

Order Below Exh. 5 in Reg. Civ. Suit No.86 of 2012

The plaintiff has filed this application as per Order 39 Rule 1 and 2 of the Code of Civil Procedure wherein he prayed for relief of temporary injunction against the defendants

2. Brief facts necessary for the disposal of this application are as under-

The subject matter of present suit and application is land admeasuring 40 R out of S.No.223 (3 H. 63 R) hereinafter referred to as "the suit land". The property bearing S.No.223 is originally purchased by plaintiff's grand-father namely Ramkisan Indani. Ramkisan died in the year 1968 living behind a widow Bhavaribai (defendant No.6), 2 sons namely deceased Kachrual (the plaintiff's father) and Bhikulal (defendant No.4). Kachrual survived by sons viz the plaintiff, defendant No.2 and 3 and widow defendant No.1. The defendant No. 5 is son of defendant No.4.

3. The plaintiff contended that, in a suit bearing R.C.S. No. 219/1978, which filed after death of Ramkishan, compromise took place wherein $1/3^{\text{rd}}$ share in the S. No. 223 allotted to the deceased Kachrual. Subsequently, defendants No. 4 to 6 started obstructing possession of deceased Kachrual. Therefore, Kachrual filed R.C.S. No. 448/1988 against Bhikulal and Bhavribai. In the said suit again compromise took place and $1/3^{\text{rd}}$ share in the S.No. 223 is allotted to the deceased Kachrual. Despite this fact, taking disadvantage of death of Kachrual, the defendant No. 4 mutated his name to suit land and subsequently partitioned it and allotted to defendant No.5. Regarding 8 Acre land out of S.No. 223 permission for non-agriculture use has been sought and plotting has also been carried out. The defendant No. 5 has also sold those plots to defendants No. 8 to 22 through defendant No.7. For that purpose, the

defendant No. 5 executed deed of power of attorney in favour of defendant No.7. So also, the defendant No. 8 to 32 sold suit property to each other. The defendants turned down request of the plaintiff about not to raise construction, alienate or change the nature of the suit property. Hence, the plaintiff has filed present suit for partition of his share in the suit property, for declaration that sale deeds executed among defendants No. 8 to 32 are null and void and also for permanently restraining the defendants from alienating the suit property and raising construction thereon. Along with the suit the plaintiff filed the present application wherein he prayed that defendants be temporarily restrained from raising construction, creating encumbrance upon and alienating the suit property.

4. The defendants No. 4 to 12, 16, 19, 20 and 31 filed their say below Exh.106. They contended that the suit is time barred. Boundaries of 1 Acre land given in the plaint are incorrect. The plaintiff's father Kachrual had only 1/3rd share. The plaintiff has not challenged mutation entry No. 3295 recorded in favour of defendant No. 5. The defendant No. 5 had got a valid title and therefore, he nominated defendant No. 7 to execute sale deeds on his behalf. The defendants categorically denied that 1 Acre landed property falls within the share of Kachrual Indani. The plaintiff did not give specific location of suit property. The plaintiff has deliberately filed this suit in order to harass the defendants.

5. Say of defendants No. 14 and 15 is at Exh.49. Here I mention that the written statement filed by the defendants No. 14, 15 and 18 is not accepted by this Court. Record shows that suit summons served on them on 13/01/2013 vide report below Exh.10. However, they filed their written statement on 30/04/2013 i.e. beyond the period of 90 days. No application for permission of the Court to file written statement has been filed on

record. No attempt has been made to that effect also. Therefore, their say cannot be considered while deciding present application.

6. The defendant No. 17 filed his say below Exh.70. He denied contention in application except the fact that plot No. 12 bearing CTS No. 350/A/132/2 has been sold to him by registered sale deed No. 3303/2009. He also denied that the plaintiff is having any share in the suit property. Ultimately he prayed for dismissal of the application.

7. The defendant No. 21 filed his say below Exh.72. He admitted that CTS No. 350/A/132/16 has been sold to him by registered sale deed No. 3340/2010. However he denied rest of the contents of the application. He also denied that the plaintiff is having 1/4th share in the 1/3rd share of deceased Kachrulal as alleged. He prayed for dismissal of the application.

8. The defendant No. 33 filed his say below Exh. 50 and denied contentions in the application.

9. The defendants No. 23, 24 and 25 have filed their say below Exh.62. During pendency of suit, defendant No.23 died and his legal representatives i.e. defendant No. 23-A and 23-B brought on record. They appeared and adopted written statement below Exh.62. They contended that in a partition entire S.No. 223 i.e. 9 Acre 3 R has been allotted to Bhavribai. Therefore she became exclusive owner of suit property. Hence, the plaintiff has no right to claim share in the property owned by defendant No. 6 Bhavribai during her life time. The defendants No. 23 to 25 have purchased their plots after giving proclamation in local newspaper and no one raised objection at that time. The names of defendants also recorded in City Survey Office, Jalna. As the plaintiff has no right in the suit

property, they prayed for dismissal of the application.

