

(2021) 12 BOM CK 0048

In the Bombay High Court

Case No : Appeal From Order No.21 Of 2020, Civil Application No.5554 Of 2020

Dr. Babasaheb Deorao Jadhav And Others

APPELLANT

Vs

Mahadeo Deorao Jadhav And Others

RESPONDENT

Date of Decision : 10-12-2021

Acts Referred:

Hindu Succession Act, 1956 — Section 14

Citation : (2021) 12 BOM CK 0048

Hon'ble Judges : R. G. Avachat, J

Bench : Single Bench

Advocate : S.V. Adwant, A.D. Gade, B.V. Virdhe

Final Decision : Partly Allowed

Judgement

R. G. Avachat, J

1. The challenge in this appeal is to an order dated 20/6/2020, passed by the Court of Civil Judge, Senior Division, Ambajogai on application Exh.160, in Special Civil Suit No.5/2012. By the impugned order, the parties to the suit have been directed to maintain status quo as regards alienating, transferring or creating third party interest in respect of the suit properties. Original defendants No.5, 9, 10 and 11 have, therefore, preferred the present appeal.

2. Shri S.V. Adwant, learned counsel for the appellants herein would submit that, it is a suit for partition and separate possession of house and landed properties (55 in number), specifically described in the plaint. The suit dates back to 2012. An application (Exh.5), seeking for injunction, restraining the appellants from creating third party interest in respect of the suit properties was filed along with the suit itself. The plaintiff, elder brother of the appellant No.1, did not urge for hearing of the said application. The trial Court, therefore, in September 2015, passed an order to hear the application (Exh.5) along with the suit. Issues have been framed way back in June 2017. affidavit of evidence was also filed. The plaint, in the meanwhile, came to be amended. For over five years, the plaintiff

has been seeking adjournments in the matter for one or the other reason. All of a sudden, an application Exh.160 came to be moved. It is nothing but a replica of application Exh.5. In October 2019, the Court passed the order of status quo without say to the application. Without indicating any reason, the trial Court confirmed the order of status quo vide impugned order.

3. The learned counsel would further submit that, the appellants herein constitute among themselves a joint family.

The appellant No.1 was a meritorious student. He first did M.B.B.S. way back in 1969. He joined the Government service as a Medical Officer. He completed Masters in Surgery, while in service. He successfully passed examination held by the M.P.S.C. for recruitment of Class II Medical Officer. In the course of time, he became Class I Officer. He served on the post of Superintendent Sir J.J. Group of Hospitals, Mumbai and superannuated on the post of Officer on Special Duty in Medical Education and Public Health Department, Government of Maharashtra, Mantralaya. Learned counsel would further submit that, the appellant No.3, son of appellant No.1 did Master in Engineering. He had opened up an industry and in the course of time, he diversified his business to construction activities. His mother and his wife have also been well educated. All of the appellants have been Income Tax assesseees. The plaint is conspicuously silent to state that the family of the plaintiff and defendants did have surplus nucleus for acquisition of other properties. There is also no pleading and evidence as well to show that, any such nucleus, if any, was applied for acquisition of other properties. The properties acquired by the appellants herein have been their gains of earnings. The properties held by the female members of the family of the appellants are their absolute properties by virtue of Section 14 of the Hindu Succession Act. The appellant No.1 had raised loan for acquisition of the properties. Evidence to that effect has been placed on record. According to learned counsel, the concept of blending of a property of the female member of the joint family is unknown to Hindu Law. Whatever properties have been purchased from the plaintiff have been duly paid for. According to learned counsel, the trial Court ought not to have restrained the appellants from exercising right to alienate or deal with the properties they have acquired on their own exertion. Learned counsel, therefore, urged for allowing the appeal.

4. Shri A.D. Gade, learned counsel for respondent No.1 would, on the other hand, submit that, the plaintiff was elder member of the joint family. The family admittedly held number of agricultural lands and house properties as well. There was sufficient nucleus for acquisition of the other properties. Documents have all been placed on record. The trial Court passed an order of status quo on the application Exh.160 with the consent of learned counsel for the appellants. The said order continued from time to time. Affidavit of evidence has been filed about 3 - 4 years back. The trial Court has rightly exercised the discretion in passing the impugned order. The appellate Court should, therefore, not interfere with the order passed in exercise of discretionary jurisdiction. Learned counsel took me

through some documents in the nature of sale deeds etc. to show that it is the plaintiff who has purchased some immovable properties in the name of appellant no.1 and his son. At the instance of appellant No.1, a Company namely Anand Live Stock Pvt. Ltd. was formed. Some joint family properties have been transferred for formation of the Company. On passing of a resolution in the absence of plaintiff and his family members, the properties have been transferred in the name of some of the appellants herein. This is nothing but a fraud. The appellants have, in fact, transferred a few joint family properties to the defendants No.14 and 15. If the impugned order is set aside, the appellants would create third party interest in respect of the suit properties. The same would be prejudicial to the interest of the plaintiffs and other members of the joint family. Relying on the authoritative pronouncements, the learned counsel would submit that, the order passed in due exercise of discretionary jurisdiction ought not to be interfered with in appeal. Principle of lis pendence is not an effective remedy. According to learned counsel, the suit is pending hearing. In the fitness of things, no interference with the impugned order is warranted, submitted by the learned counsel.

