NARENDRA KANTE

v.

ANURADHA KANTE & ORS.

(Civil Appeal No. 8290 of 2009)

DECEMBER 15, 2009

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Code of Civil Procedure, 1908:

Or. 39, r.1 – Temporary injunction – Suit for declaration and permanent injunction claiming suit property as ancestral property – Application for temporary injunction rejected by trial court holding that suit properties had already been partitioned and a deed of family settlement had been executed – High Court declining to interfere – Reliance upon deed of family settlement though not signed by one of the co-sharers – HELD: Factum of partition being a question of fact, prima facie view taken by courts below, for purposes of interim order, that oral partition had been effected, not interfered with – Deed of family settlement cannot be relied upon unless signed by all co-sharers – However, plaintiff, acting upon the said settlement, having executed sale deeds, it would not be open to him to question the deed of settlement – Keeping in view the balance of convenience and irreparable loss, the High Court while declining to grant temporary injunction has protected the interests of plaintiff by restraining the purchaser from alienating or transferring the property or from creating any third party rights therein during pendency of suit – Order of High Court not interfered with – Trial court would dispose of the suit expeditiously – Till then co-sharers would not create any third party right in respect of their shares in the suit property – Deeds and documents – Deed of family settlement – Evidentiary value of.

The appellant filed a suit for declaration and permanent injunction as also mandatory injunction in

A respect of the suit property claiming it to be ancestral property of his father. It was the case of the plaintiff that though a partition deed was executed on 8.2.1967, but it was only with the intention of giving a separate share to his step-brother, and rest of the properties remained joint
B as there was no partition by metes and bounds; that defendants 1 and 2 had no right to execute the agreement and Special Powers of Attorney dated 27.11.2004 in respect of the suit property in favour of defendants 8 and 9 nor did defendants 8 and 9 have any
C right to execute the sale deed dated 31.3.2006 in favour of defendant no. 10. The plaintiff-appellant prayed for a decree of permanent injunction against the defendants not to deal with the property without a partition having been effected and also prayed for a mandatory injunction
D on the defendants to remove the wall which had been erected in the suit property. An application for interim injunction was also filed, which was rejected by the trial court holding that a partition had been effected between the legal heirs concerned and their names were recorded in the municipal records and a deed of family settlement
E dated 8.2.1967 was executed. The deed of family settlement dated 8.2.1967 and the partition had been upheld in an earlier litigation arising out of a suit filed by the plaintiff-appellant which suit was decreed partly in his favour. In the miscellaneous appeal filed by the plaintiff-
F appellant against the order of the trial court rejecting the application for interim injunction, the High Court declined to interfere.

In the instant appeal filed by the plaintiff, the
G questions for consideration before the Court were: (i) whether reliance could be placed on the family settlement dated 8.2.1967 since the same was not registered, thought it sought to apportion the shares of the respective co-sharers; and (ii) whether the family settlement could at all be relied upon since all the co-
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sharers were not signatories thereto. A

Dismissing the appeal, the Court

HELD: 1.1. As far as factum of partition is concerned, the same being a question of fact, this Court is not inclined to interfere with the prima facie view taken by the B courts below, for the purpose of interim order, that an oral partition had been effected which had been subsequently reduced into writing as a Memorandum and not as an actual Deed of Partition. [Para 21] [503-B-C]

1.2. As regards the placing of reliance on the Deed C of Family Settlement seeking to partition joint family properties, the same cannot be relied upon unless signed by all the co-sharers. Admittedly, respondent No. 8 was not a signatory to the Deed of Settlement dated 8th February, 1967, although she is the daughter of the D family. Under the Hindu Law if a family arrangement is not accepted unanimously, it fails to become a binding precedent on the co-sharers. However, acting upon the said settlement, the appellants had also executed sale deeds in respect of the suit property. Having done so, it E would not be open to the appellant to now contend that the Deed of Family Settlement was invalid. [Para 22] [503-D-G]

1.3. So far as the question of balance of convenience and inconvenience and irreparable loss and injury is F concerned, it has to be kept in mind that respondent No. 10 has already acquired rights in respect of the share of respondent Nos. 8 and 9 to the suit property and in the event an interim order is passed preventing development of the portion of the property acquired by it, it would G suffer irreparable loss and injury since it would not be able to utilize the property till the suit is disposed of, which could take several years at the original stage, and, thereafter, several more years at the appellate stages. The appellant has been sufficiently protected by the order of H

A the High Court. While respondent No. 10 has been permitted to carry out construction activities over the disputed land, it has been restrained from alienating or transferring the property or from creating any third party right therein during the pendency of the suit. [Para 23] B [503-H; 504-A-C]

