

MHKO070015712021



Sou. Tejashri Ashok Maskar
V/s.
Shri. Sadanand Bapu Kadam and others

ORDER PASSED BELOW EXH. 5

1] This application is filed by plaintiff under Order 39 Rule 1 and 2 r/w. Sec. 151 of Code of Civil Procedure. According to plaintiff, she is having 1/4th share in the property which is mentioned in para No.1 of the application as well as plaint and hereinafter referred as 'suit property' for the sake of convenience.

2] According to plaintiff, the property mentioned in para No.1(A, B and D) are ancestral and property No. 'C' is purchased by plaintiff and defendant No.1 to 3 from the income of Hindu joint family property in the name of defendant No.4. The possession is joint possession over it. There is sugarcane crop in it. Thus, the entire suit property is their ancestral property. Defendant No.1 is her brother. Defendant No.3 is mother and defendant No.4 is her sister-in-law (wife of defendant No.1).

3] According to plaintiff, defendant Nos. 1 to 4 are members of Hindu joint family. The property of family which is joint is yet not partitioned. Suit property 1A, B and D are ancestral. However, 1C is purchased from the income of joint family property consisting of plaintiff and defendant Nos. 1 to 3. However, it is purchased in the name of defendant Nos.4. Thus, entire suit property is jointly owned and possessed by plaintiff and defendant Nos. 1 to 3. She is having her 1/4th share in it. According to plaintiff, without consent of her defendant No. 1 and 4 have obtained loan from defendant Nos. 5 and 6. The loan is not binding on plaintiffs share. Defendants are trying to create third party interest in the suit property in order to defraud plaintiffs claim. Hence, they be restrained from creating any third party interest or charge over the suit property without following due process of law.

4] Defendant No.1 appeared and submitted his say at Exh.20. He admitted relationship between the parties. According to him, they have obtained loan from defendant No.5. For repayment of loan it is necessary to sale the suit property. Suit property in Gat No. 14 and 15 are purchased in the name of defendant No.4 i.e. his wife for convenience of family. At the time of construction over it, plaintiff did not paid the agreed amount. Unless it is entirely paid, plaintiff is not entitled for relief sought. According to him, his grandfather Malhari who was from Malgaon, settled at Nrusinhwadi

and purchased suit house property No. D situated at City Survey No. 719. It was old property having no any facilities. It is developed by him. Plaintiff did not paid any amount for said development. He admitted that, by selling their ancestral property at Malgaon bearing C.T.S.No.669, his grandfather Malhari and father Bapu Malhari and great grandfather Yashwant @ Yesu Kadam have purchased properties at Nrusinhwadi in the name of Malhari.

5] Defendant Nos. 5 and 6 by way of their reply at Exh.14 opposed the application. According to them, the location of suit property is not properly mentioned in plaint. Genealogy is incomplete. Suit is bad for non-joinder of necessary parties. According to them, after completing the due procedure and necessary requirements, they have granted loan to defendant No.4, borrower. Defendant No. 1 is co-obligant/guarantor. They have received mortgage of the property in gat NO. 14 and 15 i.e. suit properties 1A and 1B as those are self-acquired properties of Malhari Yashwant Kadam as per his registered will dtd. 6/9/2003.

6] According to them, on the basis of registered Will deed and on the basis of mutation entry No. 1633 dtd. 31/1/2006, they found that, suit property No. 1A and 1B were transferred in the name of defendant No.1. The mutation remain unchallenged till today.

7] According to them, suit property No. 1A i.e. Gat No. 14 is purchased by defendant No.4 from Dhanajirao Chimaso Jagdale and Shri. Khandojirao Chimaji Jagdale by way of registered sale deed dtd. 29/12/2011. On the basis of mutation entry No. 2267, defendant No.4 has become owner of the said suit property. The property at Gat No. 15 is purchased by defendant No.4 from defendant No.1 by way of registered sale deed dtd. 29/12/2011. On the basis of mutation entry No. 2268 she has become owner of the said property.

