
(2014) 06 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : CIMA No. 56 of 2014 and CMP No. 172 of 2014

Gulzar Ahmad Khankashi

APPELLANT

Vs

Shahama

RESPONDENT

Date of Decision : 30-06-2014

Acts Referred:

Citation : (2015) 3 JKJ 618

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : M.A. Dar, Advocate for the Appellant; A.H. Naik, Sr. Advocate and Athar, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Ali Mohammad Magrey, J.—This Civil 1st. Miscellaneous Appeal has been preferred by the appellant-plaintiff against the order dated

05.04.2014 passed by the learned Additional District Judge, Srinagar, in a suit for declaration, rendition of accounts and perpetual injunction,

whereby and whereunder the learned trial court has decided the application for ad-interim relief filed by the appellant-plaintiff, partly allowing and

partly disallowing the prayer made therein.

2. The appellant, O. Agha, previously known as Ali Agha, son of Nasir Ali Agha, resident of Town House 101, Motor City, Green Community,

Dubai, through his duly constituted Attorney, namely, Gulzar Ahmad Khankashi son of Abdul Aziz Khankashi resident of Munawarabad, Srinagar,

filed a suit for declaration, rendition of accounts and perpetual injunction involving three properties, namely, a house alongwith land measuring 4

kanals comprised in plot No. 71, popularly known as Harmony House/Sun House/

Grey Stone, situated at Rajbagh, Srinagar; land measuring 71

kanals comprised in various Khasra numbers delineated in paragraph (e) of the plaint situated at Mujgund; and a house and land measuring 4

kanals, 2 marlas comprised in Khasra No. 344/182 situated at village Mammar, Pahalgam, for the sake of convenience, described by the trial

court in its impugned order as property No. 1, property No. 2 and property No. 3, respectively.

3. Alongwith the suit, the appellant-plaintiff filed an application for grant of ad-interim relief to the effect that pending final disposal of the suit, non-

applicants 1 and 2 (respondents herein) be restrained from creating any third party interest jointly or severally, in any manner, in the property No.

1, the left over land from property No. 2 and property No. 3.

4. On 20.6.2013, the trial court, on consideration the application for grant of interim relief, made the following ex parte order:

The matter appears to be one of emergency nature and if the interim relief is not granted in favour of the plaintiff, plaintiff will suffer irreparable loss

and also will be non-suited. In these circumstances, I am of the opinion that the matter warrants immediate intervention by way of interim relief to

the plaintiff. As such, issue notice to the other side. Meanwhile, it is ordered that no transfer of suit property shall take place and no 3rd party

interest shall be created.

5. The aforesaid order was challenged by the defendants-respondents in Civil 1st Miscellaneous Appeal No. 174/2013. A Coordinate Bench,

relying on the Full Bench decision of this Court in Astral Traders Vs. Haji Mohammad Shaban Dar and Others, , decided and disposed of the

aforesaid miscellaneous appeal vide order dated 05.03.2014 in the following terms:

This Civil 1st Miscellaneous Appeal is, accordingly, disposed of with a direction to the parties to appear before the trial court on 12th March

2014. The trial court shall be expected to dispose of the application under Order 39 Rule 1 or 2, after considering the objections of the appellants

preferably within a period of 10 days thereafter.

6. The learned trial court, after hearing the learned counsel for the parties and considering the rival pleadings and claims put forth by them, has

disposed of the application for grant of interim relief by the impugned order

dated 05.04.2014, operative portion whereof is quoted hereunder:

For the aforesaid reasons instant application is partly allowed to the extent of unsold property No. 2 and dismissed regarding property No. 1 and

property No. 3. It is ordered that status quo with regard to title and possession of unsold property No. 2 shall be maintained by both the parties.

Nothing stated in the disposal of this application shall be construed as expression of opinion on the merits of the case. Application is disposed of

accordingly and shall form part of the main file.

7. Feeling aggrieved of the above order thus passed by the learned trial court, the appellant-plaintiff has filed this civil first appeal, in effect and in

essence, seeking an order to refrain the respondents-defendants from creating any third party interest in the property No. 1 and property No. 2,

described above pending disposal of the case, precisely on the claim of exclusive legal title, interest and right over the properties in question.

