

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO11389 OF 2021
IN SA NO.306 OF 2006**

SMT. BEGUMBEE W/O ABDUL GAFOOR
DIED THROUGH ITS LRS. AND OTHERS

VERSUS

ABDUL RAHIM S/O ABDUL KARIM
DIED THROUGH ITS LRS. AND OTHERS

Advocate for Applicants : Mr. K. M. Nagarkar

Advocate for Respondents No.1/1 to 1/3, 1/4/1 to 1/4/10 in SA: Mr.
V.I. Thole

Advocate for Respondents No.2/1 to 2/6 : Mr. Mujtaba Gulam Mustafa
Advocate for Respondent No.1 : Mr. T. Vinod

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
29-11-2021**

**Date of Pronouncing The Order :
07-06-2022**

ORDER :

1. Present application has been filed for grant of injunction. The prayer Clause 'B' runs thus :-

“(B) Pending hearing and final disposal of the present second appeal the respondents be restrained from alienating, transferring and/or creating any third party interest or change the nature of the suit properties, by defendants or through their agent or through any one on their behalf in view of the facts and circumstances

mentioned in the civil application and in the interest of justice.”

2. The applicants are the original plaintiffs/appellants who have filed the Second Appeal No.306 of 2006 to challenge the Judgment and decree dated 10-02-2006 in Regular Civil Appeal No.257 of 2004 passed by the learned 3rd Adhoc Additional District Judge, Aurangabad, thereby dismissing the appeal and confirming the Judgment and decree dated 07-09-2004 in Regular Civil Suit No.125 of 2000 passed by learned 2nd Joint Civil Judge, Junior Division, Aurangabad. The suit was filed for partition and separate possession. It came to be dismissed and the Appellate court has confirmed the said decree. This Court by order dated 22-07-2008 has admitted the second appeal and framed the substantial questions of law. The appeal is pending for final hearing and disposal. It is to be noted that along with the appeal the applicant/appellant had filed Civil Application No.3833 of 2006 for not to alienate the suit property till the decision of the second appeal. This Court had rejected that application on 29-07-2021 on the ground that since 2006 till 2021 the applicants had not bothered to look at the application and press the said application. It is then stated that the original plaintiff expired and till her lifetime the

respondents had not taken any step to sell out the property or to change the nature of the suit property, but after her death the legal representatives of the defendants/respondents have tried to change the nature of the property in the month of February 2020 and also tried to sell out the suit properties. While disposing of the earlier application, liberty was granted by this Court to file afresh civil application if the occasion arises. It is then stated that in the month of February 2020 the applicants who are the legal heirs came to know that the defendants are likely to sell the suit property and thereupon they have given the general power of attorney to one Fayaz Khan s/o Kabir Khan. Therefore, there is possibility that the respondents would change the nature of the property. Now, the applicants also contend that during the pendency of the second appeal, the defendants have sold out the property to one Raju Suresh Nile on 16-06-2016 and that Raju Suresh Nile has sold the property to one Kishor Sanjay Gayake by registered sale deed dated 24-06-2021. Now this position is emerging and therefore in order to stop the further change in the nature of the property, the respondents deserve to be enjoined from creating any third party interest. It has been stated that the suit property is situated at different places and the property at village Mandki the construction

is going on without the permission of Grampanchayat. At Suit Property Gut No.234 and 235 in village Chikalthana also the defendants are trying to sell out the plots and started RCC construction without any permission from the competent authority. Hence, the application.

3. Heard learned Advocate Mr. K. M. Nagarkar for applicants, learned Advocate Mr. Mujtaba Gulam Mustafa for respondents No.2/1 to 2/6, and learned Advocate Mr. V. I. Thole for respondents No.1/1 to 1/3, 1/4/1 to 1/4/10 in second appeal.

4. The learned Advocate appearing for the applicants who are the legal representatives of the appellant in second appeal/original plaintiff has stated that this Court while rejecting Civil Application No.3833 of 2006 observed that since the application was not pressed from 2006 till 2021, it appears that there is no cause of action for the applicant to seek injunction. However, liberty was granted to the applicants to file similar application if occasion arises. The legal representatives of the appellants have now gathered the information and came to know about the disposal of part of the property and also in respect of construction those are going on in the suit property, therefore, in order to restrict the change in the

nature of the property, it is necessary that the injunction should be granted. He relied on the various documents in the form of copies of sale deed, applications with the revenue authorities, 7/12 extracts etc. to support his contention.

