Suppression Of Material Facts Ground To Refuse Temporary Injunction: Bombay High Court

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

SANDIPKUMAR C. MORE; J.

APPEAL FROM ORDER NO.15 OF 2021; 21/10/2022

Umaji Satwaji Shep (Died) by L.Rs. *versus* **Gulam Mohmood Gulam Dastgir (Died) By L.Rs.**

Mr. V. D. Sapkal, Senior Advocate i/b Mr. M. K. Deshpande for appellants Mr. Akash Gade, Advocate for Respondent Nos.1-A to 1-10 Mr. S.A.P. Quadri, Advocate for respondent No.3-A Mr. J. H. Deshmukh, Advocate for Respondent Nos.4-A to 4-D Mr. S. A. Sable, Advocate for Respondent Nos. 5-A to 5-H

J U D G M E N T

1. The appellants in both these appeals, who are original respondent Nos.3/1 to 3/9 and 4/A to 4/G, have challenged the common order dated 15/01/2021 passed by the learned District Judge-2, Ambajogai (hereinafter referred to as 'the learned appellate court') below Exhibits-34, 40, 44 and 80 in RCA No. 44 of 2016. The application Exhibits-40 & 80 in RCA No. 44 of 2016 were fled by present respondent Nos.1/1 to 1/10, who are respondent Nos. 5/1 to 5/10 in RCA No. 44 of 2016, where as application Exhibits-34 and 44 in RCA No. 44 of 2016 were fled by present respondent Nos.1-A and 2-A. Under the impugned order, the learned appellate court has allowed all the applications Exhibits-34, 40, 44 and 80 and thereby restrained the present appellants from alienating the suit lands and for creating any third party interest in the same till fnal disposal of the appeal.

2. On perusal of the impugned order, it appears that the learned appellate court by relying upon certain photographs in respect of display of board named as 'Satwaji Nagar' on the suit property, came to conclusion that the present appellants were trying to create third party interest in the suit land by developing the same into plots and it would create complications and addition of many parties if those plots are sold.

3. The learned senior counsel for the appellants strongly submitted that the predecessor of appellants had in fact purchased the suit land, comprising Survey No. 97 to the extent of 16 Acres 24 Gunthas, Survey No. 102 to the extent of 16 Acres 20 Gunthas and Survey No. 134 to the extent of 19.5 Gunthas by way of registered sale deed dated 11/10/1958 and since then the suit land is in possession of the appellants and their forefathers. One Gulam Dastgir had fled RCS No. 36 of 1963 for claiming 1/3rd share in the suit land, wherein Ahemad Ali i.e. the predecessor of present respondent No.2, was party as defendant in the said suit. During pendency of that suit, Ahemad Ali died and therefore, his written statement was adopted by present respondent No.2 Azeemunisa Begum (in AO No.15 of 2021), who is also no more. The suit was decided on 27/11/1972 and it was held that the appellants are the owners of the suit land. In the said suit, Ahemad Ali had admitted share of the appellants in the suit land. However, Azeemunisa Begum, despite being the party to that suit, fled another suit bearing RCS No. 215 of 1994 alongwith Sayeeda Begum, claiming ownership over the suit land under one Hibanama. However, that suit was also dismissed on 20/04/2016, against which RCA No. 44 of 2016 is pending. Not only this, but legal heirs of Azeemunisa Begum, who are the present respondent Nos.2-A and 2-B, had fled third suit bearing RCS No. 3 of 2001, which was decided prior to RCS No. 215 of 1994 i.e. on 31/10/2012. In that suit, the Hibanama theory was again raised, but it was rejected by the concerned court. The learned counsel for the appellants, thus, submitted that in earlier three rounds of litigation it has been established that the appellants are the owners and possessors of the suit land since beginning and the decrees of RCS No. 38 of 2016 and RCS No. 3 of 2001 have attained fnality and

therefore, the contesting respondents in the present appeals cannot raise the point of ownership again and again. He pointed out that earlier to passing of impugned order, the learned appellant court had in fact rejected two applications of the contesting respondents whereby status-quo was claimed, by observing that the appellants are already declared owners and possessors by the competent civil court. Thus, he fnally submits that there should be an end to the litigation which is being fought by third generation of the contesting parties and requested to allow the appeals by setting aside the impugned order.