8. I have heard learned counsel for the parties, perused the records and considered the matter.

9. It may be mentioned here that the case set up by the appellant-plaintiff in his suit is that the property No. 1 was Nazool land and had been

leased out to one Begum Zaffar Ali, grandmother of the appellant, who had constructed a residential house therein. The grandmother of the

appellant executed a will in respect of the said property No. 1 in favour of her son, i.e., defendant No. 1 (respondent No. 2 in this appeal), which

is stated to have been subsequently revoked. It is further averred that, thereafter, the grandmother of the appellant alienated the property No. 1 in

favour of the appellant. At the same time it is stated that the said gift was confirmed vide instrument dated 26.09.1968, which was also endorsed

and signed by defendant No. 1 in token of acceptance of the transfer of all rights vis-a-vis property No. 1 in favour of the appellant-plaintiff. It is

further averred that, in order to assure more and better title of the appellant-plaintiff over property No. 1, defendant No. 1 (respondent No. 2

herein) in his capacity as being the guardian of appellant-plaintiff, filed a civil suit titled Agha Nasir Ali v. Begum Zaffar Ali which was decreed by

the court. It is averred that on the strength of the decree passed by the court of competent jurisdiction, the erstwhile owner of property No. 1,

Begum Zaffar Ali, confirmed having made a gift in respect of the possessory

rights of the property in favour of the appellant-plaintiff and that thus he became the absolute owner of the property in question.

10. It is further averred in the plaint that despite divesting herself of all rights and interests vis-a-vis property No. 1, the grandmother of the appellant-plaintiff made an application seeking transfer of the property in equal shares in favour of appellant-plaintiff and defendant No. 1.

However, in order to prevent any legal complications in future, defendant No. 1 is stated to have executed an instrument styled as Deed of

Memorandum dated 01.11.1991 mentioning therein, inter alia, that the property shall be deemed to have always been the property of Agha Ali

and that the Executant shall be considered to have never had any right, title, interest or charge in such property. On the basis of the above, the

appellant-plaintiff claimed that all rights and interests in respect of the property vested him, including the right to seek proprietorship/ownership

thereof in terms of the provisions of the Jammu and Kashmir State Land (Vesting of Ownership to Occupant) Act, 2001, popularly known as the

Roshni Act.

11. Property No. 2 described above is stated to have been gifted by defendant No. 1 to the appellant-plaintiff in the year 1970.

12. As regards property No. 3, it is the case of the appellant-plaintiff that defendant No. 1 (respondent No. 2 herein) has executed a Will in

respect thereof in favour of defendant No. 2 (respondent No. 1 herein) being his second wife. It needs to be mentioned here that the appellant-

plaintiff has not laid any specific claim to this property in the suit.

13. The case of the appellant-plaintiff is that, having been out of the country in connection with his professional engagements, he had executed

power of attorney in favour of his father, defendant No. 1, for the purpose of facilitating protection of the property No. 1 and property No. 2

owned and possessed by the appellant-appellant, with authority to him to deal therewith. It is averred in the plaint that defendant No. 1 was

specially authorized to seek the transfer of 4 Kanals comprising property No. 1 in favour of the appellant-plaintiff under the provisions of Roshni

Act and in that behalf to sell the landed property of the appellant-plaintiff at Mujgund and utilize the sale proceeds thereof for payment to the

Government as consideration amount of the 4 kanals of property No. 1 on behalf

of the appellant-plaintiff. It is averred that despite selling much of the land comprising property No. 2, defendant No. 1 (respondent No. 2 herein) instead has obtained ownership of 2 Kanals of land of the property No. 1 in his name and has failed to render accounts of the sale proceeds of the land sold by him. Hence the suit.

14. There is no dispute that the property No. 2, or whatever land is left at Mujgund had been duly transferred to the appellant-plaintiff and that he

had authorized the defendant No. 1 (respondent No. 2 herein) to deal with the same. There is also no dispute about the fact that respondent No. 2

at the instructions of the appellant-plaintiff has sold major portion thereof. Now the question is only about rendition of accounts of the sale

proceeds of the sold land. The power of attorney having been revoked, there remains no other controversy in relation to the said land.

15. So far property No. 3 is concerned, the appellant-respondent has not claimed its ownership. In fact, this property belonged to defendant No.

1 (respondent No. 2) who has transferred it to his wife, defendant No. 2 (respondent No. 1 herein) which is evidenced by memorandum of agreement dated 01.11.1991.

