

808

AJAY KUMAR vs. NEHA VISHAL

[2011(4) Mh.L.J.]

my view, if not the principles of *res judicata*, the principles of constructive *res judicata* are squarely applicable in the facts of the present case, as the petitioner, in view of the fact that the amount was already deposited by the auction purchaser at the time of the earlier round of proceedings, ought to have made the said ground, a ground of challenge to assail the auction sale. Having not done so, in my view, it is not open to the petitioner to challenge the sale on the said ground at this stage. Though the proposition of law that non-compliance of Rule 85 is fatal to an auction sale is well settled by the pronouncements of the Apex Court, in the facts and circumstances of the present case namely; the fact that the amount was deposited on 19-8-2010 and the decretal amount has already been withdrawn and now what remains is only the residual amount in the Court, in my view, the clock cannot be allowed to be turned back. Hence, I do not find any merit in the above petition which is accordingly dismissed. Rule discharged.

At this stage, the application for continuation of the order staying grant of possession is prayed for. In the facts and circumstances of the case, the prayer to that effect is rejected.

Petition dismissed.

FAMILY COURTS ACT, SECTION 7 : JURISDICTION

(Smt. Roshan Dalvi, J.)

AJAY KUMAR MADANLAL BAJLA

Petitioner.

vs.

NEHA VISHAL BAJLA and others

Respondents.

(a) Family Courts Act (66 of 1984), S. 7(1), Explanation (d) — *Jurisdiction of Family Court — Suit property claimed to be matrimonial home of respondent No. 1-wife of respondent No. 2-husband — Grant of injunction by Family Court in favour of wife, restraining the petitioner-father-in-law and respondent No. 2 from dispossessing her from the suit flat — The Family Court has jurisdiction in respect of a proceeding for injunction only arising out of a marital relationship — Its jurisdiction may not extend to the father-in-law and the wife under section 7(1) Explanation (d) could invoke it to the extent of her husband — However, since the petitioner father-in-law who claims to be exclusive owner of the flat has not made application under section 9-A, Civil Procedure Code for deciding the issue of jurisdiction — Family Court is not in error in deciding the application for injunction. (Paras 27 and 28)*

(b) Family Courts Act (66 of 1984), S. 7(1), Explanation (d) and Protection of Women from Domestic Violence Act (43 of 2005), SS. 19 and 17 — *Family Court granting injunction against petitioner-father-in-law along with his son, from dispossessing respondent No. 1-son's wife from her matrimonial home — Father-in-law denied that his son is the joint owner of the suit flat and averred that the flat stood in his sole name and he has purchased it out of his own funds and he is exclusive owner of the suit flat — Respondent-Wife has not only shown that the suit flat is a matrimonial home but she has shown that her husband has paid the EMIs — Payment by the husband must, therefore, put the Court on guard that there must be some interest of the husband in the suit flat — If that interest is*

W. P. No. 7146 of 2010 decided on 17-2-2011. (Bombay)

shown, he would be at least part owner of the suit flat — If that is so, the wife would be entitled to protection of her possession therein. (Paras 20 and 25)

For petitioner : *Vivek Kantawala with Ms. Sneha Nanandkar*

For respondent No. 1 : *A. M. Saraogi*

List of cases referred :

1. *S. R. Batra vs. Taruna Batra, AIR 2007 SC 1118* (Paras 12, 13, 15, 20)
2. *Smt. Hemaxi Atul Joshi vs. Smt. Muktaben Karsandas Joshi, A.O. No. 866 of 2007 decided on 5-12-2007* (Para 13)

ORAL ORDER :— The Petitioner has challenged the order of the Family Court, Bandra, Mumbai, dated 7th July, 2010 granting an injunction against him along with his son from dispossessing Respondent No. 1 herein. The Petitioner is the father-in-law of Respondent No. 1. Respondent Nos. 1 and 2 are wife and husband. They have been married and since their marriage, have been residing in the disputed property which is a flat at Mulund, Mumbai (the suit flat). The wife claims that it is her matrimonial home. The wife filed the petition in the Family Court under section 7(1) Explanation (d) of the Family Courts Act, 1984 (FC Act) for several injunctions in respect of the suit property which is her matrimonial home. She has claimed that she has a right to live there and co-habit with her husband. She has applied for injunction against her husband as well as her father-in-law restraining them from transferring, alienating, etc. the suit flat and from dispossessing her.