10. The suit is proceeding *exparte* against defendants No. 1 to 3, 22 and 32. Despite sufficient opportunity defendants No. 13 and 26 to 30 have failed to file their say.

11. Following points arise for my determination. I have recorded my findings thereon for the reasons mentioned thereunder:

<u>POINTS</u>	<u>FINDINGS</u>
1) Whether the plaintiff has made out prima facie case? :	No.
2) Whether the plaintiff prove that he will suffer irreparable loss, if application is rejected? :	Does not survive
3) In whose favour balance of convenience lies? :	Does not survive
4) What order? :	..Application is rejected

: REASONS :

12. Heard learned counsel Mr. E. A. Shaikh on behalf of the plaintiff and learned counsel Mr. R. R. Totla on behalf of defendants No. 33, 26 to 30, learned counsel Mr. N. S. Jain on behalf of defendants No. 23 to 25, and learned counsel Mr. Hemant Surve on behalf of defendants No. 4 to 12, 16, 19, 20 and 31. Perused documents available on record. I will make refers of it wherever and if at all necessary.

As to point No. 1 :-

13. In order to succeed, the plaintiff must *prima-facie* show that, being son of deceased Kachrual, he has share in the suit property i.e. 40 R land out of S.No. 223.

14. In support of his contention the plaintiff has produced various documents on record. List Exh.4/1 is 7/12 extract of S.No.223 admeasuring 3 H. 63 R. It shows that name of defendant No. 5 Rajesh recorded to the extent of 40 R land and name of defendant No. 6 Bhavribai is recorded to the extent of 2 H. 23 R land.

15. List Exh. 4/2 is copy of Exh.06 i.e. compromise memo filed in R.C.S. No. 219/1978. It shows that compromise took place among defendants No. 4, deceased Kachrual and defendant No. 6 Bhavribai. In the said compromises partition of various properties took place among Kachrual, Bhikulal and Bhavribai wherein along with other properties S.No. 223 admeasuring 9 Acre 3 R allotted to the share of defendant No. 6 Bhavribai. It is strange to note that, the compromise memo specifies that Bhavribai shall not have power to alienate the properties allotted to her share and after her death her share will be divided equally between Bhikulal and Kachrual.

16. List Exh.4/3 is another compromise in R.C.S. No. 448/1988 which was filed by Kachrual against Bhavribai and Bhikulal for permanently restraining the defendants therein from converting use of CTS No. 223 for non-agriculture purpose and also for alienating any portion thereof to anybody. In the said compromise 34 paise share allotted to Bhavribai, 33 paise share allotted to Kachrual and remaining 33 paise share allotted to Bhikulal. After compromise in R.C.S. No. 448/1988, the

parties i.e. Bhavribai, Bhikulal and Kachrual executed one Vatap-yadi (memorandum of partition) specifying allotment of plots in their respective shares. Plots specified in schedule-A has been allotted to Bhavribai, Plots specified in schedule-B has been allotted to Kachrual and Plots specified in schedule-C has been allotted to Bhikulal. Said Vatap-yadi further shows that Bhavribai allotted 1 Acre land to Gajanan Trust for which Kachrual and Bhikulal had no objection. It further shows that said Vatap-yadi (memorandum of partition) has been executed excluding said 1 Acre land.

17. List Exh.92/3 is the copy of mutation entry No. 3295. It shows that an entry regarding allotment of land out of S.No. 223 to Shri. Gajanan Lokseva Trust has been canceled in view of Tahsildar's letter bearing O.No.2002/Jama/ 1/Kavi/204, dt. 08/02/2002. Tahsildar further ordered recording name of Bhikulal Ramkisan Indani. However, Bhikulal got recorded name of his son Rajesh on the basis of consent deed and partition deed. Thereafter, name of Rajesh (defendant No.5) recorded to 40 R land in S.No. 223. At this juncture, I mention that the copy of order of Tahsildar dt. 08/02/2002, consent deed and said partition deed are not filed on record.

18. Learned counsel Mr. E. A. Shaikh argued on behalf of the plaintiff that the partition took place in R.C.S. No. 448/88 was excluding 40 R land allotted to Gajanan Maharaj Trust. The plaintiff's father deceased Kachrual was having $1/3^{\text{rd}}$ share in the said property. He further submitted that after cancellation of allotment 40 R land in favour of Gajanan Maharaj Trust said land will revert back to plaintiff's father, Bhikulal and Bhavribai. Therefore recording name of defendant No. 5 Rajesh to suit land is illegal. The defendant No. 5 has unlawfully executed sale deeds of plots out of 40 R land. The plaintiff is having share in the said 40 R land. If the

defendants further alienates the suit property then plaintiff will suffer irreparable loss and it will also cause multiplicity of proceeding.

