

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
THE HON'BLE SRI JUSTICE T.VINOD KUMAR**

CMA.No.307 of 2017

ORDER: *(Per the Hon'ble Sri Justice M.S.Ramachandra Rao)*

1. Heard Sri A.Venkatesh, counsel for appellant and Sri V.Srinivas, counsel representing Sri O.Manohar Reddy, counsel for respondents 1 to 4.

2. This Appeal is filed challenging the order dt.20.02.2017 in I.A.No.1615 of 2016 in OS.No.213 of 2014 of the XXV Additional Chief Judge, City Civil Court, Hyderabad.

3. The appellant is 2nd defendant in the said suit.

4. The respondents 1 to 4, who are sisters, filed the said suit against the appellant, who is their younger brother, and their mother, 2nd respondent herein and others for partition of the suit schedule properties contending that they and appellant and respondents 6 and 7 are entitled to 9/64th share and that the appellant is only entitled to 1/64th share in the suit schedule properties.

5. In the said suit, the appellant herein filed I.A.No.1615 of 2016 under Order XXXIX Rules 1 and 2 CPC alleging that the respondents 1 to 4 are creating nuisance in regard to item Nos.4 and 5 of the plaint schedule, which are being run as

function halls by him exclusively; that his possession thereof is admitted by respondents 1 to 4; that they should be restrained from interfering with his possession of the said items of the property or from creating any nuisance therein, because such acts on the part of the respondents 1 to 4 are disturbing the customers, who have booked the said function halls. It is also pleaded that the appellant had filed a complaint on 07.11.2016 with Saroornagar Police against respondents 1, 2 & 6 and their husbands just prior to filing of the suit and the police did not take any action thereon. He also contended that there was a Will executed by his father bequeathing these properties in his favour on 09.07.2013 and he is exclusively entitled to these properties.

6. Counter affidavit was filed by respondents 1 to 4 opposing these applications and denying the allegations leveled by the appellants against them. They contended that all the suit schedule properties are joint family properties, that appellant and all the respondents are in joint possession of the same as tenants-in-common, and the appellant did not have any exclusive title or possession over the said property. They alleged that items 4 and 5 of the plaint schedule were function halls, which are being run and looked after by the appellant and the respondents jointly; that they have an

equal share in these properties along with the appellant; and that there cannot be an injunction granted in favour of the appellant because they are co-owners.

7. By order dt.20.02.2017 the Court below dismissed the said application. After referring to the contentions of both the parties, it held that the application for temporary injunction filed by the appellant was no doubt maintainable but on the facts it held that the appellant cannot be said to be in exclusive possession and management of item No.s 4 and 5 of the suit schedule and that there is no allegation against respondents 1 to 4 that they are causing wastage or damage to items 4 and 5 of the suit schedule property or they are trying to alienate the same. It therefore held that the appellant did not have *prima facie* case, balance of convenience was not in his favour and no irreparable loss or injury is caused to him if injunction is not granted in his favour.

8. Assailing the same, this Appeal is filed.

9. Counsel for the appellant contended that the order passed by the Court below cannot be sustained; that in situations where a co-owner of the property was in exclusive possession also, a temporary injunction pending the suit can be granted in certain circumstances and even if the

respondents' case that he is a co-owner along with them and other respondents, is to be accepted as correct, still since the respondents 1 to 4 are married daughters and since they never pleaded that they ran the function halls in items 4 and 5 of the plaint schedule, and in the Will executed by their father, he had specifically mentioned about the appellant helping him in the management of the same during his life time, the Court below ought to have granted him temporary injunction pending suit. He placed reliance on the judgments of the Supreme Court in ***T.Lakshmipathi and others v. P.Nithyananda Reddy and others***¹, ***Ayyaswami Gounder and Ors. v. Munnuswamy Gounder and Ors.***² in support of his contentions.

10. Counsel for the respondents 1 to 4 however supported the order passed by the Court below. He contended that the pleadings regarding alleged interference by the respondents 1 to 4 in the affidavit filed in support of I.A.No.1615 of 2016 are vague and the Court below therefore did not commit any error of law in refusing to grant temporary injunction to the appellant. He placed reliance on the judgments of the Supreme Court in ***Jafauri Sah and Others v. Dwarika***

¹ 2003(5) SCC 150

² AIR 1984 SC 1789

Prasad Jhunjhunwala and Others³, Tanusree Basu and Others v. Ishani Prasad Basu and Others⁴ and Sakhahari Parwatrao Karahale and Another v. Bhimashankar Parwatrao Karahale⁵.

11. We have noted the contentions of both sides.

12. Since the suit for partition is still pending and since the plea of the appellant about the validity of the Will set up by him is still to be decided, we do not want to express any opinion at this point of time as to, whether the suit schedule properties exclusively belong to the appellant or that they are joint family properties belonging to the appellant as well as the respondents.