2. The relief under section 7(1) Explanation (d) of the FC Act is the jurisdiction of the Court in a Petition for injunction arising out of a marital relationship. The injunctions sought for the matrimonial home are, therefore, claimed to be the injunction for the property which arises out of the marital relationship. The Petition is also filed under Order XXXIX, Rule 1 of the Code of Civil Procedure (CPC) for interim injunction as well as under section 151 of the Civil Procedure Code for exercise of inherent powers of the Court. It may at once be mentioned that the petition is not titled to be filed under any provisions of the Protection of Women from Domestic Violence Act, 2005 (DV Act), though the suit property is claimed to be the matrimonial home of the wife.

3. Paragraph 5 of the Petition shows that the husband and the father-in-law of the wife purchased the suit flat. The sale agreement stands in the name of the father-in-law for the sake of convenience and respect, but both the husband as well as the father-in-law are joint owners.

4. Paragraph 6 of the Petition shows that both the Respondents are Applicants for a loan of the part of the purchase price but that EMIs are exclusively paid by the husband from his account and the husband also claims benefits of deductions under sections 80(c) and 24 of the Income-tax Act. The paragraph also shows that a large part of the purchase price of Rs. 25 Lakhs was made as down payment but does not show how that down payment was made or whether the father-in-law or the husband made that down payment. Out of the purchase price of Rs. 37 Lakhs, Rs. 25 Lakhs are shown as down payment and Rs. 12.5 Lakhs are shown to be the loan payment. Hence the loan is shown to be taken for a small portion of the purchase price for which EMIs are stated to have been paid by the husband.

5. The averment in paragraph 7 of the petition shows that there is an HUF which owns certain ancestral properties in Deoghar, Jharkand. It shows that the husband has a share therein as a member of the HUF. It also shows that both the husband and the father have sold some of the HUF land for purchasing the matrimonial home so that the matrimonial home came to be purchased out of sale-proceeds of the HUF property being the land in Jharkand. The wife, therefore, seeks to claim that the matrimonial home is the HUF property.

6. The first principles relating to the HUF must be understood. The fact that a Hindu belongs to HUF has to be presumed. However, the fact that the HUF has joint family properties cannot be presumed and must be proved. Therefore, the husband may be taken to be a member of the HUF. However, the sale of HUF properties cannot be presumed and has to be shown. Further the matrimonial home being purchased from the sale of the HUF property must also be proved and cannot be presumed.

7. The wife must prove the fact of sale of HUF properties of her husband. In the Interim Application, the wife must prima facie show such sale which would be conclusively proved by her at the trial. This could be shown by showing any sale of any properties belonging to the father-in-law or in the name of the father-in-law which was earlier of his father or grandfather in Deoghar, Jharkand. At least, prima facie, any sale of any land of the family of the husband must be shown. If that is shown, a consequent purchase of the matrimonial home may be taken to be from the proceeds of such sale.

8. None of this is shown. The wife has simpliciter made averments of the HUF and the sale of HUF properties.

9. Given these first principles, the application of the wife must be appreciated. She has made two bald statements as aforesaid. She has shown nothing whatsoever even prima facie to show or suggest or substantiate the statement of sale of HUF properties of the husband and the father-in-law. Prima facie case sought to be made out by her therefore, is only that she admittedly is the wife of her husband and, therefore, the daughter-in-law of her father-in-law and that the flat in which she resides since her marriage is the matrimonial home. Upon the admission of her relationship the fact that it is a matrimonial home can be seen. However, the wife's lawful rights in the matrimonial home must be further shown.

10. Section 17 of the DV Act is in respect of the right of every woman in a domestic relationship (including a lawfully wedded wife) to reside in the shared household (including the matrimonial home) and not to be excluded from such home. The wife has essentially claimed that right, though the title of the petition does not show that fact. That may have been an inadvertent error which can be remedied by an amendment to the petition.

11. The wife would be entitled to residence orders under section 19 of the DV Act in respect of her matrimonial home. This includes the order against her dispossession as well as alienation and disposal of her matrimonial home under section 19(1)(a) and (d) of the DV Act. Her petition is essentially under this section.

