



RCS No. 27/2020
Ruma – Vs.– Bapu & Ors.
Order Below Exh. 5

ORDER BELOW EXH. 5

1. This is an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure 1908, seeking temporary injunction restraining defendants from alienating suit land or creating third party interest therein and also restraining defendants from causing any interference and more specifically restraining defendant No.7 from further carrying out any sort of construction over suit property.

2. Description of the suit property: –

(A) Land Gat No.95, admeasuring 00-H. 29-R., situated at village Makegaon, Tq. Renapur, Dist. Latur. Bounded as –

Towards East	Canal & Land Of Shyamsunder Lahane.
Towards West	Plot of Shankar Lahane.
Towards South	Public Road.
Towards North	(Panand) village border Road.

(B) Land Gat No.235, admeasuring 01-H. 95-R., situated at village Makegaon, Tq. Renapur, Dist. Latur. Bounded as –

Towards East	Canal & Land of Venkat Lahane.
Towards West	Makegaon – Divegaon, village Boundary.
Towards South	Land of Bharat Lahane.
Towards North	Land of Bharat Lahane.

(C) House Property Number-78, situated at village Makegaon, Tq. Renapur, Dist. Latur. Bounded as –

Towards East		Narhari Kerba Lahane.
Towards West		Bapu Eknath Mundhe.
Towards South		Village Panchayat Road.
Towards North		Village Panchayat Road.

Contentions of the applicant in short : –

3. It is contended by the applicant that respondent No.1 is her father. Respondent No.2 is her mother. Respondent Nos. 3 & 4 are her sisters. Respondent Nos. 5 & 6 are her brothers. Whereas, respondent No.7 is the illegal purchaser of suit property-“B”, to the extent of 0-H. 11-R, vide sale deed No.104/2005 dated 01-12-2005.

4. The applicant and respondent Nos.2 to 6 form joint Hindu Family. The parties are governed by Mitakshara School. There is not partition of family property. As such, the applicant is having undivided share in the family property. She claims to have 1/7th share in the family property.

5. It is further contention of the applicant that respondent No.1 manages all the family affairs. Respondent No.7 is the village panchayat. Taking undue advantage of old age, illiteracy and simple nature of respondent No.1, respondent No.7 induced or coerced respondent No.1 to execute Gift-Deed of land Gat No.235, to the extent of 0-H. 03-R. Under the pretext of Gift-Deed, respondent No.7 got executed registered sale deed of land Gat No.235, to the extent of 0-H. 11-R., however, falsely, mentioned boundaries of land Gat No.95, in the said sale deed. The sale deed, allegedly executed by respondent No.1 in favour of respondent No.7 is illegal. It is executed without consent of other family members. The said alienation is not for the benefit of

family or for any legal necessity of the family. As such, the sale deed is not binding on the applicant.

6. It is further case of the applicant that respondent No.7 intentionally mentioned boundaries of land Gat No.95 in the said sale deed, executed in respect of land Gat No.235. Taking undue advantage of boundaries (so wrongly mentioned) respondent has constructed Government Hospital and now respondent is constructing Anganwadi-2, in land Gat No.95. In fact, sale deed is in respect of land Gat No. 235, as such, respondent has no any right to carry out any sort of construction on land Gat No.95.

7. Applicant claims to be the member of family. The property is ancestral and still not partitioned amongst family members (i.e. applicant and respondent Nos.2 to 6). The alienation is illegal, as same is without the consent of family members. The alienation is not for the benefit of family or for legal necessity of the family. Therefore, the sale deed is not binding. In the alternative, the sale deed is in respect of land Gat No.235, therefore, the possession of respondent over land Gat No.95, on the strength of said sale deed dt.01-12-2005, is illegal. She prayed to issue perpetual injunction against respondents restraining them to further alienate any family property or creating charge thereon. As regards respondent No.7 she prayed to restrain him from alienating or carrying out any construction over suit land. Applicant claim to have prima facie case and balance of convenience in her favour. It is further submitted by her that being family member she has undivided share in the suit property. Therefore, in case respondents are not restrained, she will suffer irreparable loss.

8. Respondents appeared. Respondent No.7 filed his say at Exh.18 and contested the application. Other respondents did not file say. This application is taken up for disposal.

