

**R.C.S.No. 209/2006****ORDER BELOW EXHIBIT NO. 5**

1] Plaintiffs have moved the present application for interim relief seeking an order of temporary injunction restraining the defendants or any other persons on their behalf from creating any third party interest in the suit property in any manner whatsoever or from changing its nature.

2] As per the plaintiff's contentions one Salu Inas Pirel was the original owner of the total 38 properties as more particularly described in the plaint situate at village Gokhiware, Tal. Vasai, Dist. Thane. It is contended that after the death of his first wife he married one widow Fatima Paskol Morayas who had one son from her first husband by name Mershan, aged 13 years at the relevant time. It is contended that aforementioned Salu Inas Pirel had no issue out of his first marriage. However, he had accepted said Mershan as his son. It is contended that the couple Salu Inas Pirel and Fatima Morayas had a biological daughter born in the year 1891 by name Isabel. It is contended that said Isabel got married in the year 1916 to one Augustin Fargol, resident of village Gokhivare. The plaintiffs claim through said Isabel viz. daughter of original owner Salu Inas Pirel. The defendant Nos. 1 to 13 claim through the deceased son of Mershan by name Bastayav. Defendant Nos. 14 to 22 claim through Mershan's deceased son by name Inas. Defendant Nos. 23 to 26 claimed through Mershan's deceased son Dega. Defendant Nos. 27 to 33 claim through Mershan's daughter Anjali whereas defendant Nos. 34 to 38 claim through Mershan's deceased daughter Marybai. Defendant Nos. 39 to 42 claim through Rosemary Paskol Collasso.

3] In such circumstances, it is contended that both Mershan as well as Isabel had an equal half share in the property belonging to Salu Inas Pirel and accordingly even the plaintiffs and defendants are entitled to receive an equal half share in the suit property.

4] In such circumstances, the plaintiffs have further contended that the plaintiffs recently came to know that other defendants have sold property bearing Survey No. 26, Hissa No. 6 in favour of the defendant No. 43 and that the defendant Nos. 25 and 26 having caused construction of a house property bearing Survey No. 104 B and that they are causing construction in the property bearing Survey No. 106, Hissa No. 3. The plaintiffs apprehend that the defendants may sell out many other properties to third persons without plaintiff's consent. It is contended that on 27/07/06, the defendants refused to give half share in the suit properties to the plaintiffs due to which the plaintiffs have made up their mind to seek partition of their share. It is further contended that during pendency of the suit when the plaintiffs obtained the 7/12 extracts of the suit property, they came to know that one of the property bearing Survey No. 87, Hissa No.3 has been sold by defendant No.33 to defendant No. 48 vide registered sale deeds dated 27/03/2010 and 10/04/2010 and that the heir of defendant No. 14 and defendant Nos. 15, 16, 19 to 22 having sold property bearing Survey No. 85, Hissa No.3B in favour of the defendant No. 49 vide a registered sale deed dated 31/03/2011. In such circumstances, the plaintiffs have prayed that if during the pendency of the suit, the defendants are not restrained from dealing with the properties, the rights of the plaintiffs in the suit property would get jeopardized and hence they have prayed that the application be allowed.

5] Defendant No. 10 has filed his say at Exh. 28. He has in substance admitted the plaintiff's claim in toto and has contended that in August 2006 when the defendants refused to give half share in the suit property to the plaintiffs, he had taken efforts to solve the controversy but failed. He has prayed that the court may intervene to resolve the dispute to hand over half share of the suit property to the plaintiffs.

6] The defendant Nos. 27, 28, 30, 33 to 36 and 38 have filed their written statement and say at Exh. 38A. They have also in substance admitted the plaintiff's claim and have prayed that they be allotted their respective share in the suit properties.