4. On the contrary, the learned counsel for the contesting respondent Nos. 2-A and 3-A, who are the legal heirs of Azeemunisa Begum and Sayeeda Begum i.e. original respondent Nos.2 & 3, strongly opposed the submissions made on behalf of the appellants. He pointed out that earlier applications for status-quo fled by the contesting respondents, were not decided on merits but those were rejected being unattended. He submits that if the impugned order is set aside, then the appellants will defnitely sell the suit land, which will give rise to more complications and may defeat right of present contesting respondents. He also pointed out as to how the sale deed dated 11/10/1958 executed in favour of predecessor of the appellants, was void-abinitio. He further submits that principle of res judicata is not at all applicable to the applications for claiming stay to the alienation as every such application can be made on fresh cause of action and by considering the change in circumstances. He pointed out that the suit land was in fact in possession of the Government and not of the appellants. As such, he prayed for dismissal of the appeals. In alternative, he submits that expeditious hearing and disposal of appeals is already directed.

5. On the other hand, the learned counsel for respondent Nos.3-A to 3-D in A.O. No. 16 of 2021 submitted that an appropriate order might be passed.

6. With the assistance of the learned counsel for rival parties, I have gone through the entire documents produced by the rival parties on record alongwith the impugned order. The respective learned counsel for the contesting parties have also relied on certain judgments, which I would like to discuss at appropriate stage hereinafter.

7. On going through the impugned order in both these appeals, which is commonly passed by the learned appellate court below Exhibits-34, 40, 44 and 80, it is evident that present respondent Nos.2-A to 2-B and 3 as well as the legal representatives of 1/1 to 1/10 have fled these applications restraining the present appellants, who are the legal heirs of Umaji Satwaji Shep and Madhavrao Satwaji Shep, from creating third party rights over the suit land and alienating the same till fnal disposal of the appeal. The learned senior counsel for the appellants vehemently submitted that despite there was bar under the principle of res-judicata the learned appellate court decided all these applications for seeking temporary injunction in favour of the original appellants and legal representatives of original respondent No.5 in the appeal. He pointed out that earlier also respondent No.2-A had fled application below Exhibit-56 in the appeal before the learned appellate court for grant of status-quo pertaining to the suit property and the same was rejected on 20/02/2020 by the learned appellate court. He further pointed out that thereafter, the present respondent No.3-A had also fled similar application for maintaining status-quo by the present appellants below Exhibit-64 before the learned appellate court, but that application was also rejected on 14/12/2020. Thus, the learned senior counsel for the appellants submitted that there was a bar for the learned appellate court to decide the subsequent applications for similar relief, specially when earlier applications to that effect, were rejected. He also placed reliance on the judgment of Hon'ble Apexc Court in case of

Arjun Singh vs. Mohindra Kumar and others, reported in AIR 1964 SC 993, wherein it is held as under :

" Scope of the principle of res judicata is not confned to what is contained in Section 11 but is of more general application. Again, res judicata could be as much applicable to different stages of the same suit as to fndings on issues in different suits. If the Court which rendered the frst decision was competent to entertain the suit or other proceeding, and had therefore, competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the fnding on the issue by it being res judicata in later proceedings. Where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specifc provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable".

8. On the contrary, the learned counsel for the contesting respondents in the present appeals strongly opposed the submissions made on behalf of the appellants in respect of bar under the principle of res-judicata.

9. Admittedly, as per the observations of the Hon'ble Apex Court, the principle of res-judicata is not confned to what is contained in Section 11 of the CPC but it also applies to the different stages of the same proceedings. The learned senior counsel for the appellants is relying on the rejection of similar applications claiming status-quo against the appellants. However, on going through the orders below those applications at Exhibits56 and 64 it is evident that those applications were fled only to get restraining order till decision of applications below Exhibits-34 and 44, which are now decided under the impugned order in this appeal. The learned appellate court has specifcally observed in the orders passed on the application below Exhibits-56 & 64 that the then pending applications for restraining relief, were to be decided on merit and therefore, he was not inclined to grant relief of status-quo in those applications. As such, nothing was decided on merit by the learned appellate court while rejecting the applications below Exhibits-56 & 64. As such, there cannot be any bar for the learned appellate court for deciding the applications for grant of temporary injunction by way of the impugned order subsequently.

