

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**939 CIVIL APPLICATION NO.5561 OF 2019
IN
SECOND APPEAL NO.871 OF 2018**

Ajay s/o Tulsidas Mote,
Age 40 years, Occupation Service,
R/o Tulsi Sadan, Vishnu Nagar,
Behind Akashwani, Aurangabad.

...Applicant.

VERSUS

Sushilabai w/o Satwajirao Jagtap,
Age Major, Occupation Household,
R/o Nawabpura, Aurangabad.

...Respondent.

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Mr. V. R. Dhorde, Advocate for applicant.
Mr. V. D. Sapkal, Advocate for respondent.

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**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 03-05-2019.**

ORAL ORDER :

1. Present application has been filed for modifying or reviewing order passed by this Court on 12-04-2019. The present applicant is the original appellant who is challenging the Judgment and decree dated 24-09-2018 passed by learned Adhoc District Judge -2, Aurangabad in Regular Civil Appeal No.24 of 2016, as well as Judgment and decree dated 30-11-2007 passed by learned Civil Judge, Senior Division, Aurangabad in Special Civil Suit No.233 of 2006.

2. The matter was on board on 01-11-2018. The present respondent had filed caveat and therefore learned advocate representing the respondent was present. After hearing the learned advocate for applicant-appellant for some length, it was thought fit by this Court to adjourn the matter for admission with understanding that it would be heard finally at the stage of admission. While passing the said order this Court had passed an order that, till the next date of hearing both the parties shall not create third party interest. Thereafter the matter was listed on 14-12-2018. On that day the matter could not reach and it was adjourned to 06-02-2019. The interim relief or statement made earlier was continued till next date. Thereafter on 06-02-2019 the matter could not reach and next date was given as 25-03-2019. The matter was not listed on 25-03-2019. So also the Bench was not available on that day, and therefore, the board was not published. Under such circumstance the applicant could not pray for continuation of the interim relief. Thereafter, the matter was got circulated and was listed on 12-04-2019. It was adjourned on 07-06-2019, however at that time when prayer for continuation was made, it has been refused.
3. It has been stated that the applicant in view of the order dated

01-11-2018 had prepared private paper book and submitted it to the office therefore the applicant is willing to workout the matter, but since he could not get the order continue as regards ad-interim, he has prayed for continuation of the said order/ or reviewing the order that was passed by this Court on 12-04-2019. It is stated that, there is serious apprehension that the respondent may transfer or alienate or create third party interest in respect of the suit property. It is also stated that, during the pendency of First Appeal No.1746 of 2007 before this Court, an order was passed on 08-01-2008 there was stay to the execution of the decree passed in Special Civil Suit No.233 of 2006. In spite of that the present respondent had executed registered gift deed in favour of one relative Dhananjay Pawar and parted with suit property to the extent of 2227.10 square feet, and therefore, it is apprehended that if the interim relief is not continued or the order is not reviewed then it will leave to multiplicity proceedings.

4. The application has been objected by the respondent on the ground that, a specific order of discontinuation of the interim relief has been passed on the ground that the said interim relief was not got continued after 06-02-2019. The said order cannot be reviewed.

Further by relying upon the decision in, *Raghavendra Swamy Mutt Versus Uttaradi Mutt*, reported in *AIR 2016 Supreme Court 1589*, and *Ram Phal Versus Banarasi and Others*, reported in *(2003) 11 Supreme Court Cases 762*, it has been submitted that when the second appeal is not admitted for the substantial questions of law as contemplated under Section 100 of Code of Civil Procedure High Court does not get any jurisdiction to pass any interim relief.

5. Heard Mr. V. R. Dhorde, learned advocate for applicant and Mr. V. D. Sapkal, learned advocate for respondent. Learned advocate appearing for the applicant submitted that, after hearing both sides the order dated 01-11-2018 was passed. That order was never challenged before the higher Court contending that it is an illegal order. Due to inadvertence of the advocate when the matter was on board on 06-02-2019 however it could not reach. A prayer for continuation of the interim relief was not made and therefore it amounted to discontinuation. However, on 25-03-2019 the Bench was not available and for that purpose again the request to continue the order of interim relief could not be made. Therefore, taking into consideration the past history if the interim order is not continued then there would be multiplicity of the proceedings. He also

submitted that, though the ratio laid down in both the authorities cited by the learned advocate for the respondent cannot be denied yet still this Court has power to pass ad-interim orders to protect the interest of the parties.

