

RCS No. 59/2018

Manoj Petkar Vs. Prabhakar Petkar+4

CNR No. MHWR040015002018

ORDER BELOW EXH.5

(Date : 18.10.2019)

The plaintiff filed the suit for declaration and permanent injunction in respect of survey nos. 8/1, 9/1 and 10/1 ad-measuring area 2/53 H.R., 0.95 H.R. and 2.13 H.R. at Mouje Sindi (Railway), Taluka Seloo, District Wardha. It is the case of plaintiff that his grand-father namely Anandrao Petkar was the owner of above properties.

2. After the death of grand-father, his five daughters and two sons inherited the properties. Grand-father of plaintiff died in the year 1988. One of the daughter of Anandrao namely Kamlabai Waghmare filed the suit for partition and separate possession of ancestral properties. That suit was decreed. The suit properties are adjacent to Sindi (Railway) have more potential value for residential purpose and therefore all legal heirs of Anandrao want to sell their share. They prepared registered partition deed on 18.05.2018 and as per partition deed, the non-applicant no.1 had obtained 0.51 H.R. land in field survey no.10/1 and 0.95 H.R. land in survey no. 9/1. Thereafter, he prepared 7/12 extract but revenue officer did not make separate 7/12 extract in the name of non-applicant no.1.

3. The above properties are ancestral properties of defendant no.1. The defendant no.1 and the mother of plaintiff were residing at Nagpur with defendant no.2 during the treatment of mother. The defendant no.1 is also paralytic patient. The defendant nos.2 and 3 taking disadvantage of this fact on 10.08.2018 and 30.08.2018 fraudulently prepared gift-deeds of survey nos. 9/1 and 10/1 in their

favour. Such partition-deed and gift-deeds are executed during pendency of the suit filed by the defendant no. 4 and therefore, those gift-deeds are illegal and not binding upon him. Therefore, it is necessary to restrain the defendant nos.2 and 3 from disturbing the peaceful possession of plaintiff over the suit field. The plaintiff learnt about the activity of defendant nos. 2 and 3, therefore they are also required to be restrained from creating any third party interest till decision of present suit. Therefore, the applicant prayed for temporary injunction against defendant nos. 2 and 3 from creating third party interest in the suit properties and disturbing the peaceful possession of plaintiff.

4. The defendants / non-applicant nos. 2 and 3 filed written notes of argument at Exh.18 and adopted the same as reply to the application of temporary injunction by pursis at Exh.19. They admitted the pendency of suit bearing RCS No. 07/2016. They denied the survey nos.8/1, 9/1 and 10/1 are ancestral properties of Anandrao Petkar. In special pleadings, they submitted that the properties are separate properties of defendant no.1 and he has every right to dispose of the same. Out of love and affection, the defendant no.1 executed the gift-deeds in favour of defendant nos. 2 and 3. The plaintiff was never in possession over the suit properties. After partition, the suit properties became separate properties of defendant no.1 and therefore, the plaintiff is not having any right in the suit properties. The application is devoid of any substance and therefore, be rejected with heavy costs.

5. Following points are arise for my determination and I have recorded my findings with reasons are as under:

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

REASONS

6. Heard learned advocate for plaintiff /applicant and defendants / non-applicants at length. The applicant relied upon documents filed with list at Exh.4. He also filed on record the affidavits Vasant Krishnaji Petkar at Exh.27, Kamlabai Madhukar Waghmare at Exh.28. The non-applicants filed on record the documents by application at Exh.22. The non-applicants also filed on record the written notes of argument at Exh.21.

As to point nos. 1 to 3 :-

7. As all these points are interlinked, they are discussed together. The plaintiff, defendant no.2 and defendant no.4 are the sons, defendant no.5 is the daughter of defendant no.1 and defendant no. 3 is the son of defendant no.2.

8. It is the case of plaintiff / applicant that the suit properties are ancestral properties of plaintiff and defendants. The suit properties were partitioned during pendency of the suit filed by defendant no.4 and subsequently the defendant no.1 gifted the suit properties to the defendant nos. 2 and 3.

9. The non-applicant nos. 2 and 3 admitted the pendency of the suit but submitted that after partition, those become the separate

properties of defendant no.1 and he had every right to alienate the same. Deceased Anandrao holding ancestral property in his hand and therefore, after his death suit properties devolved as per section 8 of Hindu Succession Act upon the legal heirs. The defendant nos. 2 and 3 relied upon authority of **Commissioner of Wealth Tax Kanpur Vs. Chandar AIR 1986 SC 1753**. They also objected the application on the ground of non-joinder of necessary parties.

10. It is admitted position that one special civil suit for partition and separate possession is pending before the court at Wardha, the suit properties are also the subject matter in that suit. It also appears that the execution of partition deed and gift-deeds are subsequent development in that suit. Whether those are incorporated in the pleading or not are not brought on record. What will be effect of earlier suit on present suit cannot be decided in the present application.

11. Without going into the merit of the case, at this stage while deciding the application for temporary injunction only the factum of possession is required to be looked into. To show the possession over the suit properties, the plaintiff filed on record the affidavits of Vasant Krishnaji Petkar and Kamlabai Madhukar Waghmare at Exh. 27 & 28. However, the 7/12 extracts of the suit properties does not show the possession of plaintiff over the suit properties. Beside that except oral contentions, nothing is brought on record show that the defendant nos. 2 and 3 are about to alienate the suit properties or create third party interest. Hence, no prima facie case is made out. Hence, I answer the point nos. 1 to 3 in the negative.

As to Point no.4 :-

12. I have answered the point nos. 1 to 3 in the negative. In the

decision of this application, I pass the following order.

Order

1. Application at Exh.5 stands rejected.
2. Cost in cause.

Date :18.10.2019

Sd/-
(A.G. Mhaskey)
Civil Judge, Junior Division, Seloo.

Certificate

I affirm that the contents of this PDF are same words for words as per the original judgment.

Name of Stenographer : S.V. Made
Name of Court : C.J.J.D. & J.M.F.C., Seloo.
Upload on date : 19/10/2019