

(2011) 08 KAR CK 0071
In the Karnataka High Court
Case No : MFA No's. 7076 and 7077 of 2011

Smt. Munirathnamma and Others

APPELLANT

Vs

Sri Anneppa and Others

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Limitation Act, 1963 — Section 110

Citation : (2011) 08 KAR CK 0071

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : N.S. Sheshadri, in MFA Nos. 7076 and 7077 of 2011 and Sri D.R. Sundaresha, Adv in MFA No. 7532/2011, for the Appellant; D.R. Sundaresha, for R13 to R16 and Sri N.S. Sheshadri in MFA No. 7532/2011, for the Respondent

Judgement

A.N. Venugopala Gowda

1. Plaintiffs in the suit have filed MFA Nos. 7076 & 7077 of 2011 questioning a common order passed on LA Nos. 1 & 2 by the Trial Court. Defendants 13 to 16 have filed MFA 7532/2011 questioning an order passed by the Trial Court on I.A No. 3. The other Respondents in the appeals being unnecessary parties for consideration of subject matter herein, the Appellants in MFA 7076 & 7077 of 2011 did not take out notice of the appeal to Respondents 1 to 12/defendants 1 to 12. For convenience, the parties would be referred to with reference to their rank in the Trial Court.

2. Suit is for passing of decree of partition and to put the Plaintiffs in separate possession of 1/10th share in the suit property - 1 acre 10 guntas of land in Sy. No. 384, situated at Kalkere Village, Krishnarajapuram Hobli, Bangalore East Taluk. The Plaintiffs have sought consequential relief to hold a sale deed dated 03.10.1996 executed by Defendants 1 to 7 and 9 to 12 in favour of Defendants 13 to 16 in respect of 36 guntas of suit property and another sale deed dated 14.11.2002 executed by Defendants 1 to 12 in favour of Defendant No. 17 in

respect of 8 guntas of suit property as illegal and not binding on their half share and for enquiry into mesne profits under Order 20 Rule 12 of C.P.C

3. I.A.1 was filed by the Plaintiffs to pass an order of temporary injunction restraining the Defendants or their representatives from alienating the suit property in favour of third parties. I.A.2 was filed by the Plaintiffs to pass an order of temporary injunction restraining the Defendants 13 to 17 or their agents from putting up any construction in the suit property pending disposal of the suit. I.A.3 was filed by the Defendants 13 to 16 to restrain the Plaintiffs from interfering with their possession and enjoyment of the suit property.

4. With a view to appreciate the facts involved in the matter, it is necessary to notice the genealogical table of the parties.

Poojappa.

Wife - Gundamma

Muniyappa

D-10 Gundappa

Wife - Jayamma

1st Wife

2nd Wife

Nanjamma

D7 - Muniyamma

D1- Annappa

P1- Munirathna

Thyagaraju

(Since dead by LRs)

P2- Nanjamma

D2- Lakshmamma

P3- Manjula

D3- Nataraj

D8- Gundappa

D4-Mahendra

P4- Nagaveni

D9- Lokesh

D5-Muniraju

P5- Shakuntala

D6-Srinivasa

** P - Plaintiff

D Defendant

5. One Poojappa, the grandfather of the Plaintiffs, purchased 2 acres 19 guntas of land in Sy. No. 384 of Kalkere Village in Krishnarajapuram Hobli on 14.12.1960. He died leaving behind his two sons Muniyappa & Gundappa. Muniyappa had two wives Nanjamma & Muniyamma. Muniyappa died on 03.07.1992 intestate. 1st wife Nanjamma died leaving behind 4 sons. The Plaintiffs are the daughters of 2nd wife Muniyamma. Defendants 13 to 16 are the purchasers of 36 guntas of land out of suit property as per a sale deed dated 03.10.1996 executed by Defendants 1 to 7 and 9 to 12. Defendant No. 17 is the purchaser of 8 guntas of property out of suit property as per a sale deed dated 14.11.2002 executed by Defendants 1 to 12. Suit was instituted on 23.03.2011. An ex parte order of temporary injunction was passed on I.A.1 on 26.03.2011. I.A.2 was filed on 23.04.2011.

6. Defendants filed written statement and objections to I. As 1 & 2. By a common order dated 18.07.2011, I. As 1 & 2 were dismissed. The purchasers/defendants 13 to 16 filed I.A.3, to which the Plaintiffs filed statement of objections and by an order dated 23.07.2011, I.A.3 was held as not maintainable and was dismissed.

7. There is no dispute that the Plaintiffs and Defendants 1 to 12 are the heirs of Muniyappa, S/o. Poojappa. There is also no dispute that the Plaintiffs have not joined in execution of sale deeds dated 03.10.1996 & 14.12.2002 in favour of Defendants 13 to 17. The case of the Plaintiffs is that, they being the children of Muniyappa were not allotted legitimate share and the sale of suit property by Defendants 1 to 12 in favour of Defendants 13 to 17 does not bind them and that, they are entitled to be granted 1/10th share each in the suit property.

