

Pravin Upadhye etc.2 ... Plaintiffs

Versus

Subhash Upadhye etc. 23 ... Defendants

Order below Ex. 5 in R.C.S. No. 320/2011

1. The plaintiff has filed this interim application for injunction for restraining defendant no. 3 from creating any encumbrance over the suit property on the basis of hollow registered sale-deed dated 12.7.2011 and from alienating or creating third party interest into the suit property. It is the case of the plaintiff that the ancestor of the plaintiff and defendants 1 to 22 deceased Jinappa was the owner of the suit properties. He had three sons and four daughters and wife namely Godabai. Thus, the plaintiff and defendants 1 to 22 being legal heirs have right and interest into the suit properties. The suit property is their joint family co-parcenary property. They have 1/3rd (5 annas 4 pai) share in to the suit property. In the 7x12 extract in the ownership and occupancy column, there is a joint entry. The suit property is not partitioned by metes and bounds. They are still in the occupancy of the suit property jointly. Under such circumstances though it was not necessary to alienate the suit

property for any legal necessity, defendants are trying to alienate the suit property and therefore, plaintiff and defendant no. 4 had published a public notice in daily newspaper that no one should enter into any transaction in respect of the suit property. Still on 12.7.2011 defendants 1 to 3 have executed a hollow sale-deed illegally with defendant no. 3 which is void-ab-initio. On the basis of the sale-deed defendants 1 to 3 and 23 are trying to carry out changes in the revenue record for which plaintiff has raised the objections. Under such circumstances this application has been filed.

2. The defendant no. 23 has filed the say below Exh. 22 contending that the plaintiff has no locus-standi to file such application. Plaintiffs have no title and occupancy into the suit property. The plaintiff has concealed the material facts. The genealogy of Jinappa given by the plaintiff is not proper. Plaintiffs and defendants 22 are not the legal heirs of Bapurao. They have no share in the suit property. Jinappa died in the year 1967. The name of his legal heirs came to be recorded. However, they all were residing separately and his daughters had relinquished their share.

3. Bapurao was married with Shantabai but he had illicit relations with Malati Dhole i.e. the plaintiff no. 2 and

under the pressure. Block no. 336 was purchased by Upadhye family in her name which was sold by the plaintiff and defendant no. 22 in the year 1998. Plaintiff no. 2 is not the legally wedded wife of Bapurao. Therefore, plaintiff no. 1 and defendant no. 22 are illegitimate children. Bapurao in his life time has sold his share. As such he had no right and interest into the suit property. Defendants 1 to 3 have sold their 5 annas 4 pai share to this defendant through registered conveyance dated 14.6.2011. The public notice was issued. But no any objection was received. Defendants 1 to 3 have also availed the loan from the bank and the society by creating encumbrance on the suit property. This defendant has filed an application for entering his name in the revenue record on the basis of the sale-deed but the plaintiff raised the objections. So also the plaintiff has taken disadvantage of the interim order passed in his favour. Hence, prays for rejection of the application.

4. The points for determination along with my findings thereon are as under -

POINTS

FINDINGS

1) Whether the plaintiffs have made out prima-facie case in their favour ?

In the negative

- | | |
|---|---------------------|
| 2) Whether the balance of convenience lies in favour of the plaintiffs ? | In the negative |
| 3) Whether plaintiffs will suffer irreparable loss if injunction is refused ? | In the negative |
| 4) What order ? | As per final order. |

REASONS

5. The plaintiff has relied upon the documents produced below list (Exh.4) i.e. 7x12 extracts of gat no. 53, 538, the notice of circle officer, public notice, copy of sale-deed between Bapurao Upadhye and Sukumar Upadhye dated 3.8.1988. Copy of the sale-deed dated 7.2.2001 between Sukumar and Bapurao Upadhye. Plaintiff has also relied upon the documents produced below list (Exh.55) i.e. the affidavit of Shantabai Bapurao Upadhye, 7x12 extract and the copy of memorandum of relinquishment.

6. Defendant no. 23 relied upon the documents produced below list (Exh.50) i.e. school leaving certificate of Alka Bapurao Upadhye, voters' list and the marriage invitation card, sale-deed dated 7.2.2001. Defendant no. 23 has also relied upon the revenue record produced below list (Exh. 26) dated 9.11.2011, sale-deed dated 12.7.2011 along with the public notice and

affidavit of the adjoining owners.

AS TO POINTS NO. 1 to 3 -

7. Foremost, it is to be noted that Shantappa is the ancestral of plaintiff and defendants. He had son name Jinappa who died in the year 1967 and his wife Godabai died in the year 1986. Jinappa and Godabai had three sons namely Charudatta, Shripal and Bapurao and six daughters. In the revenue record there is an entry to the effect that the three sons have 5 annas 4 pai share each. The branch of Charudatta has sold their share to defendant no. 3. Therefore, this suit is filed for partition. As far as the status of the plaintiff is concerned, they claimed themselves to be the legal heirs of Bapurao. Their status as branch of Bapurao is disputed. In this background, it is submitted by the learned advocate for the plaintiff that the suit properties are ancestral and are not partitioned by metes and bounds. The plaintiffs have share into the suit properties. However, defendants 1 to 3 have alienated the joint family property to defendant no. 23. Therefore, is praying for the interim relief. On the other hand, it is submitted by the learned advocate for the defendants that the daughters of deceased Jinappa had relinquished their share in favour of their brothers

and the shares of Charudatta, Shrikant and Bapurao are separate and independent to the extent of 5 annas 4 pai. The locus-standi of the plaintiff to file such application is strongly raised. It is submitted that the legally wedded wife of deceased Bapurao Smt. Shantabai has not filed the present suit. Therefore, plaintiff no. 2 Kantabai with whom Bapurao had illicit relations along with the illegitimate children have filed this application. Only the legal wife and the legitimate children are entitled for the share in the ancestral properties of the joint family.