9. Respondent No.7 has not denied the relation between the parties. He has also not disputed that the suit property is ancestral one. However, he has specifically submitted that there was partition amongst respondent No.1 and his sons. It is further submitted that, respondent No.1, had already sold Land Gat No.95, to the extent of 0-H. 01-R to one Shankar Narayan Lahane. However, that transaction has not been challenged by the applicant. It is specifically submitted that the suit is for partition and separate possession, as such the plaintiff / applicant should have included whole family property in this suit. Shankar Narayan Lahane, being purchaser of family property, is a necessary party to the suit. He is not made party. Therefore, the suit is bad in the eye of law, for non- inclusion of whole family property as well as non-joinder of necessary parties. It is further case of the respondent that, the respondent No.1 has already partitioned his property amongst his children. Accordingly, names of share-holders are mutated in the revenue record of land Gat No.326, situated at village Makegaon.

10. It is further case of the respondent No.7 that he has legally purchased suit property Gat No.95 from respondent No.1 by paying legal consideration. While the sale deed was being prepared, copy of 7/12 extract of land Gat No.235, instead of Gat No. 95, was provided by mistake. Therefore, in the sale deed, instead of Gat No.95, Gat No.235 is wrongly typed in and got so mentioned. However, the parties intended

to enter into transaction in respect of land Gat No.95 only. As such, the respondent No.1, put this respondent in possession of land Gat No.95. Respondent has obtained permission from government authority and constructed Primary Health Centre – Sub Centre. Now, respondent is constructing Anganwadi in the said land, which is legally purchased by him.

11. The applicant / plaintiff has no right to file present suit. Suit is not tenable in the eye of law. The applicant is not having prima facie case and balance of convenience also does not lie in her favour. The respondent is a Village Panchayat and constructed building is meant for Hospital and Anganwadi. As such, the application is liable to be rejected with costs.

12. On the basis of rival pleadings of the parties following points arise for my consideration. Findings against them are recorded for the reasons discussed below.

POINTS FOR DETERMINATION

	<u>POINTS</u>		<u>FINDINGS</u>
1	Whether plaintiff / applicant has prima facie case in her favour?	:	... Yes.
2	Whether balance of convenience lie in favour of plaintiff?	:	... No.
3	Whether plaintiff will suffer irreparable loss if injunction as sought for is not granted in her favour?	:	... No.
4	What order?	:	Application partly allowed.

REASONS**As to point no. 1 to 3**

13. Heard, Shri. M. G. Shirsath, learned advocate for the plaintiff / applicant and Shri. V. A. Digule, learned advocate for the defendant / respondent No.7. Perused documents filed by both the parties.

14. At this juncture it is necessary to mention here that ex – parte temporary injunction was granted in favour of the applicant. In the later course of time same is vacated. Now the application Exh.5 is taken up for final disposal.

15. There is no dispute about the fact that, suit property “A”, “B” and “C” are ancestral properties of Babu Kerba Lahane, respondent No.1. It is also not disputed that the said Babu Kerba Lahane, respondent No.1, manages all the family affairs. Contesting respondent has not denied the status of parties and their inter-relation.

16. Plaintiff / applicant has filed this suit for partition and separate possession. She claims to have her un-divided share in family property. She claims to have 1/7 share in the property. Respondent No.7 has not denied her status as family member. Other respondents did not file say. As such there is no challenge, at least at present, to the contention of applicant that she is the family member and being so she has un-divided share in the family property. Respondent No.7 has specifically pleaded that the suit is bad for non-inclusion of whole family property and non-joinder of necessary parties. In such an event, it is necessary to decide, - Firstly, whether applicant / plaintiff is entitled to have her share, to the extent as claimed by her. Secondly, whether the sale deed, executed by

respondent No.1 in favour of respondent No.7 is illegal. Thirdly, whether the suit of plaintiff is not maintainable for want of inclusion of whole property and for non-joinder of necessary parties. All these are triable issues. These points need adjudication by the Court. As such, plaintiff / applicant is having prima facie case. Therefore, point No.1 is answered in the affirmative.

