

**THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

CIVIL MISCELLANEOUS APPEAL NO.150 OF 2015

JUDGMENT: (per Hon'ble Sri Justice T.Amarnath Goud)

This Civil Miscellaneous Appeal is filed challenging the order dated 20.02.2015 in I.A.No.1502 of 2014 in O.S.No.450 of 2014 on the file of the Court of the Senior Civil Judge at Tanuku (for short, the trial Court).

2. The first respondent herein filed O.S.No.450 of 2014 on the file of the trial Court as against appellants herein and respondent Nos.2 to 4 herein seeking declaration and for consequential reliefs. In the said suit, he also filed I.A.No.1502 of 2014 under Order XXXIX Rules 1 and 2 read with Section 151 CPC seeking a temporary injunction against the appellants herein (respondent Nos.1 and 2 therein) restraining them, their men and successors, etc., from making any further construction in the plaint A schedule property on the northern side shown as ABCD, pending disposal of the suit.

3. Appellants herein are father and son, while respondent No.2 herein is the brother of first appellant and respondent Nos.1, 3 and 4 herein are the sons of respondent No.2 herein. For the sake of convenience, the parties shall be referred as they are arrayed in O.S.No.No.450 of 2014.

4. The averments in I.A.No.1502 of 2014 are as follows:

Plaint A and B schedule properties are the absolute properties of late Gosala Gresamma, the mother of plaintiff Nos.1 and 3. She died on 03.08.1995 and her husband pre-deceased her. During the life time of late Gresamma, she executed a registered Will dated 01.08.1991 in a sound and disposing state of mind bequeathing all her properties to be enjoyed by her two sons i.e., defendant Nos.1 and 3 during their life time and gave vested remainder rights to the male children of defendant Nos.1 and 3, who are the plaintiff, defendant Nos.2, 4 and 5. Said Will was upheld by the lower Court in O.S.No.79 of 1999. As per the said Will, defendant Nos.1 and 3 are life interest holders and they are entitled to enjoyment of the properties during their life time only and they have no right to alienate or change the nature of the properties and that the male children of defendant Nos.1 and 3 would have the absolute rights, including alienation rights, over the properties. As per the said Will, the plaintiff, defendant Nos.2, 4 and 5, being the male children of defendant Nos.1 and 3, have got undivided joint rights over the plaint A and B schedule properties. Plaint A schedule property is a house property in 200 square yards consists of a RCC roof building with vacant site appended to it. Plaint B schedule properties are the landed properties, situated at Batlamaguturu Village, Penumantra Mandal, West Godavari District. When defendant No.1 (father) and defendant No.2 (son)

removed a portion of the structure in plaint A schedule property and started making construction in the removed portion, the plaintiff filed I.A.No.450 of 2014 seeking to restrain defendant Nos.1 and 2 from making any further construction in the plaint A schedule property on the northern side.

5. Defendant Nos.1 and 2 therein filed counter admitting that, by the date of filing of the suit, they have removed the northern house portion of plaint A schedule property and laid foundation and are constructing a house. They further stated that as per the contents of the Will, though defendant Nos.1 and 3 have no right to sell the property, there is no bar for development or to undertake repairs or to make constructions over the property for their enjoyment and that there is also no bar for partition of the properties between the life interest holders i.e., defendant Nos.1 and 3. They also stated that a partition was held among defendant Nos.1 and 2, as per which, northern half share of the house property fell to the share of defendant No.1 and southern half share of the house property fell to the share of defendant No.3 and they have been enjoying their respective properties by paying taxes. It is admitted by defendant No.1 that after his retirement, with a view to enjoy the property, he has started making construction in his northern half share of the house property and he did not cause damage to the half share of defendant No.3.

6. The trial Court, after going through the averments in the petition and counter, by order dated 20.02.2015, has granted temporary injunction on the ground that if the injunction is not granted, the plaintiff would suffer irreparable injury. The operative paras of the judgment in which the trial Court came to the conclusion that there is necessity to grant the injunction in favour of the plaintiff, are as under:

“ 49. In the present case, petitioner could establish prima-facie that he got undivided joint right in the disputed property. Further he could able to satisfy the court that the claim of exclusive right of R1 over the disputed property is not tenable in view of undivided joint right of petitioner over the entire property including disputed property. In the said circumstances, if R1 is allowed to make further construction by way of refusal of injunction, there is every chance that petitioner the vested interest holder who has undivided joint right and have constructive possession over property, cannot be in a position to enjoy the property without intervention of law in case he succeeded in the suit. The contention of R1 that he has already invested amounts and raised substantial construction cannot be taken into consideration as he is well aware that he is making unauthorized construction without having any legal right. Further it is also to be taken note of that apprehension of the petitioner as to infringement of his right is clear in view of the specific contention of R1 in claiming exclusive right over property, the court can appreciate the contention of the petitioner that by brining into a partition deed R1 not only denied right of the petitioner as vested interest holder and there is every likelihood of obstruction to the joint property after life time of R1 and R3.