12. Consequently, the wife would be entitled to reliefs by way of residence orders in her matrimonial home which she had shared with her husband

admittedly upon her marriage. That right is only the right to reside therein, without more. It, of course, would not give her any title to the property. What is this matrimonial home has been initially decided by the Supreme Court in the case of *S. R. Batra vs. Taruna Batra*, AIR 2007 SC 1118 on which the father-in-law, as the Petitioner in this Petition, relies. In that judgment, the property belonging to the parents-in-law of a wife are held to be excluded from the protective umbrella of section 17 of the DV Act. However, the HUF property is not excluded. This is understandable. That is on the footing that a property belonging to the parents-in-law of a married woman, which is their self acquired property, could belong exclusively to them. Their son would have no beneficial interest in the property but an HUF property which has survived to the parents-in-law of the lady would thereafter survive to her husband as well as her children and the husband, as a member of the HUF, would have a beneficial interest and share in such property. Consequently, the judgment in the case of *Batra* (supra) allows the matrimonial home which is either the home of the husband or the home of his HUF in which he is a member to be covered under its protective umbrella but not any other property in which the husband would have no interest whatsoever. The latent facts of *Batra*' case (supra) are that there were more than one residences which came within the sway of the wife in that case. She was held disentitled to the residence belonging exclusively to her parents-in-law.

13. The case of *Batra* (supra) has been followed in the case of *Smt. Hemaxi Atul Joshi vs. Smt. Muktaben Karsandas Joshi* by this Court under an order dated 5th December, 2007 passed in A.O. No. 866 of 2007. The mother-in-law claimed ownership of the house in which her son and daughter-in-law lived after their marriage. The husband and the wife purchased another flat and lived there. It was observed that the husband had no legal right in his mother's property and hence the wife could not claim any legal right in the house belonging to her mother-in-law. But it was also observed that she could claim such right in the house of her husband. It may be mentioned that in *Batra*'s case (supra) as well as *Joshi*'s case (supra), the wife could not claim her right in a property other than her matrimonial home.

14. Of course, from such interpretation it would follow that when a wife marries into a family in which her husband neither has his own exclusive property to reside in, nor any HUF property in which he would have a share as a member of the HUF, the wife would not be protected in respect of her residence, even if that is a shared household or matrimonial home.

15. Consequent upon the ruling in *Batra*'s case (supra) holding and interpreting the term "shared residence" to mean and include the residence belonging to the husband as also the residence of the husband's HUF being joint family property, the wife has claimed that the suit flat belongs to the HUF of the husband. That claim has not in the least been substantiated even prima facie.

16. It is one thing for a party to make a claim on a bald statement and another thing to show or substantiate that fact. The party to show a legal right and to obtain an order of injunction must prima facie show that the legal right exists. In this case, the wife must, therefore, prima facie show that the suit flat is purchased out of joint family funds and could, therefore, be taken to be the joint family property of her husband since it is specifically averred that it is purchased

not by the husband alone but by the husband and the father-in-law as joint owners, though the agreement is in the name of only the father-in-law for the sake of convenience and respect. The wife has not even prima facie shown this aspect.

17. Mr. Saraogi on behalf of Respondent No. 1 argues that since the suit flat is admittedly the matrimonial home of the parties, the wife's residence therein must be protected.

18. Mr. Kantawala on behalf of the Petitioner argues that it may be protected but against the person against whom she makes out a case. The case of the wife is that the husband pays the EMIs and has taken tax benefits. This does not show the title of the flat; it is the substantive evidence to show that the title would be in the husband. It is not shown by the wife how the husband as well as the father-in-law are joint owners when it is admitted that only the father-in-law is shown as the owner in the agreement except upon the premise that this is a joint family property. Hence the contribution, if any, of the husband in the joint purchase with the father is not shown. The contribution is stated to be only of the joint family. That contribution is only from the sale of the family property. Consequently, the father-in-law purchased the property but the husband pays off the EMIs in respect of the loan taken albeit for a small portion of the purchase price.

19. If a Petitioner cannot show at least prima facie the case made out by her/him, the very first material ingredient of the grant of injunction is not satisfied. An interim injunction cannot be granted. But if a Petitioner even shows prima facie some incident evidencing his or her legal right, that right would be required to be protected by a temporary order of injunction pending the proceeding.

20. In this case, the wife has not only shown that the suit flat is a matrimonial home but she has shown that the husband has paid the EMIs. Why would the husband be paying the EMIs if the flat is not purchased out of the joint family funds or if the flat is purchased individually and exclusively by his father or if both the parties are not joint owners? The payment by the husband must, therefore, put the Court on guard that there must be some interest of the husband in the suit flat. If that interest is shown, he would be at least part owner of the suit flat. In that case, the suit flat would be the shared residence upon the interpretation given in *Batra's* case (supra). If that is so, the wife would be entitled to protection of her possession therein. In this case, the wife, upon showing the EMIs paid, would otherwise be entitled to some protection of her possession pending the Petition even if she does not show that the flat is a joint family property because the payment of EMIs would show the husband's liability to make those payments even if the flat is not joint family property but is only jointly purchased by him and his father.