7] The defendant No. 37 has filed his written statement and say at Exh. 39. He has also admitted plaintiff's share and has prayed that his independent share in the suit property may also be allotted to him. Subsequently, the defendant Nos. 27 and 34 have filed their written statement and say at Exh. and the defendant Nos. 30, 35 and 38 have filed their additional written statement cum say at Exh. and they have respectively contended that they are withdrawing their earlier written statement and say filed through their Advocate Menezes at Exh. 38A inter-alia stating that the earlier statement was not prepared in a proper and correct manner. They have in effect withdrawn their earlier admission of the plaint and have raised defence that neither Isabel nor her daughter claim the suit properties during their lives in any manner whatsoever. Apart from the other technical defences, they have also raised the defence that the entire suit properties were not belonging to Salu Inas Pirel but only two properties bearing Survey No. 104, Hissa No.2 and Survey No. 104, Hissa No. 4 belonged to said Salu Inas Pirel

and the rest of the properties were acquired independently by Mershan and hence they belong to the defendants exclusively. It is also contended that those properties have already been partitioned amongst the heir and legal representatives of Mershan 60 years ago and they have dealt with their properties in a manner as they wished. They have therefore contended that the plaintiffs have no right to claim any relief in respect of the suit properties.

8] The defendant No. 20, 21 and 25 have filed their written statement and say at Exh. 41. The defendant Nos. 16, 17 and 32 have filed their written statement and say at Exh. 69. The defendant Nos. 3 and 32 have filed their written statement and say at Exh. 67. The defendant No. 15 has filed his written statement and say at Exh. 68. The defendant Nos. 14, 19 and 22 have filed their written statement and say at Exh. 7. The defendant Nos. 1, 2, 11, 12, 13, 23, 24, 26, 39, 40 and 42 have filed their written statement and say at Exh. 66 respectively. They have raised identical defences and have denied all the contentions of the plaintiffs to the effect that the plaintiffs are entitled to claim half share in the suit property through Isabel as daughter of Salu Inas Pirel. They have raised the alternative defence that the entire property did not belong to Salu Inas Pirel but only two properties Survey No. 104, Hissa No.2 and Survey No. 104, Hissa No. 4 belonging to said Salu Inas Pirel and the rest of the properties were acquired independently by Mershan and hence they belong to defendants exclusively. It is also contended that those properties have already been partitioned amongst the heir and legal representative of Mershan 60 years ago and they have dealt with their properties in a manner as they wished. They have therefore contended that the plaintiffs have no right to claim any relief in respect of the suit properties.

9] The defendant Nos. 48 and 49 have filed their written statement and say at Exh. They have also raised similar defences at part with the other defendants and have made out an additional defence to the effect that they are the bonafide purchasers of the property purchased by them and if at all the partition is to be effected, the property purchased by them be allotted to the share of concerned defendants from whom they purchased the same.

10] In the light of the facts and circumstances, following points arise for the determination of the Court. Considering the material produced by the both parties and arguments advanced, the findings to the respective points are as under:-

| <b>Sr.<br/>No.</b> | <b><u>POINTS</u></b>                                                                                                   | <b><u>FINDINGS</u></b> |
|--------------------|------------------------------------------------------------------------------------------------------------------------|------------------------|
| 1                  | Do plaintiffs prove existence of a prima facie case in their favour?                                                   | In the Negative.       |
| 2                  | Whether plaintiffs are likely to suffer an irreparable loss, harm, injury or prejudice if the application is rejected? | In the Negative.       |
| 3                  | Whether balance of inconvenience lie in favour of the plaintiffs?                                                      | In the Negative.       |
| 4                  | What order?                                                                                                            | As per order.          |

### **REASONS**

11] The argument is opened by Ld. Advocate Mrs. Mariya Shindalkar for the plaintiffs. She inter-alia argued that the entire suit property originally belonged to Salu Inas Pirel and that he had one step son by name Mershan and one real daughter by name Isabel and thus, his property belongs to the heir and legal representatives of both Mershan and Ijable in equal half proportion. As the defendants are now

interested in denying the plaintiff's legitimate rights in the suit property. She has prayed that the defendants are required to be restrained in dealing with the suit property in any manner whatsoever, so as to deprive the plaintiffs of their lawful rights in the suit property. She therefore prayed that the application be allowed.

