Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 93 OF 2023

SANTOSH SUBHASH KULKARNI

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Vilas Vishnupant Jadhav & anr. ...Appellants

Versus

Surekha Shankar Jadahv & ors. ...Respondents

WITH

INTERIM APPLICATION NO. 1307 OF 2023

Mr. Vijay Patil, a/w Mr. Kalpesh Patil, for the Appellant.
Mr. Surel Shah, a/w Akshay Petkar, for Respondent Nos.1 to 6.

CORAM: N. J. JAMADAR, J.

DATED : 5th APRIL, 2023

ORDER:-

1. This appeal under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 ("the Code") is directed against an order passed on an application (Exhibit-5) in Special Civil Suit No.967 of 2022, whereby the said application taken out by the plaintiffs for temporary injunction under Order XXXIX Rules 1 and 2 of the Code came to be rejected.

2. The background facts leading to this appeal can be stated as under:

(a) Vishnupant Jadahv was the father of plaintiff Nos.1 and 2, Shankar, the predecessor in title of defendant Nos.1 to 6 and Dilip, the predecessor in title of defendant Nos.7 to 9. Kamal was the wife of Vishnupant. They constituted a joint family. In 1963 a joint family business under the name and style of Gajanan Cycle Mart and Auto Care was started. Another concern namely Gajanan Caterers was started in 1967,

(b) The plaintiffs assert, out of the joint family income, the joint family purchased land bearing Gat No.25/7/1 admeasuring 13Are at Mauje Ambegaon Budruk, Taluka Haveli, District Pune (described in paragraph 1C of the plaint), in the joint names of Kamal, plaintiffs, deceased Shankar and deceased Dilip. In the year 1992 – 1993 the joint family again purchased agricultural land situated at Mauje Kesnand bearing Gat No.264 admeasuring 6H. 41Are under the registered Sale Deed dated 8th September, 1992 and a further 20 Are land out of the said Gat number by a Sale Deed dated 20th October, 1993 in the joint names of Vishnupant, Kamal, plaintiff deceased Shankar and deceased Dilip. Vishnupant expired on 26th August, 2002. Kamal died on 14th December, 2016 (described in paragraph 1A of the plaint).

(c) Since the year 2005, according to the plaintiffs, for the convenience, two family concerns have been managed separately.

(d) On 24th February, 2022, the plaintiffs claimed to have come across a notice published in a newspaper that defendant Nos.1 to 6, the successor in interest of Shankar, their deceased brother, were professing to sale 45Are land out of the suit property described in paragraph 1A. Upon inquiry, it transpired that in the year 2017, defendant Nos.1 to 6 got a Gift Deed executed from the plaintiffs by misrepresentation and fraud and on the strength thereof vide Mutation Entry No.4568 the names of the plaintiffs were deleted from the record of right of suit property (1A).

(e) After exchange of notices the plaintiffs instituted suit seeking cancellation of Gift Deed dated 27th November, 2017 and for partition of joint family properties with the allegation that all the properties were acquired out of joint family funds and there was no partition by *metes and bounds*. In the suit the plaintiffs took out an application for temporary injunction restraining the defendants from alienating, disposing of or otherwise creating third party rights in any of the suit properties till the disposal of the suit.

3. The defendant Nos.1 to 6 resisted the application by filing reply. It was, *inter alia,* contended that since 1989 the plaintiffs, on the one part, and the deceased Shankar and Dilip, on the other part, started independent businesses and since then there was no joint family business. It was denied that the suit properties were purchased out of joint family funds. It was contended that the property described in paragraph 1C of the plaint was the joint family property. However, the property described in paragraph 1A was acquired by deceased Shankar out his own income and to maintain cordial family relations and in deference to the wishes of the parents, the said property was purchased in the name of plaintiffs, deceased Vishnupant, Kamal and Dilip. Defendant Nos.1 to 6 categorically denied that the Gift Deed dated 27th November, 2017 was obtained by fraud. On the contrary, according to defendant Nos.1 to 6, since the plaintiffs were fully aware that the entire consideration for acquiring the said property was paid by deceased Shankar, they had voluntarily executed the Gift Deed. Moreover, the plaintiffs had given consent to effect mutation in the record of right resulting in Mutation Entry No.4568. On these amongst other grounds, defendant Nos.1 to 6 prayed for rejection of the application.

4. The learned Civil Judge after appraisal of the averments in the application and contentions in the reply filed on behalf of defendant Nos.1 to 6 and the material on record was persuaded to reject the application holding, *inter alia,* that the plaintiffs failed to make out a *prima facie* case. In the view of the learned Judge, the balance of convenience tilted in favour of the defendants and they would suffer irreparable loss if the injunction is granted. The factors which weighed with the learned Judge were; firstly, the Gift Deed dated 27th November, 2017 was registered, secondly, in the said Gift Deed there was a recitle to the effect that the consideration for the acquisition of the suit property (1A) was paid by the deceased Shankar and, thirdly, on the strength of the said registered Gift Deed mutation was effected vide Mutation Entry No.4568. The learned Judge also went on to observe that there was no material on record to show that the defendants were trying to alienate the suit property and, thus, the apprehension on the part of the plaintiffs was not well founded.

5. I have heard Mr. Patil, the learned Counsel for the appellants and Mr. Shah, the learned Counsel for respondent Nos.1 to 6, at some length. With the assistance of the leanred Counsel for the parties, I have perused the pleadings and material on record.