1.4. There is yet another question which goes against the case made out by the appellant, as after the Deed of Family Settlement, he also executed conveyances in respect of portions of the suit property, thereby C supporting the case of the respondents that the Deed of Family Settlement dated 8th February, 1976, had not only been accepted by the parties, but had also been acted upon. [Para 24] [504-D]

D 1.5. In the circumstances, the Court is not inclined to interfere with the order passed by the High Court, but the Court is also concerned that the suit should not be delayed on one pretext or the other, once such interim order is granted. The trial court would dispose of the suit within a year from the date of communication of the E judgment. In the meantime, the co-sharers to the suit property shall not create any third party rights or encumber or transfer their respective shares in the suit property in any manner whatsoever and all transactions undertaken in respect thereof shall be subject to the final F decision in the suit. [Para 25 and 26] [504-E-G]

M.N. Aryamurthy vs. M.D. Subbaraya Setty (dead) through Lrs. (1972) 4 SCC 1; *Kale vs. Dy. Director of Consolidation* 1976 (2) SCR 202 = (1976) 3 SCC 119; G *Mandali Ranganna vs. T. Ramachandra* 2008 (7) SCR 264 = (2008) 11 SCC 1; *Kishorsinh Ratansinh Jadeja vs. Maruti Corpn. & Ors.* (2009) 5 Scale 229 cited.

Case Law Reference:

H 1976 (2) SCR 202 cited para 17

2008 (7) SCR 264	**cited**	**para 19**
(2009) 5 Scale 229	**cited**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8290 of 2009.

From the Judgment & Order dated 13.10.2008 of the High Court of Madhya Pradesh Bench at Gwalior in Misc. Appeal No. 478 of 2007.

Vivek Kumar Tankha, Neeraj Shekhar, Sanjay Shukla, Ratna Kaul for the Appellant.

Ranjit Kumar, V.K. Bhardwaj, Nagendra Rai, Anoop G. Choudhary, Nisha Bagchi, Raja Sharma, Rakhi Ray, Anupam Srivasatava, Prashant Shukla, Shantanu Sagar, Smarhar Singh, Santosh Kumar Tripathi, Prabhat Kumar Rai for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 13th October, 2008, passed by the Gwalior Bench of the Madhya Pradesh High Court dismissing Miscellaneous Appeal No.478 of 2007 filed by the appellant herein. The said Miscellaneous Appeal had been preferred by the appellant against the order dated 14th February, 2007, passed by 5th Additional District Judge, Gwalior, in Civil Suit No.08A of 2006 filed by the appellant rejecting the appellant's application under Order 39 Rules 1 and 2 of the Code of Civil Procedure.

3. The appellant herein had filed the above- mentioned suit for declaration and permanent injunction and also mandatory injunction in respect of the suit property situated at Nadigate Jayendra Ganj, Lashkar, Gwalior, bearing Survey No.37/903 on the ground that the suit property was the ancestral property of his father, Bapu Saheb Kante, who had died intestate on 13th

A May, 1976. The application for ad-interim injunction had been filed in the suit which was rejected by the Trial Court on the ground that a partition had been effected between the legal heirs of Bapu Saheb Kante. It was also held that a Family Settlement had been effected between the heirs of Bapu Saheb
B Kante, whereby Smt. Putli Bai and Surendra Kante, the widow and son of Bapu Saheb Kante, acquired a 50% share of House No.95/21. The Respondent Nos.1 and 2 herein are the widow and daughter of late Surendra Kante, and after his death their names were recorded in the Municipal records.

C 4. At this juncture it may be pertinent to mention that Bapu Saheb Kante is said to have had two wives, Smt. Putli Bai and the mother of Jai Singh Rao. The appellant herein is one of the sons of Bapu Saheb Kante through his wife, Smt. Putli Bai. When, after the death of Bapu Saheb Kante a son by his
D second wife, Jai Singh Rao, came to claim a share in his estate, a family settlement was arrived at by which the properties of Bapu Saheb Kante were divided amongst the heirs by a Family Arrangement dated 8th February, 1967, by metes and bounds. Under the said arrangement, Jai Singh Rao
E was allowed to retain possession of plot No.25/528 and after his death on 15th June, 1971, his wife and children were allowed to live in the said premises. However, since the concession granted to them was misused, Surendra Kante filed a suit against them for possession in respect of the property
F in dispute and the same was partly decreed on 14th September, 1993.