16. The real grievance of the appellant concerns the property No. 1. The learned trial court, while adverting to this property, in the impugned order

has recorded as under:

In view of the fact that the property No. 1 is the Nazool land, therefore, his (plaintiff s) predecessor-in-interest could not have conveyed a better

title than what actually she possessed. At the most she could have transferred the possessory rights to the plaintiff and not the ownership rights as

claimed by the plaintiff. Though initially by virtue of documents relied upon by the plaintiff the possessory rights of the property No. 1 were

transferred yet the same stand defeated by the defendant No. 1 by getting the lease in his favour and subsequent ownership rights. It is also not the

case of the plaintiff that the Nazool department allotted the property No. 1 in his favour or executed any other document. On the other hand it

transpires from the record that this property was leased out to the defendant No. 1 and thereafter, extended from time to time and the same was

never challenged by the plaintiff. The right, if any, acquired by the plaintiff stands superseded by that of the defendant No. 1. As such the plaintiff

can not be said to have acquired any legal title or interest in this property. Prima facie, plaintiff is out of possession. Defendant No. 1 is in

possession of the same. On its basis he has acquired ownership rights over 2 Kanals of land under the Roshni Act. Indirectly, the plaintiff has

challenged the order conferring ownership rights in favour of the defendant No. 1 and for declaring him its exclusive owner. This Court finds legal

force in the argument of Mr. Naik learned counsel for the defendants that such a claim made by the plaintiff is not sustainable in view of Section

14(b) of the Roshni Act which envisages no order of any officer or authority passed under this Act or the rules made thereunder shall be called in

question in any civil court. It is argued by the learned counsel for the plaintiff that remedy to challenge the order passed under Roshni Act is

available to the plaintiff independent to the subject matter of the suit and the same has not been called in question in this suit and the plaintiff is

within its rights to call in question the validity of the order if any issued by the Nazool department. In the light of argument of the counsel for the

defendants this argument is not sustainable.

For the aforesaid reasons plaintiff has failed to make out a strong prima facie case in his favour regarding the property No. 1.

17. As already noticed above, by order of the Coordinate Bench of this Court, while disposing of CIMA No. 174/2013, filed by the defendants

(respondents herein) against the ex parte ad-interim relief, the trial court was directed to dispose of the application under Order XXXIX, Rules 1

or 2 CPC after considering the objections of the appellants therein. In fact, the application could be considered in terms of the provision of Order

XXXIX, Rules 1 CPC which identifies the cases in which temporary injunction may be granted. The aforesaid provision of law, insofar as relevant,

is extracted below:

1. Cases in which temporary injunction may be granted: Where in any suit it is proved by affidavit or otherwise.

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution

of a decree; or (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors, the Court

may by order grant a temporary injunction to restrain such act, or make such

other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders;

(c) that the defendant threatens to dispossess the plaintiff or otherwise causes injury to the plaintiff in relation to any property in dispute in the suit.

18. It may be observed here that grant of an interim injunction, pending disposal of a suit, is purely within the discretion of the court. However, the

discretion has to be exercised in accordance with sound judicial principles. The principles which govern the exercise of discretion, inter alia, are

that the party claiming the interim injunction should establish that he or she has a prima facie case, in that, if the injunction, prayed for, is not

granted, the party claiming it is likely to suffer a mischief and that interference by the court is necessary to protect the party from an irreparable

injury. If the party fails to show a prima facie case in his/her favour, the court can refuse the grant of injunction. In order to make out a prima facie

case, where claim is laid to an immovable property, the party has necessarily to show by some evidence, say by documentary evidence, that he/she

has a title, right or an interest in the property in question. The words, or phrase, property in dispute in a suit as used in Order XXXIX, Rule 1

CPC, quoted above, have/has to be read in context of the above settled principals.

19. In the instant case, the basic case of the appellant-plaintiff is that he is the absolute owner in possession of the property No. 1. In fact, the first

prayer made by the appellant-plaintiff in the suit is that he be declared as the absolute owner in possession of the said property on the strength of

the court decree dated 20.9.1977 passed in civil suit titled Agha Ali v. Begum Zaffar Ali read with the will deed executed on 26.09.1968. At the

same time the property is stated to have been Nazool land leased out to the grandmother of the appellant-plaintiff and that the defendant No. 1 by

the power of attorney had been authorized to seek transfer of the said property in the name of the appellant-plaintiff. The very pleadings of the

appellant-plaintiff are contradictory in nature, inasmuch as on the one hand he has claimed to be the exclusive owner and in possession of the land

and, at the same time, he pleads to have authorized the defendant No. 1 to seek transfer of the said property in his name.

20. Nonetheless, the very basic question that would arise for consideration is whether appellant-plaintiffs grandmother could have transferred any

better right or interest in the said property than what she herself had to any third person, including the plaintiff and whether the appellant-plaintiff, in

the facts and circumstances of the case, could claim to be exclusive owner and in actual physical possession of the property. Such questions cannot

be determined in an ancillary proceeding; the proper course would have been to frame issues, treat the same as preliminary in nature and determine

the same after hearing the learned counsel for the parties.