8. In this regard it is specifically noted that there is no pleading of the plaintiff that she is the second wife of Bapurao. Prima-facie it is necessary for the plaintiff to show their right and interest into the suit property in a suit for partition. It is equally material to note that though there is no such pleading but on perusal of the documents produced below list (Exh. 55) by plaintiffs themselves, it becomes clear that Shantabai is the legally wedded wife of Bapurao and not plaintiff no. 2. On perusal of these documents it is seen that Smt. Shantabai Bapurao Upadhye has affirmed an affidavit that in the suit properties deceased Bapurao had 5 annas 4 pai share. He died on 27.1.2009. Further, she has relinquished her share earlier in

favour of the plaintiffs without consideration. Therefore, name of the plaintiffs have been recorded as legal heirs. Along with the affidavit, there is a xerox copy of the 7x12 extract in which name of Kantabai is seen to be recorded. However, there is no any revenue document produced on record to show such relinquishment. Apart, the plaintiff has also produced the notarised memorandum of the relinquishment by Smt. Shantabai in favour of the plaintiffs by virtue of which Shantabai seems to have relinquished her share. Though there is no such pleading, however, by way of written arguments the submissions in respect of such material fact has been submitted by the learned advocate for the plaintiff.

9. Foremost it is to be noted that the plaintiff has concealed such material facts. Secondly, there is no any registered relinquishment deed produced on record. Under such circumstances at this prima-facie stage, it cannot be concluded that in the life time of Shantabai, plaintiff no. 2 becomes the legally wedded wife and that her children are legitimate. It is a settled principle that the illegitimate children have share only in the self acquired property and not ancestral. The learned advocate for the defendants relied upon the case **Bharatha Matha Vs. R. Vijaya Renganathan** reported in **2010 (4) Civil**

L.J. 413 wherein it is held that, "Thus, it is evident that a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenary property but is entitled only to claim share in self acquired properties, if any." Admittedly, in the present case the suit properties are ancestral and not self acquired. Therefore, at this prima-facie stage, the plaintiffs cannot be said to have right and share into the suit property in the capacity of legal heirs of Bapurao. As far as the question of relinquishment of share by the first wife Shantabai is concerned, it is a part of merit to be decided after leading the evidence. So also it is settled principle that the parties seeking the equitable relief must approach with clean hands. In the present case there is a material concealment on the part of the plaintiffs. Therefore, also are not entitled for such discretionary relief.

10. Lastly, the plaintiffs apprehends that defendant no. 23 is trying to alienate the suit property, however, in this regard prima-facie there is absolutely no iota of evidence disclosing that there is attempt on the part of the defendant no. 23 to alienate or create third party interest into the suit property. Therefore, also the plaintiff is not entitled for such interim relief.

11. As far as the question of partition is concerned, the

plaintiff has produced the 7x12 extracts in which the name of the plaintiffs are also recorded to the extent of 5 annas 4 pai share. On the other hand, the learned advocate for the defendants submitted that in the year 1976 itself there was partition amongst Charudatta, Shripal and Bapurao and accordingly there are separate 8-A extracts to the extent of 5 annas 4 pai each. Further, a point to be noted is that Bapurao has sold his 5 annas 4 pai share through registered conveyance dated 7.2.2001 in block no. 538. So also he has sold survey no. 336 (old survey no. 67/1). Both these sale-deeds are produced on record. Hence, under such circumstances, in my view, whether there was partition or not is the part of merit which is to be decided after the parties lead the evidence.

12. Considering the above discussion, it is extremely clear that the first legally wedded wife of deceased Baburao is alive and it is in her life time that the plaintiff no.2, the so-called second wife along with her sons has filed the suit for partition and is claiming for the interim injunction. As discussed above, there is material concealment of fact by the plaintiff. Apart, the affidavits and the notarised memorandum of relinquishment deed are not sufficient so as to arrive at conclusion at this prima-facie stage that the plaintiffs have right, title and interest into

the ancestral joint family property. Case would have been different if the properties of deceased Baburao were self acquired. Therefore, for the reason discussed above, as the plaintiff has failed to establish their prima-facie case, neither the balance of convenience lies in their favour nor irreparable loss would be caused to them, if the application is rejected. Therefore, points 1 to 3 are answered in the negative.

AS TO POINT NO. 4-

13. As the plaintiffs have failed to establish their prima-facie case, in my view the application deserves to be rejected. As a result, the following order is passed.

ORDER

- 1) The application is rejected.
- 2) Costs in cause.

Sangli.

(R.N.Merck)

Date : 9.1.2012

Jt.Civil Judge Junior Division, Sangli.