

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

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C.M.A. No. 361 of 2012

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Date of Judgment: 31.12.2013

Between:

Mohd. Iqbal @ Mohd. Khasim and others

...Appellant

and

Zeenaat Arra and others

..Respondents

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

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C.M.A.No. 361 of 2012

JUDGMENT:

Defendants 1, 3, 4 and 6 to 11 have preferred this appeal against the order of injunction granted by the learned I-Senior Civil Judge, City Civil Courts, Hyderabad in I.A.No. 1561 of 2010 in O.S.No. 2575 of 2010, dated 14.3.2012. The said order was suspended by order of this Court, dated 18.9.2012 pending the appeal. The first respondent/plaintiff has filed CMAMP No. 1979 of 2013 seeking vacation of the said order. With the consent of the learned counsel on either side, the appeal itself is heard and being disposed of. The parties are referred to as they are arrayed before the trial Court.

The plaintiff filed the suit for partition alleging that 'A' and 'B' suit schedule properties are Matraka properties of her father and seeking a share in both the said properties. The plaint averments, in brief, are that the father of the parties- Md. Ismail had two wives and through first wife- Rukhiya Begum, the plaintiff, defendants 1 to 4 and 15 were born and through second wife-Zaibun Begum (defendant No.5), defendants 6 to 14 were born. The plaintiff and all the defendants are thus legal heirs of late Md. Ismail. It is stated that during the life time of Md. Ismail, he performed the marriages of all his children except defendant No.11. It is alleged that the plaint A and B schedule properties were left by late Md. Ismail, from which the plaintiff allegedly was getting her share of income. However, she stated to have issued a legal notice dated 6.4.2010 to the defendants on coming to know that the efforts were being made to alienate the plaint A and B schedule properties. She has thereupon filed the present suit and sought temporary injunction restraining the defendants from alienating the plaint A and B schedule properties by filing IA No. 1561 of 2010.

The defendants 1, 3 to 11 and 15 contested the said injunction application. The defendants 1 and 3 to 11 filed their common counter-affidavit and other defendants remained *ex parte*. The defendants 1 and 3 to 11 denied the plaint allegations and contended *inter alia* that the suit 'A' schedule property which was alone Matraka property of their father was already partitioned among the parties under a

compromise decree passed in O.S.No. 142 of 1991 on the file of Senior Civil Judge, Nizamabad wherein the plaintiff also figured as defendant No.11 and accepted the said compromise. It is, therefore, stated that the suit 'A' scheduled property was already partitioned and cannot form part of the present suit schedule property. So far as suit 'B' schedule property i.e., Flat No. 303 at Red Hills, Nampally, Hyderabad is concerned, it is stated that it is the self-acquired property of first defendant purchased by him about three years ago with his own earnings and savings, as he was working abroad in Doha, Qatar. The defendants further strongly disputed the attempt of the plaintiff to disown the said compromise before the Court at Nizamabad and contended that she had appeared before the Court through a counsel, accepted the compromise, duly signed on the said memorandum of compromise and now she cannot be allowed to turn around and once again seek partition of the suit 'A' schedule property. The present suit is, therefore, claimed to be bared by principles of *res judicata*.

After considering the pleadings of the parties, the trial Court came to the conclusion that the manner in which the compromise was recorded in O.S.No. 142 of 1991 appeared suspicious and by examining the certified copies of the documents relating to the said compromise which are marked as Exs.R1 to R3, the trial Court made certain observations doubting the genuineness of the said compromise so far as the plaintiff is concerned and proceeded to grant temporary injunction by holding that the

defendants have prima facie failed to make out a case that the plaintiff gave up her rights in the suit 'A' schedule property. The said order is questioned in this appeal.

Mr. B. Vijayasen Reddy, learned counsel for the appellants placed reliance upon Exs.R1 to R3 showing that the memorandum of compromise was duly signed by all the parties including the plaintiff who figured as defendant No.11 in the said suit. He points out that she had not only engaged a counsel who appeared before the Court through special vakalat, but also accepted the terms of compromise and the said memorandum of compromise categorically shows that the defendants 1 and 8 to 12 gave up all their rights in the suit 'A' schedule property by stating that they were sufficiently provided with other properties by their late father. The said compromise decree having not been challenged even in the present suit, there is no prima facie case and balance of convenience in favour of the plaintiff.

Mr. B. Nalin Kumar, learned counsel for the first respondent/plaintiff, on the other hand, supports the impugned order by pointing out that though the memorandum of compromise was filed on 10.1.2003, it was recorded only on 3.2.2003 and as per the endorsement of the Court at Nizamabad recording the compromise, the defendant No.3 who was holding special vakalat for defendants 1, 2 and 4 to 12 represented them in the proceedings including the plaintiff herein. The learned counsel points out that the suit was dismissed in so far as

defendant No. 3 is concerned and as such it is surprising that the defendant No.3 appeared by special vakalat and admitted the compromise. The learned counsel, therefore, submits that the trial Court has rightly appreciated these facts and finding the said compromise highly suspicious, it has disbelieved the claim of the defendants that the plaintiff gave up her rights in the suit 'A' schedule property.

The points for consideration are,

- 1) Whether the plaintiff is entitled to grant of temporary injunction as prayed for?
- 2) Whether the order of the court below is justified?

It is not in dispute and it is evident from the record that the suit in O.S.No. 142 of 1991 referred to above was disposed of in terms of the compromise in I.A.No. 82 of 2003. The certified copy of the said document filed and marked as Ex.R3 shows that it was signed by all the parties including the plaintiff who figured as defendant No.11 in the said suit. Further the said compromise was recorded on 3.2.2003 by which date the plaintiff was represented by a counsel holding special vakalat who was present before the court and admitted the compromise. Further the said compromise was recorded on 3.2.2003 and the present suit came to be filed in 2010 i.e., seven years thereafter by showing the self same property which was the subject matter of the said compromise. It is very significant that even in the present suit no relief is sought either for declaration or for

setting aside the said compromise decree. Perhaps, the plaintiff being aware that such a suit is barred in view of Order 23, Rule 3A of Code of Civil Procedure, this suit merely seeks partition of plaintiff 'A' and 'B' schedule properties. The burden of showing that the said compromise decree is not binding on the plaintiff, *prima facie*, remained undischarged by her. However, the court below has placed the burden on the defendants and granted injunction in favour of the plaintiff. Secondly the only Matruka property i.e. 'A' schedule property having been disposed of by the said compromise decree way back in 2003, there was no question of acquiring suit 'B' schedule property by the plaintiff out of the income therefrom. The counter-affidavit of first defendant before the court below specifically states that he purchased the suit 'B' schedule property three years ago out of his own earnings and savings, remained uncontroverted by the plaintiff. Prima facie, therefore, the plaintiff failed to substantiate as to how the suit 'A' and 'B' schedule properties can be Matruka property of her late father. The Court below has not kept that aspect in mind while granting temporary injunction against the defendants. As the plaintiff has failed to establish any prima facie case and balance convenience, the impugned order of injunction granted by the trial Court cannot be sustained.

The appeal is accordingly allowed, the impugned order is set aside and I.A.No. 1561 of 2010 in O.S.No. 2575 of 2010 on the file of trial Court shall stand dismissed. Miscellaneous applications, if any, shall stand closed. Since

the parties are related, there shall be no order as to costs.

VILAS V. AFZULPURKAR, J

Dt. 31.12.2013

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