5. First Appeal No.76 of 1993 was filed by the legal heirs of Jai Singh Rao, wherein it was sought to be asserted that no
G partition had at all been effected in respect of the properties of late Bapu Saheb Kante and that the alleged document of partition could not be acted upon since the same had not been registered and was not, therefore, admissible in evidence. In the First Appeal it was held that there was a previous oral partition which was reduced into writing later on, on 8th
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February, 1967, which could in fact be said to be a Memorandum of Partition in the eyes of law. It was observed that while a document of partition does require registration, the Memorandum of Partition subsequently executed after an oral partition entered into on the basis of a mutual agreement could not be said to be inadmissible on account of non-registration, since the same did not require registration within the meaning of Section 17 of the Registration Act, 1908.

6. The High Court accepted the contention that a partition had been effected between the heirs of Bapu Saheb Kante and that a document had been executed in that regard on 8th February, 1967, and that it was not open to the defendants, as well as to the predecessor-in-title of Jai Singh Rao, to wriggle out of the said agreement which had been admitted by the defendants. The First Appeal filed by Surendra Kante was allowed and the other appeal filed by the predecessor-in-interest of Jai Singh Rao was dismissed. A Letters Patent Appeal was filed by Jai Singh Rao questioning the judgment and decree passed by the Trial Court, which was also dismissed by the Division Bench of the High Court upon holding that the partition deed dated 8th February, 1967, is a Memorandum of Partition pertaining to a previous oral partition.

7. In the present suit filed by the appellant herein an attempt has been made to make out a case that the alleged partition deed of 8th February, 1967, was executed only with the intention of giving a separate share to Jai Singh Rao and the rest of the properties remained joint as there was no partition by metes and bounds. Accordingly, the Respondents Nos.1 and 2 had no right to execute an agreement and Special Powers of Attorney in respect of the suit property in favour of the Defendant Nos.8 and 9 on 27th November, 2004, nor did the Defendant Nos.8 and 9 have any right to execute a sale deed in favour of Defendant No.10 on 31st March, 2006. The appellant herein prayed for a decree of permanent injunction against the defendants not to deal with the property without a partition having been effected and also prayed for a mandatory

A injunction on the defendants to remove the wall which had been erected in the disputed property. The appellant herein also prayed for a grant of temporary injunction which was rejected by the Trial Court on 14th February, 2007, upon holding that a partition had been effected between the legal heirs of Bapu
B Saheb Kante and that the Family Settlement had been reduced into writing on 8th February, 1967.

8. Before the High Court proof of partition and the Family Settlement, which was also accepted by the appellant herein without any objection, were produced, as was the decision of
C the High Court in First Appeal No.9 of 1994 in which the learned Single Judge had held that the documents of 8th February, 1967, had been held to be a Family Settlement for which no registration was required under Section 17 of the Registration Act, 1908. It was also urged that since the disputed property
D had come to the share of Surendra Kante, and, thereafter, to the Respondents Nos.1 and 2, they had the right to transfer their share in favour of the transferees and that the defendant No.10 was a bona fide purchaser for value. It was also pointed out that the decision of the learned Single Judge had been upheld
E by the Division Bench.

9. The High Court in the Miscellaneous Appeal observed that the matter of grant of temporary injunction had been considered in detail by the Trial Court which had exercised its
F jurisdiction in refusing to grant temporary injunction to the appellants. It also observed that in case injunction was granted, it would be the defendants who would suffer irreparable loss and injury. It was observed that the defendant No.10, the transferee from Respondents/defendant Nos.1 and 2, had
G acquired a right to the suit property. He was, therefore, allowed to carry out construction activities over the disputed land, but was restrained from alienating or transferring the property in question or from creating any third party rights during the pendency of the civil suit. The Trial Court was, however, directed to decide the suit expeditiously and to dispose of the same
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within six months from the date of appearance of the parties before the Trial Court. A

10. Questioning the aforesaid decision of the High Court, Mr. Vivek Kumar Tankha, learned Senior Advocate, submitted that the High Court had erred in accepting the stand taken on behalf of the defendants/respondents herein that a valid partition had taken place by metes and bounds, on account whereof the Respondents/defendant Nos.1 and 2, as the heirs of Surendra Kante, had acquired title to his share in the suit property and were, therefore, competent to dispose of the same in favour of Defendant No.10. Mr. Tankha urged that a partition of joint family property could be effected only by metes and bounds and by delivery of actual possession. In the absence of the same, it could not be contended that a partition had, in fact, been effected between the co-sharers. Mr. Tankha urged that both the Trial Court, as well as the High Court, had erred in pre-supposing a partition between the parties simply on the basis of the Deed of Family Settlement executed on 8th February, 1967. It was submitted that in the absence of evidence of partition by metes and bounds, the learned Courts below had erred in refusing to grant ad-interim injunction as prayed for by the appellant since once the portion of the property allegedly transferred in favour of Respondent No.9 was permitted to be developed, the very object of the suit would stand frustrated. B C D E