10. On perusal of the impugned order, it is evident that the learned appellate court has restrained the appellants from alienating the suit land or creating any third party interest over the same till fnal disposal of the appeal mainly on the basis of some photographs fled by contesting respondents, wherein one board showing name of Satwaji Nagar was erected on the suit land, which was divided into plots by stone markings. Further, Tahsildar, Ambajogai had also issued one letter mentioning that action would be taken against the persons who had erected that board. Ultimately, the learned appellate court found that there was possibility of alienation of the suit land during pendency of the appeal and therefore, the impugned order was passed. However, it is settled position that the temporary injunction of any nature can be granted if the three things namely prima facie case, balance of convenience and irreparable loss are established by a person seeking such injunction. It is also settled that unless and until all these three things are established, no injunction can be granted. Moreover, it is also settled by the Hon'ble Apex Court in various judgments that a party who has suppressed the material facts from the record while obtaining favourable relief, can be thrown out at any stage of proceeding. In view of the same, I have to verify whether the original appellants and the legal heirs of original respondent No.5 in RCA No. 44 of 2016, have established the three important things for seeking relief in their favour. It has also to be seen whether there is any suppression of

material facts by the persons, who are claiming the relief of temporary injunction against the present appellants.

11. On going through the plaint in RCS No. 215 of 1994 it is evident that Azeemunisa Begum and Sayeda Begum, who were the daughters of one Ahemad Ali, have claimed that they be put in Khas possession of the suit property i.e. eastern 1/2 portion of Survey Nos.97, 102 and 134 by dispossessing the defendants or any other person found in possession of those lands. In the said suit Azeemunisa Begum and Sayeda Begum had made their real brothers Munawar Ali and Habeeb Ali as party defendant Nos.1 and 2 and also present appellants and legal heirs of Gulam Mohamood s/o Gulam Dastgir Saheb and others as remaining defendants. On perusal of the plaint itself, it appears that daughters of Ahemad Ali namely Azeemunisa Begum and Sayeda Begum had claimed that their father Ahemad Ali orally gifted the suit property to them on 04/03/1957 and thereafter executed an agreement of memorandum of oral gift on 05/04/1957 to that effect and therefore, on the basis of said oral gift they became owners of the suit property.

12. On the contrary, the present appellants had resisted the suit by fling written statement mentioning that they had in fact purchased the suit property from father of Azeemunisa Begum and Sayeda Begum by way of a registered sale deed dated 11/10/1958 through their predecessor Umaji and Madhav for consideration of Rs.3,000/- alongwith proportionate share in well and four mango trees. They contended that the present original respondent Gulam Dastgir s/o Abdul Quadar had fled suit bearing RCS No. 36 of 1963, wherein deceased Ahemad Ali during his life time had admitted the fact of the aforesaid sale deed and after that Azeemunisa Begum and Sayeda Begum also admitted the same without raising any objection on the ground of the aforesaid Hibanama (oral gift). The appellants have also produced various documents in support of their claim in the written statement in RCS No. 215 of 1994.