8] According to them, in the year 2018, defendant Nos. 1 and 4 have executed an equitable mortgage for the loan raised from defendant Nos. 5 and 6 on 28/03/2018. In the year 2019, the loan account of defendant Nos. 1 and 4 became NPA and the proceeding of recovery of outstanding loan is started by bank authorities.

9] According to them, they have already initiated the proceeding at District Collector's Court, under SARFAESI Act. The present suit by plaintiff filed colludedly by joining hands with defendant Nos. 1 to 4. Plaintiff has filed it only to avoid the repayment of loan taken from defendant Nos. 5 and 6. Hence, application of plaintiff is not maintainable, it be rejected.

10] Heard both sides. Gone through record. Considering rival contentions of both parties, following points arise for my determination which I have recorded my findings thereon along with detail reasons to follow.

Sr.No	Points	Findings
1.	Whether plaintiff has made out prima facie case in his favour ?	... In the Affirmative.
2.	Whether balance of convenience lies in favour of plaintiff ?	... In the Affirmative.
3.	Whether plaintiff will suffer irreparable loss, if injunction is not granted in his favour ?	... In the Affirmative.
4.	What order?	As per final order.

REASONS

11] In support of his contentions, plaintiff has relied on various documents at Exh.3 and at Exh.22. However, defendant Nos. 5 and 6 relied on documents as per list Exh.15. According to plaintiff, she is having her share in the undivided suit property. It is Hindu joint family property. The documents at Exh.22 and Exh.3 shows that, originally plaintiffs ancestors were having their property

at Malgaon, Tal. Miraj, Dist. Sangli in survey No. 669/2 in the name of Yashwant Kadam. It was sold out and they have purchased property at Nrusinhwadi. Document at Sr.No. 1 list Exh.3 shows that, father of plaintiff died on 15/2/1978. Document at Sr.No. 2, 3, 4 at list Exh.3 shows the names of defendant Nos. 1 and 4 as recorded in revenue record of Gat No. 14, 15 and 76 of village Nrusinhwadi and area in possession of defendant Nos. 1 and 4. Document at Sr.No.6 is property card (Akhivpatrika) showing name of Malhari Yashwant Kadam i.e. grandfather of plaintiff and defendant No.1 in respect of C.T.S.No. 719. Document at Sr.No.1 list Exh.22 shows name of grandfather of plaintiff and defendant No.1, Yesu Kadam in the 7/12 extract, revenue record Gat No. 669/2 of village Malgaon, Tal. Miraj. Document Sr.No.2 is entry of mutation No. 300 in favour of grandfather of plaintiff, Malhari in respect of Gat No. 245 of Nrusinhwadi. Thereafter, document at Sr.No. 3 and 4 at Exh. 22 shows name of plaintiffs grandfather Malhari Yashwant Kadam in Gat No. 245 of Nrusinhwadi. Documents at Sr. Nos. 8 and 13 are copies of sale deed on the basis of which grandfather of plaintiff Malhari Kadam had purchased parts of property situated in CTS No. 505/7/B of Nrusinhwadi. Document at Sr.No.9 is mutation entry No. 1633 in respect of Gat No. 12, 13, 15 of Nrusinhwadi.

12] Document at Sr.No.9 list Exh.22 is copy of mutation entry No. 1633 on the basis of which property in Gat No. 12, 13 and 15

were entered in the name of defendant No.1, as per Will deed dtd. 6/9/2003 executed by his grandfather Malhari Kadam, in his favour. The receipts at Sr. No. 14 are in respect of payment made by defendant Nos. 1 and 2 in favour of Engineer Risbood for construction of suit property. While the receipts at Sr.No. 6 and 7 are in respect of payments made by plaintiff and defendant No. 1 to the concern Engineer for construction over Gat No. 14 and 15 of suit property.