21. It may be noticed that examination of the document annexure B to the plaint, which is a photocopy, relied upon by the plaintiff-appellant, said

to have been executed by his grandmother on 26.09.1968, reveals that the grandmother of the plaintiff-appellant had executed a Will in respect of

this property in favour of his son, i.e., the defendant No. 1, who also happens to be appellant-plaintiffs father, when the appellant-plaintiff had not

yet been born. After the birth of the appellant-plaintiff, his grandmother executed the document in question, wherein she amended the Will and

stated therein that she transfers the property in favour of the appellant-plaintiff. The following portion of the document would clearly bear out the

kind of document the grandmother had thus executed. It recites:

Aayinda Intikal-i-Jaidad Key Waqat wasiyatnama-qabal is tarmeemi wasiyatnama Key saath padajakar amaldaramad hona chahay

22. The learned counsel for the appellant-plaintiff also heavily cited and relied upon the compromise decree passed by the Sub-Registrar, Srinagar

in Civil Suit No. 71/Numbri decided on 20.09.1977. In fact, at page 7 of the plaint this decree is sought to be referred to as sale deed. Perusal of

the compromise deed produced in the aforesaid suit reveals that the suit for declaration and injunction had been instituted by defendant No. 1 on

behalf of the appellant-plaintiff against his (appellant s) grandmother, Begum Zaffar Ali. The photocopy of the certified copy of the compromise

deed produced by the parties therein reveals that the defendant therein, i.e., Begum Zaffar Ali, admitted that she had gifted away, in accordance

with covenants of Shariah, the suit property comprising a two storeyed tin roofed

house with land underneath and appurtenant thereto measuring

24607-6 with the compound wall, fruit bearing trees etc., to the appellant-plaintiff. The point again is that whether the defendant in that suit,

namely, Begum Zaffar Ali, could have transferred any better interest in the property to any other party by any instrument or by compromise in a

suit, be it a collusive suit or otherwise.

23. Then there is the plea of defendant No. 1 that the property No. 1 was, in fact, leased out to him in the year 1978, i.e., after the compromise

decree passed in Civil Suit No. 71/Numbri by the Sub-Registrar. If that be so, the question arises whether any interest created in the appellant-

plaintiff over the property pursuant to the aforesaid (amended) Will executed by Begum Zaffar Ali and the compromise decree could be said to

have survived and subsisted.

24. Communication dated 05.10.1989 placed on the record of the suit as annexure D reveals that Begum Zaffar Ali seems to have approached the

Government for transfer of leasehold rights in respect of the property No. 1 in favour of appellant-plaintiff and defendant No. 1 in equal shares on

the terms and conditions it had originally been leased out. Besides, at the hearing of this appeal, learned counsel for the appellant has produced a

copy of Government order No. Rev(NDK) 14 of 1989 dated 11.01.1989 whereby Government has accorded sanction to the renewal/transfer of

lease hold rights over Nazool land measuring 4 Kanals covered by plot No. 71 situated at Rajbagh for a period of 20 years in the following

manner:

Further, alongwith this appeal, the appellant-plaintiff has placed on record communication dated 05.10.1989 from Assistant Commissioner (C)

with Divisional Commissioner, Kashmir to the Commissioner/Secretary to Government, Revenue Department whereby it was recommended that

the 10 Marlas of land leased out to Begum Zaffar Ali be transferred in equal shares in favour of Dr. Agha Nasir Ali and Agha Ali.

25. There is also on record communication bearing No. 5/RD/Roshi dated 14.05.2008 addressed by Deputy Commissioner, District Collector,

Srinagar, to Agha Ali, i.e., the appellant-plaintiff. Contents of this communication in context of the above communication dated 05.10.1989 assume

importance. By the aforesaid communication the appellant-plaintiff, among other

things, has been informed as under:

The market value of the State land in your occupation with details given hereunder has been fixed under Sec. 12 of the J&K State Land (vesting of ownership to occupant) Act, 2001 at Rs. 56.00 lacs (fifty six lacs only) per Kanal by the Committee constituted under rule 9 of the Revenue

Department SRO 64 dated 5th March, 2007.

1. Estate Nursinghar

2. Plot No. 71

3. Area 2 Kanal____ Marla _____ Sft.

(Highlighting supplied)

The appellant-plaintiff in his suit does not derive any support from the aforesaid communications or Government orders; instead, his specific plea is

that Begum Zaffar Ali having divested herself of the property No. 1, she could not have applied for such transfer/allotment in equal shares between

him and defendant No. 1.