19. Learned counsel Mr. Hemant Surve argued on behalf of defendant No. 4 to 12, 16, 19, 20 and 31 that, relief under Order XXXIX Rule 1 can only be granted where property in dispute is in danger of being wasted, damaged or alienated by the defendant. The plaintiffs nowhere pleaded that someone is selling or damaging the suit property. The plaintiffs also failed to identify disputed 40 R land. By way of present suit, the plaintiff is trying to implement compromise which took place in the year 1989. The plaintiff has slept over is right. Therefore, he is not entitled for any interim relief. He further argued that, admittedly construction has been raised over suit property. That means plaintiff is not in possession of suit property. Therefore, he is not entitled for relief of interim injunction. Hence, present application be rejected.

20. Learned counsel Mr. Dhannawat argued on behalf of defendants No. 17 and 21 that, even if the suit property is alienated, the plaintiff has protection of section 52 of the Transfer of Properties Act. Grant of injunction will seriously prejudice right of the defendants. Therefore, he also prayed for rejection of the application.

21. Learned counsel Mr. Jain argued on behalf of defendants No. 23, 24 and 25 that the plaintiff has no right in the suit property. Bhavribai is absolute owner of 34 paise share in gat No. 223. The compromise which took place in the year 1989 do not show that 1 Acre land was kept aside for common use. He further submitted that, in fact Bhavribai was absolute owner of 9 Acre 3 guntha land in gat No. 223. The plaintiff has no right in the property of Bhavribai. Therefore, according to him, the plaintiff is not

entitled for any relief of temporary injunction. In support of his submission, learned counsel Mr. N. S. Jain relied on decision of Hon'ble Bombay High Court in case ***Pralhad Jagannath Jawle Vs. Sitabai Chandar Nikam*** [2011(4)MhLj137=MANU/MH/0685/2011]. In this case, Hon'ble Bombay High Court held that,

“ In any event, in view of the law laid down by the Apex Court, it cannot be said that provisions of Section 52 of the said Act of 1882 in any manner put fetters on the powers of Civil Court conferred by Rules 1 and 2 of Order XXXIX of the said Code. As stated earlier, in a given case, while exercising discretionary powers, the Court can always come to the conclusion in peculiar facts of the given case, that in view of provisions of Section 52 of the said Act of 1882, equitable relief of temporary injunction need not be granted.”

22. He further relied on decision on Hon'ble Punjab and Haryana High Court in ***Kishan Vs. Umesh and ors.*** [2014 (4) Civil Court Cases 201 (P & H)]. In this case Hon'ble Punjab and Haryana High Court observed that,

“ Admittedly, the sale deed in question was executed on 03/02/1992 and subsequently mutation No. 2131 was sanctioned in favour of the defendants on 30/03/2002. It is further not in dispute that on the basis of the aforesaid sale deed and mutation, revenue entries were made in favour of the defendants. The argument, as raised before this Court to the effect that cause of action had arisen to the appellant only in November 2007 on refusal of defendants from re-transferring the land in question in their favour, is not substantiated from the evidence on record. There is nothing on record to support the aforesaid argument of the appellant.”

23. He further relied on decision on Hon'ble Allahabad High Court in ***Narayan Sharma Vs. Devendra Kumar Sharma*** [2014 (1) Civil Court Cases 427 (Allahabad)]. In this case Hon'ble Allahabad High Court observed that,

“If that be so, from whatever angle the matter is examined, limitation to institute suit would have commenced after one year from the date of execution of agreement and since the suit was not filed within three years thereafter, it was apparently barred by time. When a suit is barred by time, question of laches, delay and also to construe an agreement whether therein time is the essence or not would not arise. Once the suit is apparently barred by time, no other consideration can prevail, inasmuch as, Section 3 of L.A. 1963 mandates that the Court shall not entertain a suit which is barred by time and such suit, if entertained, will have to be dismissed on the ground of limitation.”

24. Learned counsel Mr. R. R. Totla argued on behalf of defendants No. 26 to 30 and 33 that, after partition by compromise, second suit for partition is not tenable. The plaintiff was having knowledge about the sale deeds. Therefore, he prayed for rejection of the application.

25. There is no dispute among the parties regarding execution of sale deeds of suit property by defendant No. 5 in favour of defendants No. 8 to 22 through his power of attorney holder defendant No. 7. Even further alienation of the suit property among defendants No. 8 to 32 is also not disputed. However, the plaintiff has strongly challenged legality of these sale transactions on account of his share in the suit property. Therefore, it become necessary to determine whether plaintiff has prima-facie succeeded in showing his alleged share in the suit property being son of Kachrual.