12] Ld. Advocate Shri. William Fernandis argued on behalf of the defendant Nos. 15/1 to 15/4, 24, 27, 28, 30, 34, 35, 37, and 38. He has raised several points during the course of his argument such as want of possession on the part of the plaintiffs to agitate for their alleged claims, that no material documents having been produced by the plaintiffs to establish their relationship with Salu Pirel. It is contended that Isabel is claimed to have expired in the year 1936 after which 4-5 generation have passed and none from these generations and even Isabel claimed the property. He has argued that there is no prima facie material to show that Salu Pirel had a daughter by name Isabel. He has pointed out that amongst the Christian population in Vasai, the Canon law required the Church to maintain record regarding the birth, death, marriage, Baptism etc. of the Christians and that being the position the plaintiffs could have easily obtained the relevant record from the church. Regarding the relationship of Isabel with Salu Pirel and so on, he has further argued that Salu Pirel had only one son Mershan who held the other properties except two as his self acquired properties. It is also argued that there is no material on record to show that Mershan inherited all the properties from Salu. It is argued that there is no material record to show that all the properties originally belonged to Salu. He has relied upon a number of mutation entries on record which show that the partition took place amongst the son's of Mershan quite a

number of years ago and that there was even previous litigation pending and decided which confirmed the rights of son's of Mershan. It is argued that in an earlier suit R.C.C.NO. 23/72, a decree of partition has been passed and the same has remained unchallenged till date. In the circumstances, it is claimed that since the suit is filed with a malafide intention the same be rejected with costs.

13] Ld. Advocate Shri.A.A.Patil argued on behalf of the defendant Nos. 1 to 3, 11 to 19, 20, 22 to 27, 31, 32, 39, 40 and 42. He has also argued alike that of Ld. Advocate Shri.William Fernandis. The gist of his argument is that the plaintiffs have not prima facie proved the legal heirship of Salu Pirel and that the plaintiffs could have easily produced the record maintained by the church as per canon law and has not been so done by them. He has submitted that the plaintiffs have made bald statements.

14] Ld. Advocate Mr. Gaurav Pai argued on behalf of the defendant Nos. 48 and 49. He has adopted the argument by the other advocates of defendants and have submitted that the defendant Nos. 48 and 49 are the bonafide purchasers since last 36 years and therefore they cannot be divested of their property purchased by them.

15] In rejoinder Ld. Advocate Mrs. Mariya Shindalkar has submitted that the mutation entries do not create or destroy title. She has submitted that the proper plea that the defendants could have raised would have been that of ouster. She has submitted that between co-owners the entry in the name of only one of the co-owners does not amount to an ouster of other co-owners. In respect of the defendant's

claim regarding self acquired properties of Mershan, she has submitted that the defendants have not produced any independent title deeds and there are no specification given by the defendants in respect of the property separately acquired by Mershan. Hence, it is submitted that acquisition independent of intestate succession has not been shown by the defendants. She has pointed out that only those defendants who are interested in denying the plaintiff's title/claim have made simple denials disputing Isabel to be the heir of Salu Pirel which other defendants have not done and therefore, those denials have to be construed as evasive denials.

16] She has further argued that when the defendants raised technical defence of the suit being barred by the limitation, it necessarily presupposes an existence of a right in favour of the party who seeks the remedy and therefore there is an implied admission regarding plaintiff's rights in the suit property. She has further argued that when the suit is filed for partition, in aid of the final decree, in order to preserve the status of the properties, the order of injunction must be granted. She has also argued that so far as the purchasers are concerned, they are also not sure about the vendor's title and therefore, put forth the theory of the adjustment which necessarily gives rise to an inference that the defendants are self conflicting. She has also submitted that when the partition is required to be carried out by metes and bounds, the injunction ought to have been granted in respect of all the properties as if it is not so done, the defendants may dispose of some of the properties which may fetch them handsome price and the plaintiffs will have to remain content with worthless property. She therefore prayed that considering the facts and circumstances her application may be granted.



