

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT****DATED : 20.12.2017****CORAM :****WEB COPY****THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN****CMA(MD)No.1028 of 2016****and****CMP(MD)No.9272 of 2016**

K.Perumal

... Appellant/Respondent/Defendant No.41

Vs.

1.S.Karpooora Sundaran

2.S.Vishnu Devan (Minor),
(Minor rep. through his
natural guardian and his mother
S.Rajarajaeshwari @ Rajeswari)

... Respondents/Petitioners/Plaintiffs

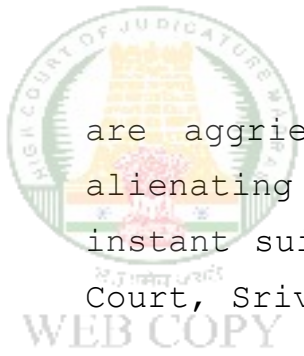
Prayer: Civil Miscellaneous Appeal is filed under Order 43 Rule (1) of CPC, to call for the records relating to the fair and decreetal order dated 25.07.2016 made in I.A.No.83 of 2014 in O.S.No.56 of 2011 on the file of the Principal District Judge, Virudhunagar District at Srivilliputhur and set aside the same.

For Appellant	: Mr.T.Antony Arul Raj
For Respondents	: Mr.V.Nagendran for R2 Mr.E.D.Prakash for R1

JUDGMENT

The 41st defendant in the suit is the appellant in this Civil Miscellaneous Appeal.

2.The suit was filed by the respondents herein seeking the relief of partition and separate possession. The suit schedule has four items. Schedule 1 and 2 pertain to immovable properties. Schedule 3 and 4 are movable properties. The case of the plaintiffs is that the suit items are ancestral in character and that the first defendant father and the plaintiffs have one third share each. They

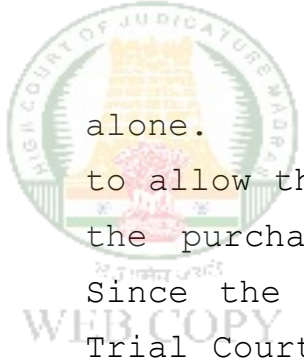


are aggrieved by the fact that the father has been unlawfully alienating the suit properties. This necessitated them to file the instant suit in O.S.No.56 of 2011 on the file of Principal District Court, Srivilliputhur.

3.The suit was filed in June 2011. The appellant herein had purchased a portion of the suit property measuring about 9 cents of land by sale deed dated 07.02.2012. Thereafter, an application for impleading the appellant was filed and the appellant was arrayed as 41st defendant. Since the appellant taken steps to construct in the plot which he purchased, the plaintiffs filed I.A.No.83 of 2014 for restraining him from altering the character of the suit properties. The said I.A was allowed. Questioning the same, the appellant filed a Civil Miscellaneous Appeal before this Court.

4.Since the I.A was allowed by a non speaking order, the CMA was allowed by setting aside the order of granting injunction and the matter was remanded to the file of the Trial Court for disposing the said I.A afresh. Following the remand, I.A.No.83 of 2014 was once again taken up and both the parties were heard. The plaintiffs marked Exs.P1 to P22. The learned Trial Judge allowed the application by order dated 25.07.2016. Aggrieved by the same, the respondent in I.A.No.83 of 2014/41st defendant in O.S.No.56 of 2011 filed this Civil Miscellaneous Appeal.

5.The learned counsel appearing for the appellant contended that it is not as if the appellant was the sole purchaser pendente lite. In fact as many as 39 persons have purchased the similar plots of land from the father of the plaintiff. Many of them have already put up constructions. As on date atleast 4 constructions are going on. In fact, one construction was already put up abutting the main road adjacent to the property which the appellant had purchased. He contended that injunction being an equitable remedy, a person coming to the Court must be bonafide in his conduct. In this case, the plaintiffs have chosen to target him

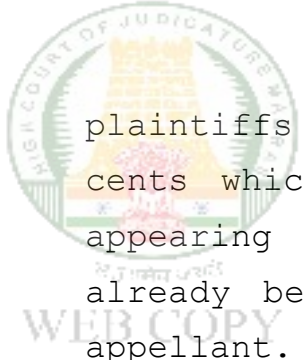


alone. He would further contend that the Court below had chosen to allow the application merely on the ground that the appellant was the purchaser of the property during the pendency of the suit. Since the appellant cannot claim the status of the co-owner, the Trial Court has chosen to allow the application straight away. In other words, the settled principles of law governing grant of injunction namely Prima facie case irreparable hardship and balance of convenience were not considered when allowing the present I.A filed by the plaintiffs.

6. On the other hand, the learned counsel appearing for the plaintiffs/respondents herein pointed out that the property in question measures an extent of 4 acres and 21 cents and that the first defendant / father can have claim only over one third share alone. He had already alienated 2 acres and 20 cents. This is in excess of the one third share available to him. The appellant is the last purchaser. He also pointed out that the appellant had not obtained any planning approval for putting up the present construction. More than anything else, the appellant purchased the property after the suit was instituted. He was immediately made as a party to the suit proceedings. Thus knowing fully well the tenuous character of his right, the appellant had chosen to go ahead with his construction. He further contended that originally injunction was granted in this I.A and that on appeal, it was set aside and the matter was remitted. During this period, the appellant had chosen to put up the construction. In fact, photographs were marked showing that the purchased property was only a vacant site and that during the pendency of the I.A, the same had been put up. He would therefore pray for sustaining the order passed by the learned Trial Judge.