13. The judgment in RCS No. 36 of 1963 indicates that there were three shares in lands bearing Survey Nos. 97, 102 and 134, situated at village Shepwadi. One Gulam Mohmood Gulam Dastgir and Gulab Gaus Abdul Quadar were having share to the extent of 25% each and one Ahmed Ali Mohmad Munawar Ali, who was father of Azeemunisa Begum and Sayeda Begum, was having eastern side half share. The predecessor of appellants by name Satwaji was possessing those entire lands since prior to 1956. However, in the year 1958 Ahmed Ali sold his half share in those lands towards eastern side, that means the suit properties to original defendant Nos.3 & 4 i.e. Umaji Satwaji Shep and Madhavrao Satwaji Shep by way of registered sale deed dated 11/10/1958. However, thereafter as per the provisions of Hyderabad Tenancy Act, 1950 under Section 98-C, Umaji and Madhavrao paid the required fne and validated earlier sale deed on 19/12/1960. Therefore, since 1958, Umaji and Madhavrao were in possession of the suit properties. However, Gulam Dastgir thereafter fled RCS No. 36 of 1963 against Umaji and Madhav and others for partition and separate possession of his 1/4 share towards western side in the aforesaid lands. The record further shows that Ahemad Ali who was party to that suit, had fled written statement in the said suit and thereby agreed that he had sold the suit property to Umaji and Madhav by way of registered sale deed, which was validated thereafter under the order dated 19/12/1960 passed by Tahasildar, Ambajogai under Section 98-C of the Hyderabad Tenancy Act in File No.409 of 1959 as required permission for the sale deed was not sought at the relevant time. It is extremely important to note that during pendency of that suit, Ahmed Ali died in the year 1969 and therefore, his legal heirs were brought on record. The name Azeemunisa Begum was shown as Abeda Begum in the said suit being the legal heirs of deceased Ahmed Ali. Moreover, Sayeda begum was also party to that suit. It is to be noted that Azeemunisa Begum and Sayeda Begum

alongwith other legal heirs of Ahemad Ali, had adopted written statement earlier fled by Ahemad Ali and as such, they admitted the fact of selling the suit land to Umaji and Madhav. Thus, it clearly indicates that Azeemunisa Begum and Sayeda Begum did not raise any objection by mentioning that there was an oral gift in their favour in respect of the suit properties by their father Ahemad Ali. On the contrary, they admitted the fact that the suit properties were sold to the Umaji and Madhav vide registered sale deed dated 11/10/1958, which was also validated thereafter in due course.

14. It further reveals that though Umaji and Madhav were in possession of the suit properties since 1958 but the plaintiffs and other defendants in RCS No. 36 of 1963 lodged false proceeding under Section 145 of Cr.P.C. to deprive Umaji and Madhav of the suit lands. Those persons by joining hands with concerned authorities, caused the suit lands to be forfeited by Government as per the order dated 25/04/1991 passed by concerned Taluka Magistrate. However, Umaji and Madhav had challenged the said decision by fling Revision No. 40 of 1991 before Additional Collector, Ambajogai and the same was allowed on 05/08/1991 and the earlier decision of Tahsildar dated 25/04/1991 was quashed and set aside. Against the said order of Additional Collector, Ambajogai, an Appeal No. 185 of 1991 was fled against Umaji and Madhav by those plaintiffs and other defendants. But this court rejected the said appeal vide order dated 20/07/1992. Thus, it is evident that the suit properties were in possession of Government from 1976 till 15/07/1994. Since after the order of this court, the Executive Magistrate, Ambajogai passed order dated 29/06/1994 and gave actual possession of the suit properties to Umaji and Madhav on 15/07/1994 under panchanama and possession receipt. Thus, it is clearly evident that the suit properties were never in possession of Azeemunisa Begum and Sayeda Begum but it was in possession of Umaji and Madhav from 1956 to 1976 and thereafter from 15/07/1994 till today. It is also evident that 1/4th share each in the land Survey No.97, 102 and 134 was given to respective fathers of original defendant Nos.5 & 6 as well as original defendant Nos.7 to 9 in the execution proceeding No. 6 of 1973 fled as per the decree in RCS No.36 of 1963 on 13/01/1973.

15. It is extremely important to note that this court in Criminal Writ Petition No. 410 of 1997 fled by legal heirs of Gulam Dastgir and Habeeb Ali i.e. son of Ahmed Ali, has made following observations :

10. At this juncture, I would like to mention that the second party had claimed actual possession of the landed property in Regular Civil Suit No. 272 of 1973 and the competent civil court granted this relief in favour of the second party. In view of this position, the party No.1 cannot claim possession of the disputed lands. Certain orders were passed by the Executive Magistrate in the past because that time, circumstances justifed to take action under section 145 Criminal Procedure Code. But after fnalization of proprietary rights in favour of the second party, the position becomes different. It is the second party who has got legal right to possess the disputed lands. Under the circumstance, it cannot be said that the Executive Magistrate should restore the disputed lands to party No.1 on the ground that the question of title or ownership is unknown to the proceedings under Section 145 Criminal Procedure Code.