50. In view of the said circumstances, this court felt that the inconvenience to the petitioner if injunction is refused is more than the inconvenience caused to Ra if injunction is granted, hence convinced that balance of convenience is in favour of the petitioner. It is also convinced that the petitioner would suffer irreparable injury which cannot be compensated by way of damages if injunction is refused.

51. Having satisfied with the contention of the petitioner and as petitioner is succeeded in proving the three ingredients necessary for granting injunction, this court held that R1, R2 and their men are to be restrained from making further construction in the disputed property by granting injunction as prayed for. Thus pint is answered accordingly in favour of petitioner.

52. In the result, the petition is allowed granting temporary injunction restraining the respondents 1 and 2 and their men, agents and successors etc., from making any further construction in plaint A schedule property on the northern side shown as ABCD as per plaint plan pending disposal of the suit. The Interim injunction earlier granted is made absolute. No order as to costs.”

7. Learned counsel for the appellants (defendant Nos.1 and 2) submitted that as per the Will dated 01.08.1991, defendant No.1, along with defendant No.3, has every right to enjoy the plaint schedule properties during his life time and plaintiff has no right to restrain him from enjoying the plaint schedule properties. He further submitted that partition was held between defendant No.1 and defendant No.3, under which, northern half share of the house property fell to the share of defendant No.1 and southern half share of the house property

fell to the share of defendant No.3 and they have been in enjoyment of their respective shares. He further submitted as the building was in dilapidated condition and is not in habitable condition, defendant Nos.1 and 2 started making constructions in their half share portion without making any damage to the other portion, with a view to better enjoyment. He also submitted that defendant Nos.1 and 2, after taking the consent of the plaintiff, have started construction of the building which is now raised upto the lintel level. He further submitted that the proposed construction would increase the value of the property and no prejudice would be caused to the plaintiff and defendant Nos.3 to 5, much less, there is no infringement of their rights. He also filed an affidavit wherein the appellants (defendant Nos.1 and 2) have undertaken that if they are permitted to proceed with the construction, they will not claim equities in the event if the plaintiff succeeds in the suit. Learned counsel for the appellants, upon instructions from the appellants present in the Court, fairly submits that the appellants would not claim equities, or the cost of construction or whatsoever, and that the appellants would abide by the result of the suit pending before the trial Court. He further submitted that the construction is done in an area around 130 square yards and informed the dimensions of the construction. The photographs and reports are relied upon.

8. Per contra, the learned counsel for respondents submitted that the construction is in about 300 square yards and also submitted photographs. He further submitted that though it is sought to be argued by the appellants (defendant Nos.1 and 2) that partition has taken place, however, no such partition has, in fact, taken place till date and no demarcation of the respective shares has been made. Learned counsel further submitted that as per the Will dated 01.08.1991, defendants 1 and 3 were permitted to enjoy the property during their lifetime and the grandsons were granted absolute rights over the plaint schedule properties.

9. Considering the arguments advanced by learned counsel for both the sides and in view of the fact that the partition suit is pending before the trial Court, and considering the affidavit of the appellants (defendant Nos.1 and 2) that they would not claim equities and also the costs of construction and expenditure incurred, if they are permitted to proceed with the construction, we are of the view that this Civil Miscellaneous Appeal can be disposed of by taking on record the undertaking of the appellants.

10. Hence, the Civil Miscellaneous Appeal is disposed of by permitting the appellants to complete the construction to the existing ground floor level only, and they shall not make construction of further floors or make further extensions to the

existing ground floor. The order dated 20.02.2015 in I.A.No.1502 of 2014 in O.S.No.450 of 2014 passed by the Court of the Senior Civil Judge at Tanuku is set aside. No costs. Miscellaneous petitions pending, if any, shall stand closed.

SURESH KUMAR KAIT, J

T.AMARNATH GOUD, J

Date: 19-01-2018
TJMR