11. Apart from the above, Mr. Tankha urged that the learned Courts below had erred in acting upon the Deed of Family Settlement executed on 8th February, 1967, which, in fact, was a Deed of Partition and could not have been acted upon without being executed by all the co-sharers and without being registered as provided for under Section 17 of the Registration Act, 1908. Mr. Tankha submitted that if the Deed of Family Settlement was to be acted upon, as has been done by the Courts below, it must also be held that partition had been effected thereby and, therefore, the same required registration. In the absence thereof, the Courts had wrongly placed reliance F G H

A on the same in refusing to allow the appellant's prayer for grant of temporary injunction pending the hearing of the suit. In support of his aforesaid submissions, Mr. Tankha referred to and relied upon the decision of this Court in *M.N. Aryamurthy vs. M.D. Subbaraya Setty (dead) through LRs.* [(1972) 4 SCC B 1], wherein in the facts of the case it was held by this Court that under the Hindu Law if a family arrangement is not accepted unanimously, the Family Settlement has to fail as a binding agreement.

12. Mr. Tankha urged that there could be little doubt that C in the facts of this case, the balance of convenience and inconvenience lay in favour of grant of temporary injunction during the pendency of the suit, as prayed for by the appellant herein as otherwise the appellants would suffer irreparable loss and injury.

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13. Mr. Anoop G. Chaudhary, learned Senior Advocate, appearing for the Respondent No.6, while supporting Mr. Tankha's submissions, reiterated that the Deed of Family Settlement had not been acted upon as would be evident from E the Deed of Settlement itself. It would be clear therefrom that one of the co-sharers, Sau. Pratibha, who was shown as the eighth executant of the Deed of Settlement dated 8th February, 1967, had, in fact, not signed the said document. She was not also made a party in the First Appeal, although, admittedly she F was one of the daughters of Bapu Saheb Kante through his first wife.

14. On the other hand, Mr. Ranjit Kumar, learned Senior Advocate, appearing for the Respondent Nos.1, 2, 8, 9 and 10, reiterated that the family settlement of 8th February, 1967, had G been duly acted upon, as would be evident from the sale deeds executed by Narendra Kante, which have been exhibited by Narendra Kante in the suit pertaining to the suit property. Mr. Ranjit Kumar also referred to a copy of the agreement made Annexure P-1 to the Special Leave Petition, which is an H agreement alleged to have been executed by Udai Kante,

Narendra Kante and Surendra Kante in favour of one Ram Bharose Lal Aggarwal regarding Municipal House No.15/642, known as "Kante Saheb Ka Bara". Reference was also made to a suit, being Case No.32A of 1991, filed by Ram Bharose Lal Aggarwal in the Court of Third Additional District Judge, Gwalior, for specific performance of the agreement dated 8th February, 1967.

15. Similarly, several other documents were also referred to by Mr. Ranjit Kumar, which were also executed during the hearing of the suit, in order to establish the fact that the parties, including the present appellant, had acted in terms of the said Deed of Settlement and had dealt with the properties which had fallen to their respective shares.

16. Mr. Ranjit Kumar submitted that as far as the second question raised on behalf of the appellant was concerned, it was well-settled that a Deed of Family Settlement which was reduced into writing was not required to be registered under Section 17 of the Registration Act, 1908. Learned counsel submitted that when an oral settlement had been arrived at and acted upon and a subsequent document was prepared only for the purpose of recording such settlement, the provisions of Section 17 of the Registration Act were not attracted, since except for recording a settlement, no actual transfer takes place by virtue of such document.

17. In support of his aforesaid submission, Mr. Ranjit Kumar firstly relied on the decision of the Three Judge Bench in *Kale vs. Dy. Director of Consolidation* [(1976 (3) SCC 119] in which the question of registration of a family arrangement had fallen for consideration. Their Lordships held that a family arrangement may be even oral in which case no registration is necessary. Registration would be necessary only if the terms of the family arrangement are reduced into writing but there also a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere Memorandum prepared after the family

A arrangement had already been made, either for the purpose of recording or for information of the Court for making necessary mutation. In such a case, the Memorandum itself does not create or extinguish any right in the immovable properties and, therefore, neither does it fall within the mischief B of Section 17(2) of the Registration Act nor is it compulsorily registrable. Their Lordships went on further to conclude that a document, which was no more than a memorandum of what had been agreed to, did not require registration.