26. Though the plaintiff pleaded that in the compromise took place in RCS 219/1978, 1/3rd share in Sr. No.223 is allotted to deceased Kachrual, the copy of said compromise (list Exh. 4/2) shows that entire Sr. No. 223 admesuring 9 Acre 6 R (3H=63R) allotted to Bhavribai. This fact is contrary to the plaintiff's pleading.

27. It is further plaintiff's case that the property bearing S.No. 223 is purchased by deceased Ramkisan. It is also plaintiff's case that said property is their ancestral property. If this would be position then after death of Ramkisan deceased Kachrual, Bhikulal and Bhavribai were entitled for 1/3rd share each in the ancestral properties of the parties. Though, in the compromise took place in R.C.S. No. 219/1978 deceased Kachrual, Bhikulal and Bhavribai get 1/3rd share each in their ancestral property, restriction put on Bhavribai regarding her power to alienate her share. It is pertinent to note that, by compromise dt. 15/06/1978 in R.C.S.No. 219/1978 no new right has been created in favour of Bhavribai. The share to which she was entitled after death of Ramkisan has been separated and allotted to Bhavribai. If this would be position then as rightly pointed out by learned counsel Mr. N. S. Jain appearing on behalf of defendants No. 23, 24 and 25, Bhavribai should have been regarded that absolute owner of properties including S.No.223, which were allotted to her in compromise took place in R.C.S.No. 219/1978. Despite this fact, deceased Kachrual, Bhikulal and Bhavribai again entered into compromise in R.C.S.No. 448/1988 and partitioned S.No.223 among themselves wherein 33 paise share allotted to deceased Kachrual, 33 paise to Bhikulal and 34 paise share to Bhavribai. In the said compromise, parties agreed that Bhavribai shall be regarded as absolute owner of her 34 paise share. It may be noted that, the compromise in R.C.S.No.448/1988 nowhere shows that while partitioning S.No.223, 40 R land has been kept aside either for common use or for allotment to Gajanan Maharaj Trust. However, in the memorandum of partition (list Exh.92/1), it has been mentioned that Bhavribai allotted 1 Acre land to Gajanan Trust and for which deceased Kachrual and Bhikulal have no objection. The fact that, Bhavribai allotted 1 Acre itself shows that she allotted 1 Acre land from her share and not from share of deceased Kachrual and Bhikulal. Otherwise, it would have

been mentioned in the memorandum of partition that Kachrual, Bhikulal and Bhavribai have allotted 1 Acre land. However, that is not the case. Apart from it, after allotment of 33 paise share to deceased Kachrual, 33 paise share to Bhikulal and 34 paise share to Bhavribai nothing remained to be partitioned in S.No.223. Therefore, prima-facie it do not appears that plaintiff's father deceased Kachrual has any share in 40 R land. Consequently, the plaintiff has prima-facie failed to show that he has 1/4th share in the share of his father.

28. Now, the question arises how name of defendant No. 4 and then defendant No. 5 came to be recorded to the suit property. As observed earlier, in view of letter of Tahsildar, entry regarding name of Shri Gajanan Maharaj Lokseva Trust has been cancelled and name of defendant No. 4 came to be recorded. However, on the basis of consent deed and partition deed produced by defendant No.4 Bhikulal, name of his son i.e. defendant No. 5 Rajesh came to be recorded to 40 R land in S.No. 223. The plaintiff has not produced said order of the Tahsildar. Therefore, it is not clear as to why Tahsildar ordered cancellation of recording of entry in the name of Shri Gajanan Maharaj Lokseva Trust and recording of name of defendant. Be that as it may. The plaintiff's case stands on his own legs and cannot derive any benefit from the weakness of defendants. If at all name of defendant No. 5 has been wrongly mutated to suit property then only Bhavribai has *locus* to challenge the same for she is absolute owner of 34 paise share in S.No. 223.

29. Thus, the sum and substance of above discussion is that the plaintiff prima-facie failed to show that he has any share in the suit property. Therefore, I answer point No. 1 in the negative.

As to Point No.2 and 3 :

30. The plaintiff has failed to make out prima facie case. Therefore, point regarding irreparable loss and balance of convenience does not survive. Hence, I answer points No. 2 and 3 accordingly.

As to Point No.4:

31. In view of findings to the points No. 1 to 3 this application deserves to be rejected. Hence, in the result, I pass following order.

ORDER

1) The application is rejected with costs.

Sd/-25/2/16

(A. R. Ubale)

5th Jt. Civil Judge (S.D.)

Jalna.

Date :25/02/2016

CERTIFICATE

I affirm that the contents of this PDF file are word to word as per original order.

Name of Steno : P. T. Bura
Name of Court : 5th Jt. Civil Judge (S.D.), Jalna
Date of PDF : 26/2/16

Sd/-26/2/16
(P. T.Bura)
Stenographer