21. The father-in-law has only refuted that the husband has paid the EMIs exclusively in the pleadings before the Family Court. The father-in-law has explained in the writ petition this denial. That is only because the father-in-law was called upon by this Court to explain how, upon the wife having shown the EMIs being paid from the husband's account, the father-in-law disputed that fact. Hence upon the query of this Court, the father-in-law produced certain bank

account statements. These are of HDFC Bank, Kotak Mahindra Bank and Axis Bank. The father-in-law has sought to show that from his account in HDFC Bank, his son, the husband, has withdrawn the amounts from time to time by ATM transactions. He has deposited some of those amounts in his own account and paid the EMIs from his own account. Such transactions are not direct debit and credit transactions under which the son withdrew by ATM deposited in his account and withdrew from his account to pay the EMIs. There is no reason really to have such a winding route for an otherwise a straight transaction. However, the father-in-law has shown his account having various debit entries by ATM withdrawals made in Mumbai and Thane. He claimed that he was in Jharkand at that time and the ATM debit entries are made in Mumbai and Thane which could be made only by his son. Of course, such transactions between the accounts of the father and son are not only legal and permitted but healthy and natural. Nevertheless, these transactions do not show the specific case made out by the father-in-law that the amounts were withdrawn for this purpose and paid as he has stated. There are far too many withdrawals and lesser payments upon the transactions as claimed by the father-in-law. The father-in-law has further shown that after the son was transferred to Calcutta on 2nd August, 2010 and he made payment of the EMIs by direct debits from his Kotak Mahindra account into Housing Finance account for payment of installments. These are indeed reflected in his Kotak Mahindra account statement. This account is opened two days after the filing of the writ petition which incidentally is stated to be a day after the transfer of the son to Calcutta. The account is opened by the very first entry of deposit of Rs. 10,000/- on 3rd August, 2010 by the father-in-law followed by a cash deposit of Rs. 18,500/- on 9th August, 2010 so as to enable the installment of the EMI to be paid on 9th August, 2010 itself to the Housing Finance account.

22. It may be mentioned that in the Family Court the father-in-law has simpliciter denied the statement of the wife that the husband was exclusively paying the EMIs. He has not shown and has not volunteered to state in his affidavit how he denies that and how the payment has been routed by the father-in-law through the account of the husband which is otherwise a more cumbersome mode of making payments. Consequently, the learned Judge could not have appreciated how actually the payments of EMIs were made as claimed by the father-in-law, assuming that they were so made. The learned Judge had to consider the statement of the wife reflected in the EMIs actually paid by her husband as also benefits claimed by the husband as against a bare statement of denial of the father-in-law not substantiated by his bank transactions and documents.

23. The wife has similarly made a statement simpliciter that both the Respondents being the husband and the father-in-law were negotiating to sell the suit flat in her presence which she has sought to restrain. The father-in-law has simpliciter denied that statement.

24. Given the circumstances in which the parties were, the statement of the wife, though made simpliciter, cannot be rejected outright, upon its denial, also made simpliciter. The wife was admittedly residing in the suit flat. The father-in-law was residing in Jharkand. There have been disputes between the parties

within about five months of their marriage. The suit flat is shown to be purchased by the father-in-law. The son is shown to have been paid some EMIs from his account and claimed tax reliefs.

25. In paragraph 6 of the written statement of the father-in-law, he has denied that the son is the joint owner of the suit flat with him. He averred that the flat stood in his sole name and he has purchased it out of his own funds and he is the exclusive owner of the suit flat. In paragraph 7 of the written statement he has denied that the son has any right of the suit flat as an heir or is a member of the HUF or has contributed any amount in purchasing the suit flat. He has specifically stated that the suit flat was purchased by him. This would certainly show that it was not purchased out of sale of the HUF properties. Hence the case of the wife that HUF properties were sold and from the proceeds the suit flat is purchased in paragraph 7 of the petition is denied by the positive statement of purchase by the father-in-law. However, the father-in-law has guardedly denied the statement made by the wife in paragraph 6 of the petition with regard to EMIs paid. It is interesting to note that the denial in the words of the father-in-law is :

“The Respondent No. 2 denies that the EMI of the said loan is being exclusively paid by the Respondent No. 1 only from his account.”