5. Deorao was the common ancestor. He was survived by his wife, three sons and three daughters. The plaintiff is eldest among the siblings. 2 / 3 daughters of Deorao are no more. On the demise of Deorao, his progeny inherited movable and immovable properties. The properties in the suit are 55 in number. 28 properties are admitted to have been either ancestral or joint family properties. The impugned order in respect of these properties, therefore, need not be interfered with.

6. It is the case of the plaintiff that, it is he who spent for primary and higher education of the appellant No.1. It is he who has acquired immovable properties in the name of appellant No.1 and his son. The consideration therefor was paid out of the joint family funds. The suit is for partition and separate possession with a consequential prayer for setting aside alienations.

7. The normal state of every Hindu family is joint. Such family is presumed to be joint in food and worship. The presumption is stronger in the case of brothers than in the case of cousins and the further one goes from the founder of the family, the presumption becomes weaker and weaker. There is, however, no presumption that a family, because it is joint, possesses joint property. A person asserting the existence of joint family property has to prove the nucleus with which such property could be acquired. It is only then such property could be presumed to be joint and the onus of proving self acquisition would shift to the person asserting as such.

8. Along with the suit itself, an application Exh.5 was preferred. The record indicates that, the plaintiff did not urge for hearing of the said application. The trial Court ultimately passed an order that the said application would be heard along with the suit. With the reiteration of almost all averments in the application Exh.5, the application Exh.160 came to be moved. The same was also pending

for long. It is true, vide order dated 31/10/2019, the trial Court passed the following order : status-quo in respect of alienation of the suit property. Accordingly to both the parties, to maintain status quo in respect of suit property till the next date."

11. The parties were directed to maintain status quo till the next date. It was an order passed below application Exh.167 moved by the plaintiff. The appellants herein had filed a say thereto as under :-

"Defendants No.5, 9 to 11 have today filed their say/ reply to the interim application filed by plaintiff below Ex.160 and also ready to argue on the said application. Plaintiff has not shown the all properties which are mentioned in the original suit and only ask the relief against the self acquired properties in the name of respondents No.5, 9 to 11. This shows plaintiff has filed this application with ill intention and only to harass the defendants No.5, 9 to 11 and only to prolong the matter. Hence this application be rejected."

12. The aforesaid reply undoubtedly indicates that the learned counsel for the appellants had given concession to pass status quo order only for the period to the next date. True, the said order continued for certain length of time. The application Exh.160, however, was ultimately argued on merits. The trial Court passed the impugned order with following reasons :-

"Accordingly the fact which property is self acquired property, and which property is the joint family property, can be ascertained after leading the full fledged evidence, and at this stage while deciding the interim application, it would not be proper to record any finding in this regard. Where plaintiff has filed his affidavit of evidence at Exh.145. The earlier application filed at Exh.5 was ordered to be heard along with the main suit and subsequently present application is filed by the plaintiff stating that during the pendency of the suit defendants are alienating the suit property. Thereafter as per order passed below Exh.165, 167 both the parties were directed to maintain the status quo in respect of the suit property. Again the very status quo order is continued till the next date as per order passed below Exhs.173, 175, 177, 178, 179, 183, 185, 186, 187, 190, 193. Accordingly, from time to time the very status quo order is got extended. As affidavit of P.W.No.1 is already filed on record at Exh.145. Therefore, it would be just to expedite the hearing of the suit directing both the parties to maintain the status quo in respect of the alienating the suit property during the pendency of the suit."

13. The aforesaid order would undoubtedly indicate the trial Court to have not assigned any reason for passing the impugned order. Although the learned counsel for the respondent no.1 was right in submitting, on the basis of authoritative pronouncement that, the appellate Court shall not interfere with the order passed in exercise of due discretion. The aforesaid order indicates no reasons have been assigned for passing order in exercise of discretionary jurisdiction. The three parameters, namely prima facie case, balance of

convenience and irreparable loss required to be considered for passing order of interim injunction have not been considered at all.

14. In case of Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel & ors., [(2006) 8 SCC 726], relying upon the judgment in Transmission Corpn. of A.P. Ltd. Vs. Lanco Kondapalli power (P) Ltd., (2006) 1 SCC 540, the Apex Court held :-

"Normally the appellate court would be slow to interfere with the discretionary jurisdiction of the trial court. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions.

The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion."

The Apex Court further referred the case of Wander Ltd. Vs. Antox India (P) Ltd., 1990 Supp. SCC 727, Seema Arshad Zaheer Vs. Municipal Corpn. Of Greater Mumbai, (2006) 5 SCC 282 : (2006) 5 Scale 263, held :-

In this case the courts below proceeded on a prima facie misconstruction of documents. They adopted and applied wrong standards. Therefore a case for interference has been made out."