5. The learned Advocate Mr. Mujtaba Gulam Mustafa for respondents No.2/1 to 2/6 vehemently submitted that this Court has rejected Civil Spplication No.3833 of 2006 which was for the same purpose and no new ground has been shown by the applicants, and therefore, the present application is barred by the principles of res judicata. He relied on the decision in *U.P. State Road Transport Corporation Vs. State of U.P. and Another*, reported in AIR (2005) (SC) 446 : (2005) 1 SCC 444, wherein it has been observed that :-

“The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of Section 11 of Code of Civil Procedure in this respect. Res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.”

He further submitted that the alleged alienations were in the year

2016 and also the construction had commenced prior to 29-07-2021 on which day this Court had rejected the earlier application. There is no reason given by the applicants as to why they had not pressed for the said application which they had filed in the year 2006 till 2021. Merely by saying that no steps were taken by the respondents to dispose of the property, they had not pressed the application will not be a correct position and that statement is also contrary to the factual aspect which the applicants want to agitate now by producing documentary evidence. Further, as regards the application of Section 52 of the Transfer of Property Act is concerned, the said provision is based on public policy and it has been enacted in order to put an end to the litigation. However, the subsequent purchasers will get it subject to the outcome of the decision. Reliance has been placed on *Madhukar Nivrutti Jagtap and Others Vs. Smt Pramilabai Chandulal Parandekar and Others*, reported in (2019) AIR (SC) 4252 : (2020) 15 SCC 731, wherein it has been held that,

“It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In

other words, the transfer remains valid subject, of course, to the result of the suit. The pendent lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court.”

Under such circumstance, the injunction cannot be clamped on the respondents. The learned Advocate Mr. V. I. Thole for respondents No.1/1 to 1/3, 1/4/1 to 1/4/10 also made submissions in support of the submissions made by learned Advocate Mr. Mujtaba Gulam Mustafa for respondents 2’s heirs.

6. At the outset, it is to be noted that the earlier Civil Application No.3833 of 2006 came to be rejected by this Court by order dated 29-07-2021. It appears that the said order is not challenged by the present applicants further. This Court had noted that though the application was filed in the year 2006, no efforts were made by the applicants to have an order in their favour. No doubt the second appeal is admitted, but in order to protect the nature of the property it appears that though application was filed, no efforts were made by the original appellant. While deciding that application also it has been observed that there was an attempt by the learned Advocate for the applicant to show that now there is an attempt on the part of

the respondents to create third party interest, but then this Court noted that the applicant failed to satisfy the Court as to how whatever the steps now the respondents are trying to take would give a cause of action for the applicant which is going back to the date in 2006. That application came to be rejected as it suffers from delay and latches. The original plaintiff/appellant in second appeal expired on 29-11-2013. It appears that her legal representatives were brought on record by order dated 01-04-2021. This Court at that time also, that is while deciding Civil Application No.4742 of 2020, observed that there is delay of seven years in bringing the legal representatives of the appellant on record. Along with the said application why application which is now filed i.e. present Civil Application No.11389 of 2021 was not filed, is a question. The applicants legal representatives cannot be allowed to say that they were not aware of alienation of some of the property and starting of construction work in other two properties by the respondents around 2016. Definitely the earlier order passed by this Court is creating hurdles for the present application. In other words, the present application is barred by principles of res judicata in view of the decision in *U. P. State Road Transport Corporation (Surpa)*. The legal position explained in *Madhukar Nivrutti Jagtap (Supra)* also is

applicable here, and further reliance can be placed in the decision in *G. T. Girish Vs. Y. Subba Raju (D) by Lrs and Another*, reported in 2022 SCC OnLine SC 60, wherein Hon'ble Supreme Court has observed that :-

"The right of the party to the suit who conveys his right by a sale is extinguished. All that Section 52 of the Transfer Property Act provides is that the transfer which is made during the pendency of the proceeding is subjected to the final result of the litigation."

Therefore, when the rights of the party to the present proceeding even after the transfer is subject of the present litigation and the applicants were not diligent enough in coming to this Court. Further, both the Courts below are against the original appellant are the points for which the balance of convenience is tilting in favour of the respondents. Now as regards the further construction that is coming up, definitely the ratio in *Madhukar Nivrutti Jagtap (Supra)* and *G.T. Girish (Supra)* would come into play. Therefore, this is not a fit case where injunction should be granted as prayed during the pendency of the second appeal. Hence, the application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.