8. The contesting Defendants appear to be only the purchasers of portions of suit property under the sale deeds dated 03.10.1996 & 14.12.2002. According to them, the co-parceners had partitioned the suit property, in terms of which, 38 guntas of property had fallen to the share of Anneyappa, Thyagaraj & Muniraju and 12 guntas had fallen to the share of Gundappa, S/o. Muniyappa and such partition was also reflected in the revenue records and for legal necessity, the sharers sold their properties under the sale deeds dated 03.10.1996 & 14.12.2002. They have contended that, the suit is barred by limitation apart from applicability of estoppel by conduct and also hit by the principles of Hindu Succession Act. They have contended that, the partition cannot be re-opened and the suit property having been converted and a house therein having been built apart from property being protected by a compound wall, ceased to be an

agricultural land long ago and that the Plaintiffs have no legal right to institute the suit, which is also bad for non-inclusion of all the family properties and all the legal heirs.

9. The Defendants 13 to 17 have placed on record, the copies of the orders converting the suit property from agricultural to residential use. The Plaintiffs have placed on record of the appeal the photographs of suit property taken on 11.08.2001, which show pillars having been erected and the preparation undertaken by Defendants 13 to 17 for construction of a multi-storeyed building. Indisputedly, Defendants 13 to 16 have constructed a residential house in a portion of suit property.

10. The Trial Court, noticing the claim of the Plaintiffs that, they recently got knowledge of the sale of portion of the suit property in favour of Defendants 13 to 16, held that, the plea cannot be accepted, though it cannot be outrightly rejected without a regular trial. It found merit in the contentions of the Defendants that, the suit is barred by limitation in view of applicability of Article 110 of Limitation Act and held that, there is no prima facie case for consideration. Noticing that the Defendants would be put to loss and injury, it held that, the balance of convenience does not lie in favour of the Plaintiffs. As a result, I. As 1 & 2 were dismissed. I.A.3 filed by the purchasers was dismissed as not maintainable.

11. Sri N.S. Sheshadri, Learned Counsel appearing for the Plaintiffs, contended that, there being no dispute with regard to Plaintiffs being the children of 2nd wife of deceased Muniyappa, the property having been purchased by Defendants 13 to 17 from the other heirs/defendants 1 to 12 of Muniyappa, the Plaintiffs being not parties to the alleged partition amongst the 2nd wife and children of their father Muniyappa, the Trial Court erred in holding that prima facie case does not exist. Learned Counsel submitted that, in view of the misdirection adopted by the Trial Court, the findings recorded on other aspects concerning grant of temporary injunction is also highly erroneous. Learned Counsel contended that, the Trial Court failed to examine the record in the correct perspective and the impugned order is arbitrary, capricious & illegal. Learned Counsel referred to case laws which were relied upon before the Trial Court, which find a place in the impugned order.

12. Sri D.R. Sundaresha, Learned Counsel appearing for the Defendants 13 to 17, firstly contended that, the suit is false, frivolous and vexatious, apart from being collusive one to have illegal gain. Secondly, the Plaintiffs have no right to seek partition of suit property being the daughters of 2nd wife of late Muniyappa. Thirdly, the Plaintiffs have not approached the Court with clean hands and there is material suppression of facts apart from willful misrepresentation. Fourthly, the purchasers constructed a house long ago and are residing therein and have also undertaken construction of massive building, which is evident from the photographs produced by the Plaintiffs. It was stated that, the Plaintiffs having kept quiet for long period even after construction of residential building and its

occupation, instituted the suit with oblique motives only after the work of construction of apartment complex was commenced. Fifthly, the Trial Court has considered the record in the correct perspective and the order passed on I.A. 1 and 2 being neither arbitrary nor capricious much less illegal, does not call for interference and that, the Appellate Court should be slow to interfere with an order passed by the Trial Court in exercise of the discretionary jurisdiction vested in it. Learned Counsel submitted that, on any view of the matter, the order passed by the Trial Court on I. As 1 & 2, does not call for interference. Learned Counsel further submitted that, since the Trial Court by misdirecting itself has dismissed I.A.3, MFA 7532/2011 filed by the purchasers being meritorious, may be allowed.

13. In view of the rival contentions and the record, the point for consideration is: Whether any interference with the impugned order/s is called for?

