.7 in the application. The

defendant no.7 while filing his written statement did not ask for the partition or did not file counterclaim. Therefore, the defendant no.7 has no right to file the application. The suit is filed only to harass the defendant no.1, 5, 8 and 9. The application is filed in collusion with plaintiff and defendant no.2, 3, 6, 7 and 10 to 14. The will deed dated 9.02.2005 is false and bogus. The suit property no.9 is purchased by the defendant no.1 by registered sale deed. The said property is in possession of the defendant no.1 by registered sale deed. Therefore, the defendant no.1 has right to alienate the said property. The application is filed only to prolong the matter. The suit property no.9 is not the self acquired property, but it is purchased property of the defendant no.1. The defendant no.2, 3 and 14 and others have sold some properties before filing suit and after filing suit, but they are not made parties to the suit. Therefore, the suit is not maintainable. Hence, prayed to reject the application with costs.

5. I have heard Mr. R. K. Wagh, the learned advocate for the defendant no.7 and Mr. B. D. Thorat for defendant no.1. Following points emerges for my discussion. I have recorded my findings thereon for reasons to follow.

Sr.No	POINTS	FINDINGS
01.	Whether the defendant no.7 has made out prima facie case ?	Yes
02.	Whether balance of convenience lies in favour of the defendant no.7 ?	Yes
03.	Whether the defendant no.7 would suffer irreparable loss if temporary injunction is refused ?	Yes
04.	What order ?	As per final order..

REASONS

6. In support of the application defendant no.7 relied on the following copies of document along with Exh.97. Copy of Will deed dated 09.02.2005.

AS TO POINT NO. 1 :-

7. The suit is filed for partition of the suit properties by metes and bounds. Initially suit is filed only against the defendants no.1 to 7 for seeking partition of Gat no.65, 42 and house property at Adgaon Jehur. My learned predecessor also allowed Exh.5 application and granted interim injunction on merit on 26.10.2007 to restrained the defendants from alienating the suit property till final disposal of the suit. However, at that time the present suit property no.9 was not added in the suit. By way of amendment in the year 2012 the plaintiff has added other 11 properties in the suit, in which the property no.9 is the survey no.35/1/e/293, plot no.25 admeasuring 3 R, which is the part of this application.

8. By way of present application the defendant no.7 contended that suit property no.9 was given to him by his grand mother Kaushalyabai by way of will deed dated 9.02.2005. Therefore, defendant no.7 becomes the owner and possessor of the said property in view of the said will deed. However, the defendant no.1 by taking disadvantage of his name on the 7/12 extract trying to sold the suit property. The defendant no.1 denied this fact and submitted that defendant no.7 is not at all concern with the said property. It was in possession of the defendant no.1 in view of registered sale deed. The will deed is not valid and legal.

9. On the background of the above contentions if we perused the

pleading of the plaintiffs it reveals that the plaintiffs contended that all the suit properties are the ancestral properties. Therefore, they are seeking their 1/6th share each in the suit properties. The defendant no.1 filed his written statement below Exh.61 and denied the contentions of the plaintiff. In his written statement para no.10 he contended that the suit property survey no.35/1/e/293, plot no.25 admeasuring 3 R was given to him by his in laws at the time of his marriage as a gift (भू दान). However, he has not mentioned the sale deed number in the written statement as well as in his say to the present application. The defendant no.7 filed his written statement below Exh.99 and the contention of the plaintiff about ancestral property. The defendant no.7 has not specifically denied any contentions of the plaintiffs. However, he contended that he was looking after his grand mother Kaushalyabai in her life time, therefore, she has executed Will deed of her share in the suit property to him including survey no.35/1/e/293, plot no.25 admeasuring 3 R. The copy of said will deed is filed along with Exh.97 which prima facie somehow corroborated the contentions of the defendant no.7 about execution of the will deed, but there is no contention about the possession.