11. The cases relied upon by Shri Khader, learned counsel can very well be distinguished on facts. The cases relied upon by Shri Khader, learned counsel, do not come to the rescue of Party No.1. It is true that on the background of pendency of civil litigation for possession, the Executive Magistrate should not have initiated a parallel criminal proceeding under Section 145 Criminal Procedure Code. In the civil court, the parties were in a position to obtain interim orders such as injunction or appointment of receiver for the purpose of protection of the disputed property during pendency of the civil litigation. But simply because wrong is committed by the Executive Magistrate in the matter of initiation of proceedings under Section 145 Criminal Procedure Code on the background of pendency of civil suit, it cannot be said that the Executive Magistrate should

now ignore the ultimate relief granted by civil court in favour of second party and direct restoration of possession to Party No.1. The decree of civil court for possession has achieved fnality in law and therefore, the Executive Magistrate is bound to obey the decree of civil court.

12. The civil court has settled the rights of second party and as a consequence thereof, the actual possession of the disputed lands should go to the second party. Directing restoration of possession in favour of Party No.1 by Executive Magistrate would be an abuse of process of the court."

Thus from the aforesaid observations of this court it is clearly evident that the civil court had already settled right of Umaji and Madhav being the owner of the suit properties and therefore, refused to entertain the aforesaid criminal writ petition. Not only this but the Executive Magistrate while passing order dated 29/06/1994 had observed that Umaji and Madhav had purchased the suit properties vide registered sale deed by referring all the earlier civil proceedings bearing RCS Nos. 36 of 1963, 272 of 1973, 40 of 1991, 41 of 1991, Appeal No.6 of 1980 and order of this court in Proceeding No.185 of 1991.

16. It is extremely important to note that Azeemunisa Begum and Sayeda Begum, who have fled the original appeal RCA No. 44 of 2016 on rejection of their RCS No. 215 of 1994, were parties in suit bearing RCS No. 36 of 1963, wherein civil rights of Umaji and Madhav were crystallized by the competent civil court and they had also admitted the position that the suit properties were sold by their father to Umaji and Madhav by way of registered sale deed dated 11/10/1958 after being impleaded in the suit and by adopting the written statement of Ahmed Ali. It is also important to note that though Azeemunisa Begum and Sayeda Begum were party to that suit, they suppressed the entire earlier proceedings and even the observations of this court in respect of creation of legal right by Umaji and Madhav over the suit properties while fling the subsequent suit bearing RCS No. 215 of 1994. This suppression of material facts by Azeemunisa Begum and Sayeda Begum needs to be taken seriously and they can even be thrown out from the proceeding for that reason as per the observation of Hon'ble Apex Court in so many judgments that fraud vitiates everything.

17. The learned counsel for respondent Nos.1/1 to 1/10 relied upon various judgments as follows:

1) Wander Ltd. and another vs. Antox India P. Ltd, 1990(Supp) SCC 727;
2) Maharwal Khewaji Trust (Regd.) Faridkot vs. Baldev Dass, (2004) 8 SCC 488;
3) Sunil s/o Madanlal Agrawal vs. Jawaharlal s/o Nandlal Chittarke, 2012(2) Mh.L.J.254 and
4) Prakash Ahuja vs. Ganesh Dhonde and others, 2016(6) ABR 745.

It has been observed in the above judgments that the nature of the property cannot be permitted to be changed and for avoiding multiplicity of proceedings, temporary injunction has to be granted for restraining further alienation during pendency of appeal or proceeding. It has also been observed in the aforesaid judgments that discretion exercised by the lower court is not to be interfered with in appeal. However, all these observations will be applicable to the party who has come with clean hands before the court. It is a principle of law that who seeks equity, must do the same. However, in this case, the record prima facie indicates that ownership of Umaji and Madhav over the suit properties was established twice in the earlier proceedings which remained unchallenged and thereby attained fnality. Further, by giving complete go-bye to the earlier proceedings, Azeemunisa Begum and Sayeda Begum fled another suit knowing well that Umaji and Madhav were declared owner of the suit properties by competent civil courts, suppressed those earlier proceedings and came with concocted story of oral gift, which has been negatived by the trial court.