17. It is the specific case of the applicant / plaintiff that respondent No.1 has executed sale deed of suit property of land Gat No.235 (Scheduled property- “B”). It is further pleaded by her that the respondent No.7 is in the possession of land Gat No.95 and has constructed Hospital and is now constructing Anganwadi. This means that execution of sale deed of land Gat No.235 and possession of respondent No.7 over land Gat No.95 is an admitted position. What is challenged by the applicant / plaintiff is the legality of alienation of land Gat No.235, as the same is family property and consent of family members was not taken before alienation and in addition the said alienation was not for legal necessity of the family. Now, whether there was legal necessity to alienate family property or not is an issue which needs to be decided on the basis of evidence. This is not a stage to draw any conclusion regarding that issue. Doing so will be premature determination of the suit itself. Secondly, whether in the sale deed No. 104/2005, Dated 01-12-2005 of land Gat Number 235, instead of Gat No.95, was wrongly mentioned, as pleaded by contesting respondent, or boundaries of land Gat No.95 were mentioned with ill-motive, as pleaded by applicant / plaintiff is a matter of dispute and that issue will have to be answered after the parties adduce their respective evidence. At this stage no finding in that regard can be recorded. Therefore, these

aspects are not required to be gone into detail at present.

18. Applicant has admitted the possession of contesting respondent over land Gat No.95. It is also admitted position that the contesting respondent has constructed Primary Health Centre (Sub Centre) and is now constructing Anganwadi. In addition to this it is specifically pleaded by the contesting respondent that respondent No.1 has put him in the possession of land Gat No.95. This goes to show that contesting respondent is in the possession of suit property land Gat No.95 and has erected construction thereon.

19. Now, coming to the nature of the suit. The suit is for partition and separate possession. The respondent No.1 is the father of the applicant. He is the manager of the family affairs. He being father and manager of family affairs stands in the position of Karta of the family. The parties are governed by Mitakshara School, as claimed by applicant. Respondent No.1, being Karta of the family, holds the entire property himself and for all the other family members. The Karta of the family is put under all the liabilities to maintain affairs of the family. For the purpose of discharging such liabilities he is empowered to take decisions in the interest of the family. It is trite law that the Karta of the family has a right to alienate family property for legal necessity of the family. What is legal necessity is a fact to be determined on the basis of factual matrix of each case. It would not be proper to restraint Karta from alienating family property, only due to such fear, in the mind of any of the members of the joint family. Such an order would result in to passing a blanket order, restraining Karta from exercising his right in case of legal necessity of the family. If a joint family property is

alienated in favour of third person, who is not the member of the family, the burden is always upon such third party and not on the plaintiffs to prove legal necessity.

20. Admittedly, the suit is for partition and it is pending for adjudication. Injunction cannot be granted against the Karta, restraining him from alienating family property. However, this rule is applicable so far as landed property is concerned. In the event suit property is alienated by the respondents the plaintiff will have the remedy to challenge such alienation on the ground of *lis pendens*, as per Section 52 of the Transfer of Property Act too.

21. The suit scheduled property “C” is a house property. Powers of the Karta of the family are restricted to some extent when it comes to house property. A Karta cannot alienate house property in favour of third person. A person who is alien to the family, can not be permitted to accommodate in the house used & enjoyed by members of joint family.

22. It is admitted position that respondent No.7 is in the possession of suit schedule “A” property. He has erected construction over it. As such his possession cannot be disturbed at this juncture. Therefore, the balance of convenience is not in the favour of applicant / plaintiff. In case injunction is granted in favour of applicant and against respondent No.7, respondent No.7 will suffer irreparable loss. Secondly, respondent No.1 being Karta of the family no injunction can be granted in favour of applicant and against respondent No.1, so far as suit schedule “A” and “B” property is concerned. In these circumstances, point Nos.2 and 3 are answered accordingly.

As to point No.4

23. In the light of above discussed facts and legal position in answer to point no. 4 following order is passed.

ORDER

- (1) Application is partly allowed.
- (2) Respondent No.1 is restrained from alienating House Property No.78, more specifically described in the plaint as suit schedule property “C”.
- (3) Cost in cause.
(Pronounced in open Court)

SD/-

(R.B. Hanwate)

Civil Judge (J.D), Renapur, Dist. Latur.

Date :- 22/09/2021