

R.C.S.No. 186 / 2016

Prabhuling Vs. Mahadev

COMMON ORDER BELOW EXH. 05 & 37[Delivered on : 11th October, 2019]

1] The application below Exh.05 filed by plaintiff for temporary injunction U/o.39, Rule-1 and 2 of Code of Civil Procedure restraining defendant from alienating the suit property. The suit is for declaration of ownership alongwith perpetual injunction.

2] The application below Exh.37 filed by plaintiffs in counter claim (original defendant) for temporary injunction U/o.39, Rule-1 and 2 of Code of Civil Procedure restraining defendant in counter claim (original plaintiff) from causing obstruction in the possession of plaintiffs in counter claim over the suit property. The counter claim is for perpetual injunction.

3] **The suit property :**

Land situated at Vatvate, Tal. Mohol, Dist. Solapur bearing Block No.21/2/A having area 2H. 32R., land revenue 2.70 Ps., alongwith right of use of water by pipe line, well, bore-well, electric motor (This property is hereinafter referred as "suit property").

4] **Original Plaintiff's case in nut-shell.**

The suit property was owned by Kallappa Patil - grand father of original plaintiff. The original defendant no.1 is his father, defendant no.2 is

his grand mother and defendant no.3 is his sister. During partition, suit property was allotted to Kallappa. Defendant no.2 has relinquished her right over the suit property. After partition, defendant no.1 has never taken care of Kallappa. Both of them were living separately due to partition. Being the sole owner, Kallappa has executed registered will deed on 30/04/2009 in favour of original plaintiff. Accordingly, original plaintiff become owner of the suit property after the death of Kallappa. One suit bearing RCS No. 200/2009 was filed by present defendant no.1 for partition. In said suit Kallappa was appeared and admitted the fact of execution the will deed in favour of plaintiff. Said suit was not prosecuted, hence, it was dismissed. On the basis of said will deed, name of plaintiff was entered in the revenue record. Against the same, defendant has preferred an revenue appeal which was allowed and now it is pending before Commissioner, Pune. Mean time, on 29/07/2016, without any right defendant no.2 has executed sale deed in favour of defendant no.3. By virtue of will deed plaintiff become owner, hence, defendant no.2 has not any right to execute sale deed in favour of defendant no.3. Therefore, still the plaintiff is the owner of the same. There are every possibility of alienating the property. Hence, it is necessary to restrain the defendants from creating any third party interest over the suit property by an order of temporary injunction. Hence, this application.

5] **Original Defendants (Plaintiffs in Counter Claim) case in nutshell :-**

Defendants have resisted the suit and application by filing written statement and say vide Exhibit 20. It is their case that, Kallappa was never become the exclusive owner of the suit property. It is a joint family property of Kallappa and defendant no.1 and 2. No any partition was effected between

them. Therefore, he has not an exclusive right of execution of will deed in favour of plaintiff (defendant in counter claim). By taking advantage of ill-health of Kallappa, plaintiff (defendant in counter claim) mischievously secured the deed. Therefore, plaintiff has not got any ownership over the suit property. On the other hand, being a joint family, defendant no.2 on 29/07/2016 has executed sale deed of her share in favour of defendant no.3 for the valuable consideration. Accordingly, possession was also delivered to defendant no.3 to the extent of 1H. 21R.. Still suit property is in possession of defendants (plaintiffs in counter claim). Therefore, original plaintiff has no prima facie case. Accordingly, prayed for rejection of application below Exh.05. On the contrary, they have filed counter claim restraining plaintiffs from causing obstruction in their possession over the suit property. Vide Exh.37 they prayed for temporary injunction restraining plaintiff from causing obstruction till the decision of the suit.

6] Heard, both the learned advocates and perused the record. On the basis of rival contention, following points arise for my consideration, I have recorded my findings thereon for the reasons below ;

POINTS

FINDINGS

- | | |
|---|---|
| 1] Whether the original plaintiff has prima-facie case in his favour for Exh.05? | Yes. |
| 2] Whether the plaintiff in counter claim has prima facie case in their favour for Exh.37 ? | Yes. |
| 3] In whose favour balance of convenience tilts ? | For Exh.05, in favour of plaintiffs and for Exh.37 in favour of |

Common Order Below Exh.05 & 37

defendants.

- 4] Who will suffer from an irreparable loss, if temporary injunction as sought for is granted ? For Exh.05, in favour of plaintiffs and for Exh.37 in favour of defendants.
- 5] What order ? Applications Exh.5 & 37 are allowed.