**ALL POINTS TOGETHER:-**

17] As per the plaintiff's contentions, the plaintiffs and the defendants are entitled to one half share each in the suit property. The plaintiffs mainly claim the said share through their ancestor Isabel who was allegedly the daughter of one Salu Inas Pirel. It is also their case that Salu Inas Pirel had another step son by name Mershan who was elder to Isabel. So far as these contentions are concerned, a few generations have passed since the time of Isabel and Mershan as according to the plaintiff, Salu Inas Pirel married Mershan's mother Fatima Paskol Morayas some time in the 18<sup>th</sup> century and their daughter Isabel was born in the year 1891. From the alleged date of birth of Isabel, the suit has been filed after 115 years. Isabel was married to one Augustin Fargol in the year 1916 and that Mershan died in the year 1939. Thereafter, as per family chart filed on record Isabel had a daughter Koshav (d.1943) and son Girgol (d.1997). The present plaintiffs are the children of said Girgol. In any event, it is required to be seen whether the plaintiffs establish their lineage with original owner Salu Pirel through Isabel or otherwise. Now, since several years have passed in between and apparently the plaintiffs or their predecessor having not exercised any right, title or interest of theirs in the suit property throughout, it becomes rather important to see whether their interest subsist if at all they possess one as against the established rights of the defendants who according to the plaintiffs are claiming through Mershan's branch.

18] In this connection, the plaintiffs have placed on record the 7/12 extracts of the suit property. They apparently stand in the name of the defendants. The names of the plaintiffs nowhere appear on the 7/12 extracts. There is no document on record produced by the plaintiffs to

show that the entire property which consists of 38 different properties was originally belonging to Salu Pirel. The age old record which could have proved the originality of title in Salu Pirel has not been produced on record by the plaintiffs. So, also during the course of argument it was submitted on behalf of the plaintiffs that the old record regarding birth of Isabel and likewise is not available even with the church. It has been submitted by the Ld. Advocate for the defendants Mr. Fernandis and Mr.A.A.Patil that it was the well known and well accepted practice of canon law as was prevailing then amongst the Christian Community that the church used to maintain the record relating to the birth, death, marriage, Baptism etc. of the fellow Christians and hence it was apt for the plaintiffs to have produced such record before the court to justify their claim on the basis of the legal heirship of Salu Inas Pirel. It is required to be seen that oral argument to the effect that the said record is not available with the Church is also not substantiated by any authentic pronouncement to that effect from the concerned church authority in which case the argument would have gained weight.

19] The plaintiffs apparently find support from the written submissions of certain defendants who admitted the plaintiff's claim. It is the argument that when some of the defendants have admitted the plaintiff's claim, they would not do so lightly or casually. In such circumstances, it would be those defendants who would be at a loss as they would be losing straight one half share to the plaintiffs on account of their express admission to that effect. No person is expected to risk his own share willingly and unnecessarily. In this context, Ld. Advocate Mr. Fernandis for the defendants argued that some of the defendants who have admitted the plaintiff's claim are distinct relatives of the plaintiff

through marriage or otherwise and some of them have admitted the claim on account of some allurements.

20] However, it is well settled law that the plaintiffs must establish their case on own strength and should not ordinarily be allowed to take benefit of the loop-holes of defence. The defendant No. 10 who is presently the sole defendant who has supported the plaintiff's claim cannot be held to be a strong point in favour of the plaintiffs, particularly when the other requisite material on record shows otherwise. We will now consider the prima facie material produced on record by the defendants.