13] According to plaintiff, all the documents referred above are showing that the suit property is ancestral property of her and defendants. Initially her grandfather Malhari purchased some portion of it at Nrusinhwadi and thereafter it is developed by defendant No.1 as well as plaintiff by making payment to the Engineer by way of receipts at Sr.No. 6, 7, 14 and 15 of Exh.22. According to plaintiff she is having her undivided share in all properties mentioned in plaint. The suit property at Sr.No. 'D' was initially old property which is developed from the common income of the joint family property. The receipts relied by her are sufficient to show the same.

14] I have carefully gone through the documents relied by plaintiff, the nature of suit property seems to be ancestral, instead of that, grandfather of plaintiff Malhari, bequeathed the property

belonging to him in favour of defendant No.1 excluding share of plaintiff. There was no notice of mutation entry No. 1633 received by plaintiff. Admittedly at this juncture defendant No.1 and 4 have obtained huge loan from defendant Nos. 5 and 6. According to defendant Nos. 5 and 6 they have initiated proceeding for recovery of amount from defendant Nos. 1 and 4 under SARFAESI Act. According to bank after verification and on the basis of mutation entry No. 1633, they found that, said portion suit property was self acquired of deceased Malhari Yashwant Kadam and defendant No.1, his grand son has become owner of said property on the basis of Will deed. Therefore, they have disbursed the loan in favour of defendant Nos. 1 and 4 on their execution of equitable mortgage to them.

15] According to defendant No. 5 and 6, property in Gat No. 14 is purchased by defendant No.4 from Shri. Dhanajirao Jagdale and Shri. Khandojirao Jagdale by way of sale deed dtd. 29/12/2011 and property in Gat No. 15 is purchased by defendant No.4 from defendant No.1, by way of registered sale deed dtd. 29/12/2011. On the basis of these two sale deeds bank had issued loan to defendant No. 4 to which defendant No.1 is guarantor.

16] After perusal of both sale deeds which are filed on record at Sr.No. 4 and 5 of list Exh,15, they do not disclose the source of income of defendant Nos. 4. It appears that, defendant No.1 as well

as 4 are having no source of income except agriculture and no other agricultural property except suit property. According to plaintiff, both these transactions are from the common source of income i.e. income of agriculture of the undivided Hindu family. Therefore, it can not be said that, those properties were self acquired properties of defendant Nos. 1 and 4. According to plaintiff, loan application at Sr.No.1 Exh.15 does not bear her signature so security created on part of suit property by defendant Nos. 1 and 4 is not binding on plaintiffs share. Prior to determination of her share in suit property if, defendants succeeds in creating any third party interest, the entire purpose of suit will be frustrated. Hence, injunction is required to be granted.

17] On the perusal of copy of Will deed dtd. 6/9/2003 executed by deceased Malhari, which is at Sr.No.2 of Exh.15, it appears that, there is no reference in respect of suit property A(Gat No.14) and C(Gat No.75). Moreover notice of Mutation Entry No. 1633 was not served upon plaintiffs. The documents at Sr.No. 4 and 5 at list Exh.15, on the basis of which defendant Nos. 5 and 6 issued loan to defendant No. 4 and 1 are executed on same day. Both are in favour of defendant No.4, she has shown her profession as agriculturist. However not mentioned her exact source of income. From the documents on record it can be prima facie held that those properties are purchased from income of agricultural property of

joint Hindu family.

18] From perusal of entire documents on record, prima facie nature of suit property seems to be ancestral. Plaintiff is seeking her undivided share. Whether she is entitled for her share and if yes then to what extent, are the questions to be decided during trial. According to her at this juncture defendants are required to be restrained from transfer or alienating her proposed 1/4th share in suit property to third party till decision of suit. It is also prayed that, nature of suit property may be preserved as it is till decision of suit.

19] Learned advocate appearing on behalf of defendant Nos. 5 and 6 submitted that, there is express bar for granting such relief in favour of plaintiff as per section 34 of SARFAESI Act. Defendant Nos. 1 and 4 have mortgaged the portion of suit property in favour of defendant Nos. 5 and 6. Their loan account is now in the category of NPA. Already notice for auction of mortgaged portion of suit property under SARFAESI Act is issued to defendant Nos. 1 and 4. In such circumstances, plaintiff is not entitled for relief of injunction against defendants as prayed.