REASONS

AS TO POINT NO. 01 and 02:

7] By virtue of Exh.05 and 37, both parties have claimed temporary injunction against each other. However, the nature of said relief are different. Original plaintiff claim relief not to create third party interest by virtue of Exh.05. Whereas, defendants (plaintiffs in counter claim) have claimed relief of restraining plaintiff from causing obstruction in their possession over the suit property. The requirements for both reliefs are different. Evaluation of prima facie case for both reliefs based on two different aspects. For the relief claimed under Exh.05, plaintiff must show his prima facie right over the suit property. On the other hand, for the relief under Exh.37, defendants have to show their prima facie possession over the suit property. Being so, those points have to be discussed separately.

8] For the purpose of application Exh.05, existence of plaintiff's ownership prima facie has to be verified. As per the plaintiffs case, suit property was belonging to Kallappa. The relations between parties as well as with Kallappa are not denied. Defendants have specifically pleaded that, suit property was owned by Kallappa and it is a joint family property. The inclined meaning is that the property at particular point of time was in the name of

Kallappa. Now, the question is whether he was exclusive owner of it or whether it was a joint family of Kallappa and defendant no.1 and 2. Admittedly, defendant no.1 is the father of plaintiff. Even assuming the fact of existing of joint family and nature of property as ancestral, in absence of any partition, as alleged by the defendants, the right of Kallappa, have not denied though in the form of joint in nature. Now the question arises whether he has executed any will deed or not. Plaintiff has placed his reliance on the certified copy of will deed bearing No.1716/2009 dt. 30/04/2009. It is a registered deed. Furthermore, the copy of death certificate is also placed on record. The date of death of Kallappa is 30/07/2009. The document is a registered document. At this prima facie stage, it cannot be determined whether the document was right or wrong. As per the allegations of defendants, the document might be executed by playing fraud. Execution of will deed and existence of fraud are the questions which only can be determined after conclusion of trial. At this prima facie stage, the legality of will deed as well as existence of fraud cannot be determined.

9] As per the contentions of plaintiff, on the basis of said will deed, his name was entered in revenue record. On the other hand, he himself admitted that, said mutation entry was set aside by Appellate Authority and said matter is still subjudice before the Commissioner. This shows that, the mutation sanctioned in favour of plaintiff is set aside.

10] As per the contentions of defendants, the property is still joint family property which was denied by the plaintiff. The pleading discloses that, one suit bearing RCS No. 20/2009 was filed by the defendant no.1 against Kallappa and two others for partition. It was vehemently argued by the

Id.advocate for plaintiff that, in said suit Kallappa was appeared and admitted the aspect of execution of will deed. For fortifying this fact, he placed his reliance on certified copy of written statement filed in RCS No. 20/2009 by Kallappa. In Para No.4 of said written statement he admitted the fact that, he executed will deed in favour of present plaintiff on 30/04/2009. Whether by virtue of the same, any right was created and vested on defendant no.1 is again a matter of trial. On the other hand, the only thing which can be prima facie collected at the stage is that there is something for whose decision trial is required.

11] The Id. Advocate for defendants (plaintiffs in counter claim) have argued that, defendants are still in possession and defendant no.2 has executed sale deed in favour of defendant no.3 which is still in existence. Admittedly, though sale deed was executed, the existence of prima facie right discussed above cannot be lost sight at this stage. Though the 7/12 extract discloses the name of defendants, the existence of right cannot be finally adjudicated at this stage. Therefore, merely there exists joint family, does not wipe out question which was raised above, for whose decision substantial trial is required.

12] It was argued by the Id.advocate for the defendant (plaintiff in counter claim) that, suit is barred by limitation. Hence, he sought for rejection of the application. It is pertinent to note that, the question of limitation is a mix question of law and fact. Plaintiff has claimed the relief of declaration alongwith recovery of possession. When these two reliefs claimed, it cannot be said that the limitation is only of three years. Admittedly, the will deed dt. 30/04/2009. By its virtue, plaintiff claiming his ownership with possession. It is

settled that, the limitation for suit for recovery of possession based on title covers under Article- 65 of Limitation Act. It has limitation of 12 years. Again the question of starting point cannot be adjudicated at this stage. Even assuming the date of execution of will deed is concerned, suit was filed on 07/09/2016 i.e. obviously within 12 years. Therefore, prima facie at this stage it cannot be said that suit is barred by law of limitation. Hence, said objection is over ruled.

