

RCS. No. 233/2015

Jamil Ahmad Vs Sultan Ahmad

ORDER BELOW EXH. 5

(Dated 17/10/2016)

1. Plaintiffs have filed present application under Order 39 Rule 1 and 2 r/w section 151 of the Code of Civil Procedure, 1908, thereby prayed to restrain defendants from creating third party interest and from carrying out any construction over the suit property till the final decision of the suit.

2. The case of plaintiffs as unveiled from the plaint as well as present application is as under:-

The suit property is owned and possessed by plaintiffs with defendants in common. The original owner of the suit property was late Abdul Karim Sk. Chhotu, who was the father of Amanabi. Amanabi is the mother of present plaintiffs. After his death, late Abul Razzak, late Abdul Rahim, late Jainabi, and mother of the plaintiff late Aamanabi, being his real sons and daughters were his legal heirs and entitled to inherit the suit property according to Muslim Law. They were joint owner of the suit property after his death.

The father of the defendant of the Abdul Razaak died in the year 1984 leaving behind in defendant No. 1, 2, 10, 11, late Abdul Wahab, late Rahmat Bee being his sons and a daughter. It is further case of plaintiffs that Abdul Wahab, Rahmat Bi and Jainabi died leaving behind them defendant Nos. 3, 4, defendants Nos. 5 to 9 and defendant No. 12 to 16 respectively. Abdul Rahim died issue less in the year 1958. The suit property after the death of Abdul Karim Shaikh Chhotu is held by his heirs and after their death by plaintiffs and

defendants as a common owner. No partition took place amongst them by metes and bounds. Despite of the same defendant Nos.1, 2, 12 and the husband of defendant No.3 without the knowledge of plaintiffs applied for the division of the suit property in the office of City Survey, Kamptee and by misleading the officials, have got the suit property in two parts i.e house No. M-202/1 and house No. M-202/2. It is the case of the plaintiffs that they have no right, interest to do the same in absence of partition of the suit property. On 31.08.2015 when the plaintiff No.5 obtained the copy of maintenance Khasara and Akhiv patrika of the suit property at that time plaintiffs came to know the illegal acts of the defendants No.1, 2 and 12. They are trying to disturb the possession of plaintiffs on the basis of these forged and fabricated documents in any manner and also trying to encroach over the suit property and the defendant No. 12 is trying to create third party interest in the suit property. Hence, plaintiffs constrained to institute the present suit for declaration, partition and injunction along with the present application.

3. Vide reply (Exh. 26,27,31) the defendants Nos.1, 2 and opposed the present application. However, though the suit summons and notices of the present application duly served to the other defendants they failed to remain present before the court, hence the suit is proceeded ex-parte against them. The defendants Nos. 1, 2 and 12 in their reply denied entire case of plaintiffs and submitted that plaintiffs have no right, interest in the suit property. According to them the suit property was the self acquired property of late Abdul Razzaq. He has purchased it from one Champalal Marwadi. They further submitted that the present application is false and baseless hence it be

rejected with costs.

4. Heard, learned counsel for plaintiffs Shri. S. R. Kale and learned counsel for the defendants Nos. 1, 2 and 12 Shri. S. M. Kushawah at length. Considering the revival submissions and contentions of both the parties following points arises for my determination and I have recorded my findings for the reasons to follow :-

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether prima-facie case lies in favour of plaintiffs ?	<u>No.</u>
2.	Whether balance of conveniences lies in favour of plaintiffs ?	<u>No.</u>
3.	Whether irreparable loss would cause to plaintiffs if the injunction as prayed refused ?	<u>No.</u>
4.	What Order ?	<u>Application rejected.</u>

5. In order to substantiate their contentions the plaintiffs have filed some documents below Exh. 4. The defendants Nos.1, 2 and 12 also have filed some documents below Exh. 38.

REASONS

As to point No. 1 to 3 :-

6. At the outset it is necessary to mention here that the plaintiffs have claimed equitable relief by way of temporary injunction to restrain the defendants from creating third party interest and from constructing over the suit property. Needless to say that, injunction is an equitable relief, therefore, in order to seek equitable relief the plaintiffs have to show that they have prime facie case, balance of convenience

in their favour and if the equitable relief is not granted it would cause irreparable loss to them. It is pertinent to note here that prima facie case means debatable or arguable case. In the light of above mandate of law I have to see whether the plaintiff have satisfied the above cited elements.

7. Perused record. It is seen from the record that plaintiffs have filed present suit for declaration,partition, separate possession and injunction. Plaintiffs have come with the case that the suit property is owned and possessed by plaintiffs and defendants in common and till date no partition took place amongst them by metes and bounds. Despite of the same defendants trying to encroach and to create third party interest in the suit property. However, from the perusal of the reply of defendants it is seen that they claimed that the suit property was the self acquired property of Abdul Razzaq.

8. It is pertinent to note here that during the course of arguments the learned counsel for Plaintiffs drew my attention towards the documents filed below Exh. 04 and submitted that the document at serial No. 1,3 clearly shows that the suit property was in the name of Abdul Karim Shaikh Chhotu. He further submitted that till the date no partition took place amongst his heirs. Therefore, he submitted that prima facie case and balance of convenience are in favor of plaintiffs and prayed for issuance of temporary injunction thereby to restrain defendants from creating third party interest in the suit property. So far as the case of plaintiffs is concerned they claims to be the joint sharer of the suit property being the hairs of Aminabi i.e daughter of Abdul Karim Shaikh Chhotu. However, defendants Nos. 1 and 2 claimed that the suit property was self acquired property of their father late Abdual

Razzaq. The xerox copy of sale deed filed below Exh. 38 at serial No.1 prima facie shows that Abdual Razzaq purchased House No. M-200 from one Champatlal Marwadi on 08.08.1957. This document prima facie appears to be the title document which strengthen the contention of defendants No. 1 and 2 that the house No. M- 200 was purchased by their father. So far as the house property No 202 is concerned the document No. 3 filed below Exh. 38 i.e xerox copy of sale deed dated 23.01.1985 shows that this property is purchased by defendant No. 12 by way of sale deed from defendants Nos. 1 and 2. As to whether the defendants had any right to sale out this property it can not be decided at this stage. This document is title document infavor of defendant No. 12 and therefore, it would be improper to disbelieve this document at this stage. No doubt as to whether plaintiffs have share in the suit property as claimed by them, can be decided after full fledged inquiry at trial but at this stage the title document can not be simply thrown away by relying on the above mentioned revenue entries.

9. So far as the apprehension of plaintiffs that defendants are trying to create third party interest in the suit property during the pendency of the present suit is concerned, it is pertinent to note here that as per section 52 of Transfer of property Act, the right and interest, if any, of plaintiffs are already protected by law. It would be improper in absence of any cogent, legal, and substantive foundation in support of the claim of plaintiffs that the suit properties are held by them in common with defendants, at this primary stage. So far as the contention of plaintiffs that the defendants are trying to construct over the suit property is concerned, there is noting on the record which prima facie shows that the defendants are illegally constructing over the

suit property. Hence, for the reasons stated supra in my view plaintiffs have neither prima facie case, balance of convenience nor irreparable loss would cause to them as compared to defendants. Therefore, in my view the plaintiffs failed to show above cited elements for grant of temporary injunction. Thus, I answer the point Nos. 1 to 3 as “No” and in answer to point No. 4 proceed to pass following order-

ORDER

1. Application rejected
2. Costs in cause.

Sd/-

Kamptee.
Date. 17/10/2016.

(R.P. Bathe)
2nd Jt. Civil Judge, Jr. Dn,
Kamptee.