7. Heard the learned counsel on either side.

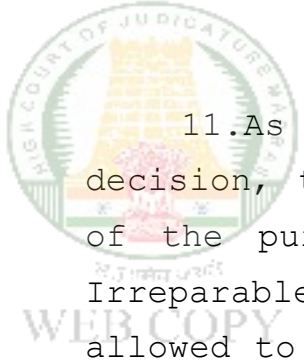
8. The plaintiffs are admittedly not in actual possession of the property in question. The first defendant namely, the father of the



plaintiffs by sale deed dated 07.02.2012 sold away an extent of 9 cents which was a defined piece of land. The learned counsel appearing for the appellant would point out that mutation had already been carried out and patta was issued in favour of the appellant. Unfortunately, the same was not marked as a document in the I.A. But, the same has been enclosed in the typed set of papers.

9.He would place reliance on the decision of the Hon'ble Supreme Court reported in (2010) 2 SCC 77 (Narendra Kante Vs. Anuradha Kante and others). The Hon'ble Supreme Court while considering the question of balance of convenience and irreparable hardship noted that even a purchaser pendente lite is entitled to develop the property acquired by him. This is because, the suit may take a number of years to get concluded and that therefore if the purchaser is restrained from developing the property great hardship would be caused him. In that view of the matter it was held that the balance of convenience lay on the side of the purchaser. At this stage, the learned counsel appearing for the appellant gives an undertaking on instructions that the property purchased by him shall not be alienated or transferred further.

10.This undertaking is placed on record. The plaintiffs are not in possession of the property in question. Third party right has already come into existence. The only question is whether the appellant should be restrained from developing the property or not. This Court is not presently constrained with the merits of the matter. Admittedly, the father of the plaintiffs is having one third share in the suit property. Only at the time of the division by metes and bounds, one would come to know which portion or area of the suit schedule would be allotted to the share of the father. The property purchased by the appellant may fall in the allotted portion of the first defendant's property or it may not fall. At this point of time one cannot make any guess. Thus, prima facie case at this stage does not lie in favour of the plaintiffs.

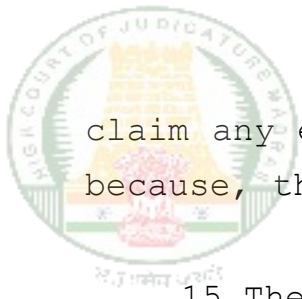


11.As pointed out by the Hon'ble Supreme Court in the aforesaid decision, the balance of convenience would also lie only in favour of the purchaser of land and not in favour of the plaintiffs. Irreparable hardship would be caused to the purchaser if he is not allowed to develop the property purchased by him. The learned Trial Judge has not applied these settled principles of law while considering the petition for injunction. Merely on the ground that the appellant was a purchaser of the land during the pendency of the suit, the application came to be allowed. This is clearly erroneous.

12.I therefore set aside the order dated 25.07.2016 in I.A.No.83 of 2014. But, the matter cannot rest there. As the learned counsel for the plaintiffs pointed out, the suit was filed in June 2011. The appellant chose to purchase the 9 cents of land on 07.02.2012. An application for impleading was filed in June 2012. He was made as a party. Only thereafter, he chose to develop the land purchased by him. Immediately, an application for injunction was filed and it was allowed. Only on appeal it was set aside and remanded. During the interregnum period, the appellant had chosen to put up the construction.

13.As the learned counsel for the plaintiffs rightly contended, the father of the plaintiffs had alienated beyond his one third share and that the appellant is the last purchaser. One cannot now point out as to where the allotted portion would lie.

14.Therefore, in the interest of justice, the appellant is directed to pay a sum of Rs.1,00,000/-, ie., Rs.50,000/- each to both the plaintiffs. The said amount shall be paid within a period of four weeks from today. If the said amount is not paid, the order setting aside the injunction would stand automatically vacated. No application for extension would be entertained. It is made clear that the rights of the parties have not been adjudicated in the Civil Miscellaneous Appeal. The appellant shall not be entitled to



claim any equity at the time of partition of the property. This is because, the appellant knowingly took the risk.

15. The learned counsel appearing for the plaintiffs pointed out that the father already sold 2 acres and 20 cents out of 4 acres 21 cents. The learned Trial Judge is directed to dispose of I.A.No.83 of 2014 for restraining the first defendant from alienating the properties in question. The said I.A. shall be disposed of on or before 10.02.2018.

16. With these observations and directions, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (AE)

/True Copy/

Sub Assistant Registrar

To

1. The Principal District Judge,
Virudhunagar District at Srivilliputhur

2. The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1cc to M/S.T.ANTONY ARUL RAJ, Advocate SR.No.93959.

+1cc to M/S.E.D.PRAKASH, Advocate SR.No.94220.

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and
CMP (MD) No.9272 of 2016
20.12.2017

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SDS/MR/SAR 4/19.01.2018/6P/6C