21] Thus, the defendants have produced on record certain mutation entries which need proper consideration even at this stage. Accordingly, the Mutation Entry No. 403 dated 26/06/1939 records the statement of Mershan Pirel in favour of his son Bastyav regarding his possession over some of the properties. Similarly, the Mutation Entry No. 445 dated 01/09/1941 records the statement of Bastyav Pirel and Inas Pirel in respect of possession over certain properties of their brother Dega in pursuance of an oral partition. The Mutation Entry No 446 dated 27/09/1941 is the heirship entry of one Faru Salu Fargol. The Mutation Entry No.589 dated 29/01/1949 is the entry regarding mortgage of the properties mentioned therein by Dega Pirel. The Mutation Entry No.601 dated 06/05/1950 is the heirship entry of Bastyav Mershan Pirel in respect of some of the suit properties. The Mutation Entry No. 632 dated 04/10/1957 reflects the names of the defendants in respect of some of the properties. The Mutation Entry No.1430 dated 18/06/1974 records the partition in pursuance of decision in R.C.S.No. 23/1972 amongst the

defendants. The Mutation Entry No. 1505 dated 24/08/1976 is the heirship entry of Dega Mershan Pirel. The Mutation Entry No. 1506 dated 27/08/1976 records deletion of names of daughter of Dega in view of their voluntary statements. The Mutation Entry No. 1677 dated 03/03/1982 is regarding cancellation of the encumbrance on the property of defendant Sebestin Diago Pareira. The Mutation Entry No.1806 dated 10/06/1985 records the heirship entry of Luisa Diago Pareira as per Mutation Nos. 1605, 1606. The Mutation Entry No. 2101 dated 28/06/1989 records the sale of Survey No. 104/41, 91/08 in favour of Sebestin Diago Pareira and Thomas Diago Pareira.

22] Thus, it appears that the defendants and their predecessors have from time to time taken necessary steps in respect of the suit properties. They have from time to time made heirship entries as well as effected partition amongst themselves even through the intervention of the court. However, the plaintiffs do not appear to have been party to any of the transaction relating to the suit properties in past and have sought to seek their alleged half share after lapse of several years which therefore cannot be said to be a step taken in a diligent manner.

23] Thus it becomes apparent that though the plaintiffs are claiming equal half share in the suit properties, there is nothing on record to show that they are in possession of the suit property or any portion thereof or that they were in possession of any portion of the suit properties even in past. On the contrary, it becomes apparent that neither the plaintiffs nor their predecessors have exercised any apparent authority, power or dominion over any of the suit properties in the past. They are only claiming on the basis of their alleged claim through Isabel.

However, the relationship has not been properly established even on a prima facie basis through proper channels in the absence of which an equitable relief cannot lightly or blatantly or blindly be granted against the defendants who are in settled possession of all these suit properties. As is already discussed hereinabove, there is nothing on record to show all the suit properties originally belonged to Salu Pirel to consider the plaintiff's claim extending to all the suit properties. This is particularly so as the defendants have also contended that all the properties barring two are the self acquired properties of Mershan at this stage. There is no evidence to show that Mershan had acquired any of the properties. However, that issue will be discussed at a later stage during the course of trial. However, it was for the plaintiffs to firstly establish their prima facie right, title and/or interest in the suit properties. In this context, Ld. Advocate for the defendants has placed reliance upon a ruling in the case of *Mandali Ranganna and Ors Vs. T. Ramchandra and Ors. 2008(4) ALL MR 932 (S.C.)* in which the Hon'ble Supreme Court is pleased to rule that while considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto, viz. existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties. Grant of injunction is an equitable relief, a person who has kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. It is further held that the court will not interfere only because the property is a very valuable one. Thus, it is held that application of mind on the part of the court that in respect of the suit for partition and possession, whether it appears that prima facie the respondents are in possession of the suit properties for a long period, rightly or wrongly huge

constructions are raised spending about three crores of rupees. Further constructions in such cases cannot be stopped at such a stage and they can be allowed proceed with construction subject to the ultimate decision of suit. So also, the ruling in the case of Satyabhamabai w/o Wasudev Dhanjode and Ors. Vs. Chhatrapati s/o Zibal Dhanjode and Ors. 2004(1) ALL MR 779 applies squarely to the facts of the present case.