13] The meaning of prima facie case is, there needs the investigation over the matter. It does not mean conclusive proof at this stage. What is required is that the plaintiff has to show that he has raised a substantial question which needs to be adjudicated at the trial of the case. An existence of serious arguable question is enough to establish the prima-facie case. The same has also to be calculated on the basis of relief claimed. Furthermore, the certified copy of decree in RCS No. 20/2009 was placed on record. It shows that, said suit which was filed by present defendant no.1 and 2 was for partition claiming jointness of the property. However, it discloses that, on 30/03/2012, said suit was dismissed in default. Therefore, the question of existence of jointness and right of partition claimed by the Mahadev and Laxmibai was dismissed for want of prosecution in that suit. Therefore, the existence of registered will deed, admission about said document by Kallappa in RCS No.20/2009 and even admission of defendants about existence of right of Kallappa in the property though in the nature of jointness, satisfies the requirement of prima facie case for the purpose of Exh.05 discussed above. Hence, I have no hesitation to conclude that, plaintiff has prima facie case for the purpose of decision of Exh.05 in his favour.

14] Now turning towards Exh.37 which was filed by defendants (plaintiffs in counter claim) for temporary injunction restraining plaintiff (defendant in counter claim) from causing obstruction in their possession. This relief is exclusively in respect of protecting possession over the suit property. For its decision defendants have to show their prima facie possession over the suit property. It is the case of defendant (plaintiffs in counter claim) that the suit property is joint family property and accordingly they are in the possession of the suit property. The original plaint itself discloses that, plaintiff (defendant in counter claim) has claimed relief of declaration of ownership and possession of the suit property. The relief Clause-B in original plaint shows that, original plaintiff is claiming recovery of possession of suit property from defendants (plaintiffs in counter claim). This prima facie shows that, defendants are in possession over the suit property. At the same time, original plaintiff has claimed mesne profits. This admissions itself shows that, original plaintiff is never in possession over the suit property. On the other hand, they are the defendants who are in possession over it. The defendants (plaintiffs in counter claim) has placed their reliance on the 7/12 extract which shows the name of defendant in the extract no.7, whereas the extract no.12 shows the entry about crops. Original plaintiff has not shown any contrary entry about the same. Record further discloses that the entry of defendant was prima facie confirmed by the Collector also.

15] Apart from this, as per the contentions of both parties, defendant no.2 has executed sale deed to the extent of 1H. 16R. land in favour of defendant no.3. The photocopy of said sale deed is placed on record. The recitals of said sale deed shows that, possession was handed over to defendant no.3. The admission by plaintiff (defendant in counter claim) in plaint about defendants possession fortifies the version of defendants that

they are in possession over the suit property. While deciding the issue of prima facie case for Exh.05, it was concluded that plaintiff's (defendant in counter claim) has prima facie right over the suit property. Though it is so, he is not permitted to obtain possession without following due process of law. The aforesaid document as well as admission prima facie shows the existence of possession of defendants (plaintiffs in counter claim) over the suit property.

16] For the relief of temporary injunction on the basis of possession, the prima facie case can be determined on the basis of existence of prima facie possession. As discussed supra, the defendants (plaintiffs in counter claim) have shown their prima facie possession over the suit property. This show the require prima facie case in favour of defendants (plaintiffs in counter claim) to the extent of Exh.37. Hence, defendants have prima facie case in their favour for the decision of Exh.37. Accordingly, I answer points no. 1 and 2 in affirmative accordingly.

AS TO POINT NO. 03 and 04 :

17] So far as balance of convenience is concern, it is mixed with calculation of losses. It is required to see in whose favour the pendulum of inconvenience shifts. In this case as discussed above, plaintiff does have a prima-facie case in his favour to the extent of relief of not to alienate to the extent of Exh.05. At the same time, for the decision of Exh.37 same is in favour of defendants (plaintiffs in counter claim). Therefore, the balance of convenience and irreparable loss tilts in their favour respectively.

18] In this case as discussed above, plaintiff has a prima-facie case in his favour to the extent of not to alienate only. Ultimately, if injunction below Exh.05 rejected, he is the plaintiff who has to face the multiplicity of suit. It is pertinent to note that principle of lis-pendence will apply only after transfer. It also create the multiplicity and complexity of the case. So, it will always better to prevent it. Prevention is always better than cure. If no injunction granted to that extent, defendants will succeeded in alienating the property. Then he is the plaintiff who is bound to suffer the loss. Therefore, balance of convenience is also lies in favour of plaintiff to that extents of decision of Exh.05.