15. Under the Hindu Law, a member of joint family can have his separate property. The appellant No.1 became major in December 1963. he did M.B.B.S. in 1969. He was appointed as a Medical Officer with the Health Department of the State of Maharashtra. He completed his Master in Surgery, while in service. After having passed the examination held by M.P.S.C., he was first appointed as Medical Officer, Class II and then he became Class I Officer.

His son, appellant No.3 is postgraduate in Engineering. Initially he had opened up an industry at M.I.D.C., Waluj, Aurangabad. He has now diversified to construction business. His wife too is well educated. The appellants have been income tax assesseees. There is material on record to indicate the appellant No.1 to have had raised loan from the Bank. Pledged gold ornaments for another loan to acquire immovable property. He had been in Government service for over 20 years. Whatever acquisitions made by him and his son would prima facie take colour of their self acquisition. There is prima facie nothing to indicate that the joint family funds have ever been paid to them for acquisition of the properties in Pune, Beed etc. This Court, however is not inclined to consider the submissions

made by learned counsel for the appellants that the property held by the female members of the family of the appellants would be their absolute property by virtue of Section 14 of the Hindu Succession Act. There is, however, another aspect of the matter that, the record indicates that, while acquiring a few of the properties in the name of appellant No.3 Anand, the original plaintiff has paid consideration amount. The details of those sale deeds have been given in the reply affidavit. The appellants are, therefore, required to come clean on this aspect during trial of the suit. Moreover, the properties which were acquired by or transferred to Anand Live Stock Pvt. Ltd. formed by the appellant No.1 is concerned, it is to be stated that, by passing a resolution behind the back of the plaintiff and his family members, the properties in the name of the said Company have been mutated in the name of members of the appellants' family in revenue record. There is prima facie nothing to indicate the original plaintiff and his family members have been parties to the said resolution shown to have been passed by the Board of Directors of the Company.

16. Learned counsel for the respondent No.1, based on the authoritative pronouncement, namely R. Janakammal Vs. S.K. Kumarasamy (Deceased) through Legal Representatives & ors. [2021 SCC OnLine SC 444], Maharwal Khewaji Trust (Regd.) Vs. Baldev Dass, [(2004) 8 SCC 488] and Baikuntha Nath Paramanik, Dead by his L.Rs. Vs. Sashi Bhusan Pramanik, Dead by his L.Rs. [(1973) 2 SCC 334], would submit that, filing of Wealth Tax and Income Tax returns is not conclusive of status of family. The Court should not permit change of status quo. When joint family is having nucleus, acquisition in the name of family members are presumed to be family acquisitions.

17. It is reiterated that, the appellant no.1 was not the elder in the family. He was a medical practitioner. He joined service as a Medical Officer. He rose to the higher rank, superannuated as Officer on Special Duty in Medical Education and Public Health Department, Government of Maharashtra, Mantralaya. His son too was well educated and daughter-in-law as well. They have been assessed to income tax for long. The properties have been acquired in their own names. Some times, Bank loans have been raised for acquisition of the property. Gold and policy of insurance have also been pledged. There is nothing prima facie to indicate the joint family funds to have been utilised for acquisition of those properties except one which has been referred to hereinabove. If the impugned order is to continue, the same would necessarily affect the rights of the appellants to exercise proprietary rights in respect of their self acquisitions. This Court is, therefore, inclined to interfere with the impugned order to the extent mentioned in the operative order.

18. In the result, the appeal partly succeeds. Hence, the following order :

ORDER

(i) The appeal is partly allowed.

(ii) The impugned order so far as regards the properties at Sr.Nos.2, 4, 5, 17,

18, 19, 24, 25, 28, 35, 36, 37, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 54 and 55, which are prima facie self acquired properties of the appellants - original defendant Nos.5, 9, 10 and 11, is hereby set aside;

(iii) The impugned order stands unaltered so far as regards properties at Sr.Nos.1, 3, 13, 14 and 15; properties at Sr.Nos.6, 7, 8, 9, 10, 11, 12, 16, 22, 23, 26, 27, 29, 30, 31, 32, 33, 34, 38 and 39, which are admittedly joint family properties. The impugned order so far as properties at Sr.Nos.20 and 44, which are said to be not in existence and the property at Sr.No.21, which is the same property mentioned at Sr.No.19, mentioned in the plaint, to stand unaltered.

(iv) The impugned order also to stand unaltered in respect of the properties acquired under sale deed Nos.3125/1974, dated 25/9/1974; 2337/1988, dated 30/6/1988; 1700/1989, dated 2/6/1989; 686/1996, dated 23/5/1996; 685/1996, dated 23/5/1996 and 1389/1998, dated 2/5/1998, mentioned in paragraph No.30 of the affidavit-in-reply filed by respondent No.1.

(v) The impugned order also stands unaltered so far as regards the properties acquired for the Company - namely Anand Live Stock Pvt. Ltd. and transferred in the names of the appellants herein in the revenue record.

(vi) The trial Court shall decide the suit immediately, uninfluenced by the observations made herein.

(vii) Any alienation of any of the suit properties, pending the suit, shall necessarily be subject to principle of lis pendence.

(viii) In view of disposal of the Appeal from Order, Civil Application also stands disposed of.