14. It appears that, the Plaintiffs are not parties to the deed of partition between the sons of Muniyappa through his 1st wife Nanjamma & 2nd wife Smt. Muniyamma and his son. The Defendants 13 to 17, have purchased portions of suit property from Defendants 1 to 12. There is no record as of now showing allotment of share to the Plaintiffs in the estate left by their father Muniyappa. About 6 guntas of suit property is still held by legal heirs of Late Muniyappa. It is not the case of the contesting Defendants that, the Plaintiffs were aware of the fact that the property which has been purchased by them was converted from agricultural to non-agricultural use. In the circumstances, ex-facie, bar of limitation cannot be taken note of. Issue relating to limitation is not a pure question of law, but is a mixed question of fact and law and hence, is required to be decided after trial. Since the relationship of the Plaintiffs with Defendants 1 to 12 is not in dispute and also the fact that the suit property has been left by Late Muniyappa, the father of the Plaintiffs, the finding of the Trial Court that, prima facie case does not exist, is erroneous. Considering the facts noticed supra, a prima facie case does exist for trial of the suit. However, mere making out of prima-facie case does not permit leap-forging by the Plaintiffs directing to an order of temporary injunction without crossing the other hurdles i.e., balance of convenience, irreparable loss and injury etc.

15. While considering an application for grant of temporary injunction, the Court is not only to take into consideration the basic elements in relation thereto, namely, existence of prima-facie case, balance of convenience and irreparable loss & injury, but it must also take into consideration the conduct of the parties. Grant of injunction is an equitable relief. When a Trial Court has exercised its discretionary jurisdiction, the Appellate Court, as is well settled, should be slow to interfere with the order unless sufficient and cogent reasons exist there for. If one party had kept quite for long period of time and allowed the other party to deal with the property exclusively, such party, who kept quite, ordinarily, would not be entitled to an order of temporary injunction. Since the grant or refusal of temporary injunction has serious consequences to the parties, the Court while

dealing with the matter must endeavor to protect the interest of the parties i.e., balance the rights and equities, depending upon the facts and circumstances of each case.

16. In *Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others*, it has been held as follows:

30. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the Plaintiff: (i) existence of a prima facie case as pleaded necessitating protection of the Plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the Plaintiffs rights is compared with or weighed against the need for protection of the Defendant's rights or likely infringement of the Defendant's rights, the balance of convenience tilting in favour of the Plaintiff; and (iii) clear possibility of irreparable injury being caused to the Plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the Plaintiff's conduct is free from blame and he approaches the court with clean hands.

17. In the instant case, after the sale of portion of suit property by Defendants 1 to 12, the purchaser/s Defendants 13 to 17, obtained conversion order/s from agricultural to residential use and indisputedly constructed a house and are in occupation of it. That apart, by obtaining plan and licence, Defendants 13 to 17 have undertaken development of the property. Laying of column footings and raising of columns upto ground level is complete, as is evident from the photographs produced. The Plaintiffs have not assigned any reasons as to why they kept quiet when a house was constructed and occupied by the purchaser/s. The purchasers have made investment for development of the remaining portion of the property. There is escalation of construction cost. The Appellants only claimed share in the suit property. The contesting Defendants have pleaded that, the suit is bad for non-inclusion of all other items of properties, which belonged to Late Muniyappa and also non-joinder of necessary and proper parties. In the circumstances, if the Defendants 13 to 17 are restrained from completing the construction work undertaken in the suit property, would suffer greater prejudice and loss. The balance of convenience lies in favour of Defendants 13 to 17. The Plaintiffs having kept quiet when a big house was constructed in the suit property and was occupied by the purchasers, cannot at this stage seek an order of injunction restraining the purchasers from completing the construction work in the other portion of the property sold by Defendants 1 to 12. Prima-facie, the purchasers have held and enjoyed the purchased portion of suit property from the time it was purchased by them from Defendants 1 to 12. In the circumstances, the Plaintiffs conduct appears to be not free from blame.

18. Keeping in view the facts and circumstances of the case noticed supra, it would be inequitable to stop Defendants 13 to 17 from completing the construction work undertaken by them in the suit property. In my opinion, the interest of justice would be sub-served by allowing the Defendants 13 to 17 to

carry out the further construction work at their cost and risk, subjecting the same to ultimate decision of the suit. The Defendants 13 to 17, if were to proceed with the construction work and complete the same, they shall not claim any equity and shall abide by the ultimate decision of the suit. If any third party rights are created on the suit property or upon the building that may be constructed thereon by Defendants 13 to 17, such deed/s shall clearly stipulate that the matter is subjudice and the sale/s or the right/s created shall be subject to ultimate decision of the suit. Thus, the interest of both parties would be protected.

19. The suit being one for partition and separate possession, the Trial Court is directed to decide the suit with expedition keeping in view of provisions made in the Karnataka (Case Flow Management in Sub-Ordinate Courts) Rules, 2005, within a period of one year of the pleadings being complete and issues being framed. Both parties are directed to render co-operation to the Trial Court for early trial and disposal of the suit.

In the result, MFA Nos. 7076 & 7077 of 2011 filed by the Plaintiffs stand dismissed and MFA 7532/2011 filed by Defendants 13 to 16 stands disposed of, subject to observations and the directions made herein.

In the circumstances of the case, the parties are directed to bear their respective costs.