6. Mr. Patil strenuously submitted that the trial court has totally misdirected itself in rejecting the application for temporary injunction despite holding that one of the properties was clearly a joint family property. Mr. Patil further submitted that the observations of the learned Judge that there was no material to demonstrate that defendant Nos.1 to 6 were trying to alienate the suit property is against the weight of the material on record. Inviting the attention of the Court to an application preferred by the plaintiffs (Exhibit-42) seeking *status quo* during the pendency of the temporary injunction application, to which the plaintiffs had annexed a copy of a registered Agreement for Sale whereby and whereunder defendant Nos.1, 2 4 and 6 professed to transfer a portion of the suit property (1A), Mr. Patil urged with a degree of vehemence that the learned Judge in the face of such clinching material could not have observed that the apprehension was imaginary, and, thus, non-suit the plaintiffs.

7. Mr. Shah, on the contrary, endeavoured to support the impugned order. It was urged that in the face of admission of execution of the Gift Deed, the plaintiffs cannot be heard to urge that the Gift Deed is obtained by fraud. The reason ascribed in the plaint for the execution of the Gift Deed namely purported execution of a Power of Attorney to obtain possession of the suit property (1A) from the vendor is *ex facie* untenable. Mr. Shah further submitted that not only the plaintiffs had executed the Gift Deed but had also given consent to mutate the name of the deceased Shankar to the record of right, as is evident from Mutation Entry No.4568. In any event, according to Mr. Shah, fraud has to established at the trial. At this stage, in the face of the registered Gift Deed, defendant Nos.1 to 6 cannot be deprived of the exercise of incidence ownership over the said property.

8. I have given careful consideration to the rival submissions. In the light of the view, which I am persuaded to take, it may not be expedient to delve deep into the thickets of facts. It would be suffice to note that the existence of a joint family is not put in contest. So far as the suit property (1C), defendant Nos1 to 6 concede that it forms part of joint family property. *Prima facie,* joint family was running family businesses. It is the pleaded case of defendant Nos.1 to 6 that since the year 1989 there was separation in business.

9. As regards the suit property (1A) it is incontestible that the said property was acquired in the joint names of the plaintiffs deceased Vishnupant, Kamal and Dilip. Defendant Nos.1 to 6, however, assert that the consideration was parted with by the deceased Shankar alone and the Sale Deed in the name of Vishnupant, Kamal and their four sons was nominal.

10. In the backdrop of the aforesaid facts, the fate of the suit hinges on the legality and validity of the Gift Deed allegedly executed by the plaintiffs in favour of the deceased Shankar. Whether the said Gift Deed was obtained by fraud as alleged by the plaintiffs is indeed a matter for trial. However, the antecedent character of the property which is the subject mater of the said Gift Deed *prima facie* appears to be that of a joint family property. Keeping in view the said character of the suit property (1A) the prayer for temporary injunction ought to have been appreciated.

11. From perusal of the impugned order, one gets an impression that the fact that there was no material to show that defendant Nos.1 to 6 were in the process of disposing of the suit property weighed with the trial court significantly. However, the documents placed on record do indicate that such a view could not have been recorded. Alongwith the application for *status quo* (Exhibit-42) the plaintiffs had tendered for the perusal of the trial court a registered Agreement dated 2nd November, 2022 evidencing the contract for Sale executed by defendant Nos.1, 2, 4 and 6 in favour of Mr. Shubham Dhanaji Jadhav and two others. The learned Judge seems to have failed to take into account the said registered instrument which unmistakably manifested the intent on the part of defendant Nos.1, 2, 4 and 6 to alienate the suit property.

12. The situation which thus obtains is that one of the principal reasons which weighed with the Court in declining to exercise the discretion in favour of the plaintiffs is shown to be wholly unsustainable. Could the Court have exercised the discretion not to grant interim injunction, had it taken note of the document which clearly manifested intent to alienate the suit property is a question which cannot be answered in the appeal, definitively. It is, however, evident that the learned Judge exercised the discretion not to grant the temporary injunction by ignoring material which bears upon the exercise of the discretion. If the trial court passes an interim order without considering relevant material, that constitutes a justifiable ground to interfere in the order of the trial court. In such a situation the exercise of discretion by the trial court cannot be said to be justifiable and, therefore, deserves to be corrected in appeal. It would, therefore, be expedient to remit the matter to the trial court for afresh decision on the application for temporary injunction. The appeal thus deserves to be partly allowed.

13. Hence, the following order:

: O R D E R :

(i) Appeal stands partly allowed.

(ii) The impugned order dated 17th January, 2023 stands quashed and set aside.

(iii) Application for temporary injunction (Exhibit-5) in Special Civil Suit No.967 of 2022 stands remitted to the Court of Civil Judge, Senior Division, Pune, for a fresh determination on its own merits and in accordance with law.

(iv) The Court shall provide an effective opportunity of hearing to the parties and consider all the material which bears upon the determination of the application for temporary injunction.

(v) The Court shall make an endeavour to decide the application as expeditiously as possible.

(vi) The parties shall maintain *staus quo* in respect of the suit property till the decision of the application.

(vii) In view of disposal of the appeal, the interim application does not survive and accordingly stands disposed.

(viii) No order as to costs.

(ix) By way of abundant caution, it is clarified that the trial court shall not be influenced by any of the observations made hereinabove.

[**N. J. JAMADAR, J.**]