18. Further, it is also extremely important to note that the earlier dispute was between Satwaji i.e. father of Umaji and Madhav and the earlier owners of the suit properties. Thereafter, Umaji and Madhav continued the proceedings and established their ownership over the suit properties. Now their next generation is fghting for getting fruits of earlier decrees. Likewise, the third generation of original owner Ahmed Ali has continued the litigation despite it has already been established that Ahmed Ali had sold the suit properties. Under such circumstances, I do not fnd that there is prima facie case established by Azeemunisa Begum and Sayeda Begum. Per contra, it appears that they have suppressed the earlier proceedings despite being party to it and fled RCS No.215 of 1994 on account of new ground of alleged oral gift theory. It is also important to note that if the injunction granted by the learned appellate court is allowed to be continued further, then there will be no end to the present litigation and it will continue for indefnite period leaving the appellants deprived from getting fruits of earlier proceedings. Thus, it has been revealed that twice it has been established by the competent civil court that Umaji and Madhav were owners of the the suit properties and the said fact remained unchallenged. There should be an end to the litigation specially when the fnding of competent civil court determining the legal ownership of Umaji and Madhav over the suit properties.

19. Therefore, considering all these facts, I come to the conclusion that the learned appellate court has wrongly restrained the appellants from alienating the suit properties till decision of appeal only on the basis of certain display board and by ignoring the vital ingredients required for granting equitable relief of temporary injunction. The record clearly shows that Azeemunisa Begum and Sayeda Begum failed to establish prima facie case in their favour for securing the temporary injunction as prayed. Moreover, they have also suppressed the earlier proceedings while fling RCS No.215 of 1994. It is to be noted here that there was no injunction of any kind was running against the present appellants during pendency of the suit. In fact, Azeemunisa Begum and Sayeda Begum despite fling the application for grant of temporary injunction in the suit, did not press the same and requested to the trial court to hear the same alongwith the suit. It is signifcant to note that the advocate for the present appellants had in fact made statement before the trial court that the appellants would not alienate the suit properties till the decision of the suit. Thus, on dismissal of the suit, the said statement also become useless and it can not be considered as a ground for granting further injunction in favour of Azeemunisa Begum and Sayeda Begum. By considering all these aspects, I certainly fnd that the learned appellate court has defnitely erred in restraining defendant Nos.3 & 4 namely, Umaji and Madhav and their legal representatives, who are the appellants in this appeal from alienating the suit properties and creating third party interest thereon till fnal disposal of the appeal. As such, the impugned order is liable to be quashed and set aside.

20. After the impugned order in these appeals is quashed and set aside, the learned counsel for the respondent Nos. 2A and 3A requested for continuation of impugned order for certain period since he wants to challenge the order of this Court before Honourable Supreme Court. The learned counsel Mr. Niranjan M. Deshpande, holding for Mr. M. K. Deshpande, the learned counsel for appellants, strongly opposed the submission made on behalf of respondent Nos. 2A and 3A.

21. Since the learned appellate Court i.e. District Court at Ambejogai had granted relief in favour of respondents and thereby restrained the present appellants from alienating the suit property till disposal of appeal and the respondents now want to challenge the order of this Court setting aside the said order, the said order can be continued for certain period considering the ensuing Diwali Vacation which starts from tomorrow. Accordingly following order is passed.

O R D E R

1) Both the appeals are allowed and the impugned common order dated 15/01/2021 passed by the learned appellate court i.e. District Judge-2, Ambajogai in RCA No.44 of 2016 below applications Exhibits-34, 40, 44 and 80 is quashed and set aside.

2) Both the appeals are accordingly disposed of.

3) Pending civil applications, if any, accordingly stand disposed of.

4) The order of learned appellate Court i.e. the impugned order in these appeals is continued for further period of four weeks.