19] Reliance can be placed on the decision of Hon'ble Supreme Court, in **Maharwal Khewaji [Regd.]Faridkot V/s. Baldev Dass, reported in A.I.R. 2005 Supreme Court,104.** It was held that court should not permit the nature of property being change which also include alienation or transfer of property which may lead to loss to the party and may further lead to multiplicity of the proceeding. This ratio is very well applicable to the case in hand. One of the relief claimed to the extent of restraining the defendants from alienating the suit property. If injunction is granted, accordingly, there will not be any loss or damage to the defendants. Even it will not cause any prejudice to their rights. Therefore, in view of discussion made supra, plaintiff has a prima-facie case in his favour for the decision of Exh.05. The balance of convenience also lies in his favour for Exh.05. If injunction below Exh.05 about not to alienate will refused then plaintiff will bound to suffer an irreparable loss.

20] So far as balance of convenience and irreparable loss for the decision of Exh.37 are concern, as discussed above plaintiffs in counter claim are in prima-facie possession over the suit property. Defendant in counter claim (original plaintiff) is obstructing the same. If he is not restrained, then plaintiffs in counter claim will suffer from inconvenience and resultantly into the irreparable loss. The balance of convenience is nothing but the balance of inconvenience and therefore it is also connected with the irreparable loss. Resultantly balance of convenience tilts in their favour for Exh.37 and if it will not protect by way of an order of injunction, they will ultimately suffer from the loss of irreparable nature. Hence, I have recorded my findings for point **Nos. 03 and 04 accordingly.**

AS TO POINT NO. 05 :

21] In conclusion, original plaintiff prima-facie rights should be protected in respect of not to alienate, at this stage. Three important aspects mentioned above i.e. prima facie case, balance of convenience and irreparable loss are established by the plaintiff for Exh.05. The existence of all three aspects will ultimately resulted into the entitlement of injunction in favour of plaintiff about not to cerate third party interest. Therefore, the application of plaintiff Exh.05 deserves to be allowed.

22] The reliance can be placed on the Judgment of the **Hon'ble High Court in Baban Anantrao Naik V/s.Sou. Pramila Uttamrao Yenare,2011(6) All MR,15** By referring the judgment of Hon'ble Apex Court in the case of Rame Gowda, the Hon'ble parent High Court has been held that ;

“at the time of determination of an application for temporary injunction, the factum of possession would only be the relevant factor. Whether the possession is lawful possession or not would not be subject matter of enquiry. Whether the amount of consideration has been paid or not, whether the plaintiff was ready and willing to perform his part of contract or not, would all be the issues which can be decided only after the parties adduce evidence. It would be premature at this stage to give findings on the said issues”.

The above guidelines are very well applicable to the case in hand. Plaintiffs in counter claim have shown their possession so as to decide the factum of possession and same could not be disturbed by the plaintiff (defendant in counter claim) without following due process of law.

23] In conclusion, rights of plaintiffs in counter claim prima-facie should be protected at this stage for the decision of Exh.37. Three important aspects mentioned above i.e. prima-facie case, balance of convenience and irreparable loss are established by the plaintiffs in counter claim for Exh.37. The existence of all three aspects will ultimately result into the entitlement of injunction in favour of plaintiffs in counter claim. Hence application Exh.37 is deserves to be allowed. Hence, following order ;

-:- ORDER -:-

- 1] Applications Exh.05 and Exh.37 are allowed.

- 2] The original defendants (plaintiffs in counter claim) are restrained from alienating or creating any third party interest in the suit properties in any manner till the disposal of the suit.
- 3] The plaintiff (defendant in counter claim), his agents, servants or any person claiming through him are restrained temporarily from causing any sort of obstruction and interference in the possession of defendants (plaintiffs in counter claim) over the suit property, without following due procedure of law, till final disposal of this case.
- 4] Costs in cause.

Sd/-

[P. R. Kulkarni]

Date : 11/10/2019.

Jt. Civil Judge, [Jr. Divn.]

Mohol.

Mohol.

CERTIFICATE

I affirm that the contents of this PDF file Order/Judgment are same word to word as per the original Order/Judgment.

Name of Stenographer	:	Shaikh N. M.
Court	:	JMFC.,Mohol.
Date	:	11-10-2019
Judgment/order signed by the Presiding Officer on	:	11-10-2019
Judgment/Order uploaded on	:	14-10-2019