10. From the above facts and circumstances it prima facie appears that suit is filed for partition as per Hindu law. The plaintiff contended that the suit properties are the ancestral properties. The defendant no.7 did not deny this fact but contended that the suit property no.9 survey no.35/1/e/293, plot no.25 admeasuring 3 R is given to him by his grand mother by will deed. Per contra the defendant no.1 contended that the said property is given to him by his in laws by registered sale deed. Therefore, prima facie it appears that the nature of the suit property is disputed. The 7/12 extract of the said property prima facie shows the name of the defendant no.1 in the ownership column. However, whether

the said property is ancestral or given to defendant no.7 by will deed or given to defendant no.1 by his in laws by registered sale deed is a disputed question needs to be decided on merit after evidence.

11. In the present suit my learned predecessor has granted the interim injunction in favour of plaintiff to the extent of alienation against the defendants as per order below Exh.5 dated 26.10.2007. However, at that time the present suit property no.9 i.e. survey no.35/1/e/293, plot no.25 admeasuring 3 R was not added in the suit. It was added in the suit by amendment of the year 2012. Therefore, by taking disadvantage of the non mentioning of the said property in the order below Exh.5 possibility of alienation cannot be denied.

12. In the light of above discussion, I am of the considered view that, prima facie defendant no.7 as well as plaintiffs and defendants have right in the suit property no.9 i.e. survey no.35/1/e/293, plot no.25 admeasuring 3 R. Therefore, I answered point no.1 in the affirmative.

As To Point No. 2 to 4 :-

13. I have already held that, the defendant no.7 has proved prima facie case. However, it is well settled that, existence of prima facie case alone, does not entitled the party to an order of temporary injunction. He must further show (i) he will suffer irreparable injury if the relief is refused; (ii) in the event of success in suit he will not have proper remedy being awarded adequate damages; (iii) the balance of convenience is in his favour or in other words their convenience will far exceed the convenience of her opponent in the event of refusal of the prayer; and (iv)

lastly they must show a clear necessity for affording immediate protection to their alleged right or interest which should otherwise to be seriously injured or impaired.

14. Herein this case, the defendant no.7 has prima facie shows that he has right in the suit property. Therefore, apprehension in the mind of defendant no.7 cannot be neglected. If defendant no.1 succeeded to create third party interest in the suit property it will cause irreparable loss and multiplicity of proceedings.

15. The learned advocate for the defendant no.1 submitted that the application is not maintainable as the defendant cannot file injunction application against other defendants. I have gone through the above submission. It reveals that generally the defendant cannot seek temporary injunction against the another defendants. However, in the partition suit there is presumption that all the parties are plaintiffs and defendants as well to the extent of their share. Therefore, they have right to protect their interest against each other. Now let us go through the provision of O.39 R. 1 of the C.P.C. ***O. 39 : Cases in which temporary injunction may be granted.***—*Where in any suit it is proved by affidavit or otherwise :-*

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to 5[defrauding] his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing

the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

16. After gone through the above provision of O. 39 R. 1 (a) it reveals that if the property in dispute is in danger any party to the suit may seek injunction. There is no specific bar that one defendant cannot filed application for temporary injunction against another defendant. Having regard to the facts and circumstances of the case, I am of the opinion that, the rights and interest of the parties is required to be protected for time being till the decision of the suit. Consequently, if the application is rejected, irreparable loss would be caused to the other defendant no.7 as well as other parties. I, therefore, answered point no. 2 & 3 in the affirmative and in answer to point no. 4 I proceed to pass the following order.

ORDER

1. Application below Exh. No. 191 is allowed.
2. Defendant no.1 or his agents or any person claiming right on his behalf are temporarily restrained from alienating or creating any third party interest in the suit property no.9 i.e. survey no.35/1/e/293, plot no.25 admeasuring 3 R, by any mode till final decision of the suit.
3. Cost in main cause.
(Pronounce in open Court)

Place : Kannad.
Date :- 12.10.2023

(P. M. Kolse)
Civil Judge, Junior Division, Kannad.

CERTIFICATE

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

Name of the Stenographer : Y. S. Mali

Court : Shri. P. M. Kolse,
C.J.J.D. & JMFC, Kannad.

Date : 12.10.2023

Order signed by the
presiding officer on : 16.10.2023

Order uploaded on : 16.10.2023