13. For deciding this application we wish to proceed on the footing that the properties are joint family properties.

14. In ***T.Lakshmipathi***'s case(1 supra) the Supreme Court at para 25 held that:

“The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified and limited by similar interest of the other co- owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so he may be restrained by an injunction. A co-owner may, by an arrangement, expressed or implied, with his other co-owners,

³ AIR 1967 SC 109

⁴ 2008(4) SCC 791

⁵ 2002(9) SCC 608

possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is dispossessed by the latter, he can recover exclusive possession. (See *Jahuri Sah & Ors. Vs. Dwarika Prasad Jhunjhunwala & Ors.*, (1966) Supp SCR 280). It is beyond any controversy that on the death of late P. Narayana Reddy, his rights devolved upon the several heirs including respondent no.1. The respondent no.1 is the only male person in the body of the co-owners, all others being women. It may be for this reason, or otherwise, that the respondent no.1 was in possession of the property, through tenants, realizing the rent peacefully and with the consent, expressed or implied, of other co-heirs of late P. Nithyananda Reddy. So far as the respondents no.2 and 3 are concerned, by operation of Section 116 of the Evidence Act, they were estopped from challenging or denying the ownership of the respondent no.1 and his rights in the tenancy premises. As held in *Vasudeo Vs. Balkishan*, (2002) 2 SCC 50, the rule of estoppel between landlord and tenant continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord. The estoppel would cease to operate only on the tenant openly restoring possession by surrender to the landlord. Neither the respondents no. 2 and 3 nor their successors in interest or the persons claiming under them could have denied the title of the respondent no.1 during the continuance of the tenancy and even thereafter unless they had restored possession over the tenancy premises to the respondent No.1. Looking at the status of the appellants whether as co-owners or as persons inducted in possession by the tenants they have no legs to stand on. If other co-owners could not have dispossessed the respondent no.1 or demolished the property without the consent of respondent no.1 it is difficult to conceive how their transferees could have demolished the tenancy premises and raised their own construction over the land on which the tenancy premises stood earlier”(emphasis supplied)

15. This principle was reiterated in **Tanusree Basu**’s case(4 supra) in the following terms:

“13. There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be

treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.

18. We are concerned in this case with a question whether if a co-owner was in specific possession of the joint property, he could be dispossessed therefrom without the intervention of the court. In this case, the first respondent is not claiming title of adverse possession. The said decision has, therefore, no application to the fact of the present case.

23. It is not the law that a party to a suit during pendency thereof shall take law into his hands and dispossess the other co-sharer. If a party takes recourse to any contrivance to dispossess another, during pendency of the suit either in violation of the order of injunction or otherwise, the court indisputably will have jurisdiction to restore the parties back to the same position.”(emphasis supplied).

16. In **Sakhahari Parwatrao Karahale's** case(5 supra) cited by the counsel for the respondents the Supreme Court while reiterating the normal legal position that if there was no partition among the members of the joint family, each member of the joint family is a co-sharer and possession of one is possession of all, held that even if there is exclusive possession of a party before partition, such party cannot get an injunction.

17. This legal position seems to be contrary to the law declared in **T.Lakshmipathi's** case(1 supra) and **Tanusree Basu's** case(4 supra). That apart, no precedent is cited in support of said conclusion. Therefore, we are not inclined to

follow the judgment in **Sakhahari Parwatrao Karahale's** case(5 supra).

18. In **Jafauri Sah's** case(3 supra) also it was stated that every co-owner of undivided share is entitled to enjoy the whole of the property and is not liable to pay compensation to other co-owners, who have not chosen to enjoy the property thereby implying that if such co-owner is sought to be dispossessed, he is entitled to seek protection from dispossession.

19. In view of the judgments of the Supreme Court in **T.Lakshmipathi's** case(1 supra) **Tanusree Basu's** case(4 supra) and **Jafauri Sah's** case(3 supra), we hold that even if the appellant and respondents are said to be joint family members, if the appellant is able to establish his exclusive possession of items 4 and 5 and the fact that respondents 1 to 4 are trying to interfere with his possession and enjoyment thereof, he would be entitled to get a temporary injunction pending suit.

20. It is not in dispute that respondents 1 to 4 are married and are staying with their respective husbands. It is not pleaded by respondents 1 to 4 that they had ever managed the function halls in items 4 and 5 of plaint schedule exclusively. Their plea is that they are deemed to be in

possession because they are co-owners along with the appellant.

21. In the affidavit filed in support of I.A.No.1615 of 2016, there is a clear pleading by the appellant about the attempts of the respondents 1 to 4 and their husbands, who interfered with the running of function halls in items 4 and 5 of the plaint schedule, and there is also a clear reference to the police complaint dt.07.11.2016 given by the appellant against the husbands of the respondents 1, 2 & 6. A reading of the said complaint shows that the appellant had alleged he was beaten-up by his brothers-in-law, locks of the function halls were broken opened by them, and that they had taken away the register books and important land documents available in the function halls. The said police complaint was filed along with the counter affidavit by the appellant, but the same was not taken note of by the Court below.

22. Therefore, it can not be said that the appellant was not entitled to have an apprehension about his dispossession by respondents 1 to 4 & 6.

23. In our opinion, respondents 1 to 4 having got married, and staying with their spouses, would not *prima facie* be running the function halls, and since the appellant was the only male child of his parents, naturally he would be running

them. Though his possession might be on behalf of other co-owners, that does not entitle the respondents 1 to 4 to interfere with his running of the function halls in items 4 and 5 of the plaint schedule and attempt to totally oust him from possession thereof.

24. Counsel for respondents 1 to 4 also contended that there was no temporary injunction in favour of the appellant from 2016 till date, and therefore he ought to be denied the said relief.

25. Due to steep fall in the strength of judges in this Court, this Court was not able to take up this CMA at an earlier point of time.

26. It is settled law that mistake of the Court should not cause prejudice to any party. Therefore, the fact that for the last 2 years there could not be any disposal of this appeal, cannot be a ground to deny relief to the appellant at this stage.

27. Therefore, this Civil Miscellaneous Appeal is allowed; Order dt.20.02.2017 in I.A.No.1615 of 2016 in OS.No.213 of 2014 of the XXV Additional Chief Judge, City Civil Court, Hyderabad is set aside; and the said I.A. is allowed. No order as to costs.

28. Consequently, miscellaneous petitions pending if any shall stand cancelled.

M.S. RAMACHANDRA RAO, J

18th September, 2019.
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T.VINOD KUMAR, J