26. It is to be noted that it is the claim of the appellant-plaintiff that he had authorized his father, defendant No. 1 (respondent No. 2 herein) to sell

the landed properties belonging to the appellant-plaintiff, situated at Mujgund, i.e., property No. 2, and utilize part of the sale proceeds thereof for

depositing the cost of the aforesaid land with the Government so as to complete the process of vesting of ownership of the land in the name of the

appellant-plaintiff. It is his further claim that instead of getting the property vested in the name of the appellant-plaintiff, defendant No. 1

(respondent No. 2) utilized the sale proceeds of the land situated at Mujgund for getting the said land transferred in his name.

27. To rebut the claims of the appellant-plaintiff, the learned counsel for the respondents has raised two arguments: first, that since the appellant-

plaintiff had converted to Christianity, therefore, in accordance with the Shariah law, he would stand divested of right to inherit any property from

his predecessors; second, that since the appellant-plaintiff has acquired the citizenship of Ireland, and is no more an Indian citizen, he cannot

acquire any property in India, muchless in the State of Jammu and Kashmir.

28. On the other hand, the learned counsel for the appellant-plaintiff submitted that he is not seeking any right or interest in the property in question

on the basis of inheritance, but on the basis of the possessory/ownership right on the land in question which stood transferred in his favour long

prior to the appellant-plaintiffs conversion to Christianity; and secondly that law does not prohibit him to hold immovable property in India,

including the State of Jammu and Kashmir. Reference in this connection has been made to the Citizenship (Amendment) Act, 2003 and 2005.

29. The arguments raised by the learned counsel certainly concern triable issues involved in the case. This Court at this stage of the proceedings

and in context of the controversy involved herein, cannot go into such arguments. This is not the right stage to do that. This Court at this stage is

only required to see whether the appellant-plaintiff has been able to establish a prima facie case in his favour which would warrant exercise of the

discretion vested in the Court in his favour. It is the case of the appellant-plaintiff that defendant No. 1 (respondent No. 2) being under the

influence of defendant No. 2 (respondent No. 1 herein) is likely to transfer the property in question in her favour and, thereby the suit property is in

danger of being alienated to defeat the claim of the appellant-plaintiff. In order to establish such danger, the appellant-plaintiff has referred to and

relied upon the Deed of declaration executed by defendant No. 1 whereunder he has already declared to have gifted certain immovable and

movable properties, including property No. 3, in favour of defendant No. 2, which is not denied by the respondents.

30. It may also be mentioned here that during the course of arguments, the learned counsel for the parties vehemently stressed their respective

contentions on whether the order passed under the Roshi Act and the Rules framed thereunder could be challenged in a civil suit or not and, in

order to put across their respective contentions, cited and relied upon various decisions of the Supreme Court etc. I think it is unnecessary to go

into such arguments for the purpose of determination of the present controversy, more so in view of the fact that the appellant-plaintiff has not

expressly challenged any such order in his suit. Besides, the arguments would essentially need framing of preliminary issues by the trial court and

determination thereof.

31. On the basis of what has been discussed above, I am of the considered opinion that the basic issues, rather legal issues, that need to be

determined first by the trial court concern, inter alia, the maintainability of the suit and whether the appellant-plaintiff, having, admittedly, acquired the citizenship of a foreign country can acquire and/or hold immovable property in the State etc. Again, it is the admitted case of the appellant-plaintiff that he has been out of the State. The legal issue that would have to be framed and determined in that behalf is as to what is the nature of the occupation/possession claimed and, in view of the fact that appellant-plaintiff has converted to Christianity, whether he can claim constructive occupation/possession over the land and to whatever extent? Such issues can be treated as preliminary issues and determined by the trial court after hearing the learned counsel for the parties in accordance with law. Till such issues are framed and decided by the trial court, the status of property No. 1 shall have to be preserved.

32. It is, accordingly, ordered that the learned trial court shall frame the necessary legal issues as emerge from the respective pleadings of the parties, treat them as preliminary issues and decide the same in accordance with law after hearing the learned counsel for the parties, preferably within a period of two months from today. Till then there shall be a status quo with respect to property No. 1. Depending upon the decision on the preliminary issues as may be framed, the trial court shall pass appropriate orders as to the continuance or otherwise of the status quo order with respect to property No. 1, as ordered above.

33. The appeal is, accordingly, partly allowed and the impugned order dated 05.04.2014 passed by the learned trial court is modified to the extent indicated above.

34. Parties to appear before the trial court on 05.07.2014. Registry is directed to send down the original records of the trial court immediately through a special messenger.

35. It barely needs to be mentioned here that nothing stated in this order shall be construed as expression of any opinion by this Court on the merits of the case or on the preliminary issues that may be framed by the trial court.