6. Per contra the learned advocate Mr. V. D. Sapkal for the respondent after relying upon the above said authorities submitted that, this Court had no jurisdiction to pass any order of interim nature before admitting the second appeal. He also submitted that, what was prayed in Civil Application No.13569 of 2018 along with second appeal No.871 of 2018 was stay to the execution of the impugned Judgment and decree, and therefore, question of restricting a party from creating third party interest did not arise.

7. The first and the foremost fact that is required to be considered is that, Special Civil Suit No.233 of 2006 was filed for declaration only. The suit was decreed and the declaration as prayed in respect of ownership and the alleged gift deed to be cancelled after declaring it as void and illegal has been granted. The appeal filed by the present applicant-appellant is dismissed. On 01-11-2018 the second appeal as well as Civil Application No.13569 of 2018 were on board. After hearing Senior Counsel for applicant-

appellant it appears that the order was passed to adjourn the matter for admission with understanding that the entire appeal would be heard finally at the stage of admission. Direction was given to the applicant-appellant to file compilation of the documents and depositions etc., and at the end it was stated that till the next date of hearing both the parties were directed not to create third party interest. Perusal of Civil Application No.13569 of 2018 would show that, it was under Order 41 Rule 5 of Code of Civil Procedure to stay the execution of the impugned Judgments. There was no separate application filed by the applicant - appellant for grant of injunction against the respondent. No doubt the Appellate Court as far as possible when dealing with the appeal should ensure that the position of the property would remain as it is till the final decision in the appeal and for that purpose passing of order of maintaining status-quo is usually adopted. Taking into consideration the nature of the decree that was passed in this case i.e. the decree for declaration, it would come into force immediately after the pronouncement of the Judgment. There is no question of putting it to execution specifically. Under such circumstance though it appears that this Court directed both the parties not to create third party interest on 01-11-2018, in fact there was absolutely no application

filed by the applicant - appellant to that effect. Further it can also be said that, no separate order was passed on the civil application on that day, however on 14-12-2018 when the matter was on board order was passed in the second appeal as well as the civil application and the interim relief or statement made earlier was continued till next date.

8. The matter was then on board on 06-02-2019 but it could not reach on that day. However, since statement was not made, the interim relief was not continued. Further it appears that, the matter was again scheduled to be on 25-03-2019 but the Bench was not available. It will not be out of place to mention here that, though the Bench may not be available yet the charge would be with some another Bench and it could have been continued on that day by mentioning it before the in-charge Bench, however it appears that it was not got done. Thereafter in fact the matter was got circulated by the respondent on 12-04-2019. Learned advocate for the applicant - appellant submitted that, he has not received the intimation about the circulation and then the learned advocate for the respondent gave no objection to adjourn the matter. However, then learned advocate for the applicant - appellant sought

continuation of the interim relief and in that circumstance it was observed by this Court that, "perusal of the earlier orders would show that the interim relief was continued till 02-06-2019 only but thereafter it was not got extended, under such circumstance it was not continued.

9. Now instead of bringing an application for injunction, the applicant has filed this application for continuation of the earlier interim order. As aforesaid the application which was filed by the respondent i.e. Civil Application No.13569 of 2018 was for stay under Order 41 Rule 5 of Code of Civil Procedure and not for claiming injunction. The parameters which are required to be considered for granting injunction are different than for grant of stay to the impugned decree. Now at this stage the learned advocate for the applicant is contending that alternatively it is stated in the application that, there is likelihood by the respondent to create third party interest and therefore prayer clause "C" has been made to restrain the respondent from transferring, alienating or creating third party interest. This alternative prayer would be considered later on but what was on record on 01-11-2018 was that there was no application for grant of any injunction. Though this Court had

granted that prayer that does not mean that it should be continued when it is revealed that there is no such application. Further whatever was not got continued and it got discontinued cannot be continued under such circumstances.

10. As regards the alternative prayer is concerned, the applicant is relying on the gift deed which respondent had executed in the past i.e. on 24-12-2013. Copy of that gift deed has been produced along with the application. It is to be noted that, whatever has taken place on 24-12-2013 would be taken note of now as a future act. For that act that is the gift deed, parties were at liberty to take their legal recourse. It cannot be said that, whatever had happened in the past would also now happen. At least the present application does not say as to what action he has taken in respect of the said gift deed. Further at this stage for the above said reasons when the application cannot be allowed, I do not want to go into the aspect as to whether this Court could have granted the interim relief or not in view of the above said pronouncements by Hon'ble Apex Court. Therefore, the application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-