C 18. While holding as above, Their Lordships also indicated that even if a Family Arrangement, which required registration was not registered, it would operate as a complete estoppel against the parties, which had taken advantage thereof.

19. Learned counsel urged that as had been held by this D Court in *Mandali Ranganna vs. T. Ramachandra* [(2008) 11 SCC 1], while considering an application for grant of injunction, the Court has not only to take into consideration the basic elements regarding existence of a prima face case, balance of convenience and irreparable injury, it has also to take into E consideration the conduct of the parties since grant of injunction is an equitable relief. It was observed that a person who had kept quiet for a long time and allowed another to deal with the property exclusively, ordinarily would not be entitled to an order of injunction. Mr. Ranjit Kumar also referred to the recent F decision of this Court in *Kishorsinh Ratansinh Jadeja vs. Maruti Corpn. & Ors.* [(2009) 5 Scale 229], in which the observation made in *Mandali Ranganna's* case (supra) was referred to with approval.

20. From the submissions made on behalf of the G respective parties and the materials on record, we have to see whether the Courts below, including the High Court, were justified in refusing the appellant's prayer for grant of interim orders pending the hearing of the suit. Though the Deed of Family Settlement has been heavily relied upon by the Courts H below and the Respondents herein, it will have to be considered

whether reliance could have been placed on the same since the same was not registered, though it sought to apportion the shares of the respective co-sharers. It has also to be seen whether the document could at all be relied upon since all the co-sharers were not signatories thereto.

21. As far as the first point is concerned, since the same is a question of fact and has, on a prima facie basis, been accepted by the Courts below, we are not inclined to interfere with the prima facie view taken that an oral partition had been effected which had been subsequently reduced into writing as a Memorandum and not as an actual Deed of Partition. Of course, these observations are made only for the purpose of disposal of the Special Leave Petition and not for disposal of the suit itself.

22. As far as the second question is concerned, a Deed of Family Settlement seeking to partition joint family properties cannot be relied upon unless signed by all the co-sharers. In the instant case, admittedly, the Respondent No.8, Sau. Pratibha, was not a signatory to the Deed of Settlement dated 8th February, 1967, although, she is the daughter of Bapu Saheb Kante by his first wife. As was held in the case of *M.N. Aryamurthy* (supra), under the Hindu Law if a Family Arrangement is not accepted unanimously, it fails to become a binding precedent on the co-sharers. Both Mr. Vivek Tankha and Mr. Anoop G. Chaudhary, learned Senior Advocates, brought this point to our notice to indicate that all the co-sharers had not consented to the Deed of Family Settlement which could not, therefore, be relied upon. The argument would have had force had it not been for the fact that acting upon the said Settlement, the appellants had also executed sale deeds in respect of the suit property. Having done so, it would not be open to the appellants to now contend that the Deed of Family Settlement was invalid.

23. Now, coming to the question of balance of convenience and inconvenience and irreparable loss and injury, it has to be kept in mind that the Respondent No.10 has already acquired

A rights in respect of the share of the Respondent Nos.8 and 9 to the suit property and in the event an interim order is passed preventing development of the portion of the property acquired by it, it would suffer irreparable loss and injury since it would not be able to utilize the property till the suit is disposed of, B which could take several years at the original stage, and, thereafter, several more years at the appellate stages. The appellant herein has been sufficiently protected by the order of the High Court impugned in this appeal. While the Respondent No.10 has been permitted to carry out construction activities over the disputed land, it has been restrained from alienating C or transferring the property or from creating any third party right therein during the pendency of the suit.

24. As mentioned hereinabove, there is yet another question which goes against the case made out by the D appellant, viz., that after the Deed of Family Settlement, even the appellant has executed Conveyances in respect of portions of the suit property, thereby supporting the case of the respondent that the Deed of Family Settlement dated 8th February, 1976, had not only been accepted by the parties, but E had also been acted upon.

25. In such circumstances, we are not inclined to interfere with the order passed by the High Court, but we are also concerned that the suit should not be delayed on one pretext or the other, once such interim order is granted.

F 26. We, accordingly, dispose of the appeal by directing the Trial Court to dispose of the pending suit within a year from the date of communication of this judgment. In the meantime, the co-sharers to the suit property shall not create any third party rights or encumber or transfer their respective shares in the suit G property in any manner whatsoever and all transactions undertaken in respect thereof shall be subject to the final decision in the suit.

27. There will be no order as to costs.

R.P. Appeal dismissed.

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