This statement has not been substantiated and designedly so. The son has indeed made payments from his bank account. The son has indeed claimed tax reliefs. The father-in-law has sought to show certain withdrawals by the son by ATM transactions and thereafter certain credits in the son's account followed by EMI payments. It may have been made perhaps only to obtain tax benefits. But if the Court is not shown the exact transaction by the party who alone can show it to the Court, the fact of such transaction cannot be accepted and the party must bear the brunt of the injunction upon not bringing to Court all the facts specially within his knowledge. In this case, the fact of ATM transactions and the winding mode of payments between the father and the son for whatever ulterior or other motives or for expediency between them, was specially within the knowledge of the father-in-law. Even at the trial it would be for the father-in-law alone to prove that fact under section 106 of the Evidence Act in a Court of competent jurisdiction upon an action in law being taken.

26. The vehement argument of Mr. Kantawala that the wife has no semblance of any right and that she has not made out any prima facie case whatsoever and has not shown any apprehension to Court for grant of the relief is, therefore, incorrect. Similarly Mr. Kantawala's contention that the order of the Family Court is perverse as being passed simpliciter upon a wife coming to Court and stating that the particular property is her matrimonial home and obtaining relief without at all showing how it could be a matrimonial home in which she could get relief is incorrect at least until the full facts of the unique transaction between the father and son for payment of EMIs is brought to the notice of the Court. Of course, if it is brought to the notice of the Court, which would be at the stage of trial, the learned Judge would surely consider it. Therefore, even after the father-in-law has shown this Court his case, whatever that be, from the documents produced by him upon the Court's query, they cannot be considered to set aside the order of the Family Court passed without considering them upon the father-in-law not producing these documents in that Court. Hence though ultimately the suit flat purchased in the sole name of the father-in-law, which

2011(4) Mh.L.J.] MUNI. COUNCIL, BHADRAWATI vs. ARVIND 815

would be presumed to be from his own funds, is not proved by the wife to be the HUF property in which her husband, as a member of the HUF, would have had a share, the interim order cannot be interfered with.

27. The father-in-law has challenged the jurisdiction of the Court against him in paragraph (III) of his affidavit-in-reply to the injunction application. The learned Judge has not framed the preliminary issue relating to the inherent jurisdiction of the Family Court under section 9A of the Civil Procedure Code and has proceeded to grant the interim relief. The Family Court's jurisdiction was invoked by the wife in her capacity as such. The Family Court has jurisdiction even in respect of a proceeding for injunction only arising out of a marital relationship. Family Court's jurisdiction may not extend to the father-in-law and the wife under section 7(1) Explanation (d) of the FC Act as much as it would extend to the husband. That aspect should have to be decided by the Family Court. However, the father-in-law has not taken out any separate application for deciding the issue of jurisdiction under section 9A of the Civil Procedure Code also. That issue also may be decided by the Family Court at appropriate time in appropriate proceedings. Since no such application was made, the learned Judge is not seen to be in error in deciding the application for injunction.

28. Seeing the entire proceedings, the impugned order, as a whole, is not seen to suffer from any material irregularity such as to require any interference of this Court in its writ jurisdiction. It must, therefore, remain until any application is taken out by the father-in-law or until the final proceedings are considered in the trial upon the oral as well as documentary evidence of the parties.

29. Consequently, the Writ Petition stands dismissed.

Petition dismissed.

CONSTITUTION OF INDIA, ARTICLES 14, 16 AND MAHARASHTRA
RECOGNITION OF TRADE UNIONS AND PREVENTION OF UNFAIR
LABOUR PRACTICES ACT, SCHEDULE IV, ITEM 6

(*R. M. Savant, J.*)

MUNICIPAL COUNCIL, BHADRAWATI

Petitioner.

vs.

ARVIND s/o KESHAVRAO BHUSARI

Respondent.

Constitution of India, Arts 14, 16 and Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act (1 of 1972), Sch. IV, Item 6 — Public Employment — Employment under the Municipal Council is a public employment — It is governed by the Rules, Regulations and directions issued by State Government from time to time.

The Industrial Court has totally misdirected itself by directing the petitioner-Municipal Council to regularize the service of the respondent in any post in any other cadre where his educational qualifications entitle him to be so appointed. That is impermissible, as the respondent No. 1 could have at the highest be regularized in the post which he was claiming and not in any other post in the Municipal Council. If the said course of action is permitted to be followed, it will create chaos as there might be other employees in queue for the said post, who are waiting to be regularized in terms of the policy that may have

W. P. Nos. 105 and 106 of 2011 decided on 20-6-2011. (Nagpur)