20] On the contrary, learned advocate appearing on behalf of plaintiff submitted that, plaintiff is seeking partition of her undivided share in ancestral joint Hindu family property. She can claim

injunction against defendant Nos. 5 and 6 to the extent of her share or her portion of suit property.

21] In support of his above contentions he relied on case of **Mohan Lal and Anr. V/s. Dwarka Prasad & Ors. reported in AIR 2007 Rajasthan 129.** Wherein Hon'ble Rajasthan High Court has held that, Securitization Act does not bar Jurisdiction of Civil Court to decide rights between third parties including borrowers in case of partition etc. It has further held that, in a suit for portion of ancestral joint Hindu family property, co-parcener can claim injunction against bank or financial institution, in so far their share in property is concerned.

22] He also relied on case of **Bank of Baroda V/s. Gopal Shriram Panda and others in Civil Revision Application No. 29/2011** decided by Division Bench of Hon'ble Bombay High Court on 25/3/2021, wherein Hon'ble Bombay High Court held that, the jurisdiction of Civil Court is not entirely barred by section 34 of SARFAESI Act, civil rights like partition of undivided share in suit property claimed by person other than borrower or guarantor would have to be decided by Civil Court only and not by D.R.T. under Section 13 and 17 of Debts Recovery Tribunal Act, 1993.

23] Thus from the law discussed above, and facts on record in my opinion the both citations referred by plaintiff are perfectly applicable to case in hand. Thus, creation of mortgage deed by defendant No.1 and 4 in respect of the portion of the suit property, will not dis entitle present plaintiff from seeking equitable relief of injunction against all the defendants to the extent of her undivided share. Thus she is entitled for relief of injunction against all the defendants to the extent of her share.

24] If injunction will not be granted in favour of plaintiff, purpose of her suit will be frustrated. She is seeking injunction in respect of her proposed share i.e. 1/4th. Defendant Nos. 5 and 6 are having every right to recover their loan amount from defendant Nos. 1 and 4, from their respective shares in the suit property. Present plaintiff was not party to the loan transaction between defendant Nos. 1, 4 and 5, 6. She never received any notice about creation of such security interest in the part of suit property by defendant Nos. 5 and 6. Thus action at the hands of creditors will defeat her proposed share in suit property, which she may be entitle after trial.

25] For all above reasons, I am of the view that, plaintiff has establish her prima facie case, balance of convenience lies in her favour. If injunction will not be granted, plaintiff will suffer irreparable loss, the loss can not be compensated in terms of money.

On the contrary, defendants will not suffer any loss, if injunction will be granted against them. Defendant Nos. 5 and 6 will be always entitled to recover their dues alongwith interest from defendant Nos. 1 and 4, excluding plaintiffs share which will be determined during trial.

26] Admittedly trial for determination of plaintiffs proposed share will require some time. Considering huge loan amount disbursed by defendant Nos. 5 and 6, to defendant No. 4 and 1, it is necessary to dispose the suit at the earliest so that plaintiffs share will be determined by court and defendant Nos. 5 and 6 can recover their loan amount alongwith interests, excluding plaintiffs share.

27] Hence, for reasons recorded above, I answer point No.1 to 3 in the affirmative and in order to answer point No. 4, proceed to pass following order which will meet ends of justice;

ORDER

1. Application Exh.5 is allowed.
2. Defendants, their agents or servant or anybody acting on their behalf are hereby restrained from creating any third party interests over the suit property in respect of plaintiffs undivided share in it, without following due process of law.

3. Considering huge loan amount disbursed by defendant No.5 and 6 in favour of defendant Nos. 1 and 4, and public money involved in said loan, the trial of present suit is expedited.
4. Both parties to the suit shall assist this court for speedy disposal of suit.

Date : 18/02/2022.

(B.A. Gaikwad)
Civil Judge Senior Division,
Jaysingpur.