24] In this context, the defendants have produced on record certain part occupancy certificates in respect of Survey No.104, Hissa No.3, Survey No.105, Hissa No.3, Survey No.110, Hissa No.9 & 10 dated 05/06/2002 and May 2007 respectively which show that in respect of these properties third party rights have already been created, the defendants have also placed reliance upon a sale deed dated 26/02/1999 with M/s. Luyiza Builders and Thomas Diago Pareira and Bassin Catholic Bank Ltd, which has not been challenged so far. The defendants have also placed reliance upon a decree in R.C.S.No. 134/68 in which apparently the present defendant No. 10 was a party defendant No. 3 and the Ld. Trial Court was pleased to pass a decree for partition of the properties mentioned therein. It is argued that the defendant No. 10 who has supported plaintiffs in the present cause had not disputed the passing of decree in the said earlier suit excluding of the present plaintiffs. It is therefore argued that in such circumstances, the present support given by the defendant No. 10 to the plaintiffs needs to be ignored being on account of the defendant No. 10 being the husband of the sister of plaintiff No. 1 and thus, being an interested party from the side of the plaintiffs. In this context, Ld. Advocate for the plaintiffs has argued that so far as the documents showing part occupancy certificate and creation of third party interest are concerned, both the parties being co-owners,

their rights can be decided at the final stage and even if certain rights are created at this stage, they do not dis-entitle the plaintiffs from seeking interim order to protect their rights in the suit properties. In any event, as is already discussed hereinabove, the party who sleeps over his rights for a considerable long period particularly when the other party has even engaged itself in litigation, have had their rights decided from the court of competent jurisdiction and the decree having attained finality on account of the passive attitude to the plaintiffs would certainly go against the party in default. In this context, the defendants have also placed reliance upon the ruling in the case of **Abasaheb Bali Gharge and Ors. Vs. Balaji Ramhari Gharge 1995(1)Bom.C.R.542** in which the Hon'ble Bombay High Court was pleased to hold that where there were long standing mutation entries and transaction executed on the basis of such mutation entries, the possession being open and unchallenged, the title gets perfected by prescription. In the instant case, the ratio can be made applicable by analogy to a certain extent as the same is open for proper application and can also be distinguished at a later stage on the basis of evidence adduced as the scope of present litigation is not confined to the aspect of acquisition of title or possession and prescription alone. In any event, it is a matter of fact and record that in the instant suit there have been mutation entries in the name of the defendants since past many years and those long standing mutation entries have not been challenged by the plaintiffs in any manner. So also, they have not made any attempts also to get their name recorded to the suit property in their capacity as the heir of Isabel or otherwise.

25] In such circumstances, in view of discussion hereinabove, prima facie the material question that was required to be considered at

this stage having regard to the peculiar facts of this case, that dispute has been brought to court after lapse of so many years after death of the alleged original co-owners, namely, Isabel and Mershan, there ought to have been some prima facie material which could have gone to establish at least at a prima facie level that Isabel had some lineage or linkage with Salu Inas Pirel. However, that prima facie material been absolutely missing, at this stage, the plaintiffs cannot be held to have successfully made out a prima facie case in their favour and consequently, the balance of convenience does not lie in their favour. Needless to say, the question of irreparable injury or prejudice also does not arise in favour of the plaintiffs. As such, answer to all the points is in the negative. However, in the light of the said facts and the circumstances in this case the suit is required to be tried expeditiously as already a period of eight years has passed and hence the parties are directed to co-operate the court in having a speedy trial. Hence, the order.

**∴ ORDER ∴**

1. The application Exh.5 is rejected .
2. Costs to be cost in the cause.
3. The suit is adjourned to 29/12/2014 for issues.

Vasai  
Date:- 01/12/2014

(R.U.Malvankar)  
Jt. Civil Judge, J.D. Vasai