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Presented on : 18/11/2013.

Registered on : 18/11/2013.

Decided on : 22/08/2016.

Duration : Ys. Ms. Ds.
02 10 03

**IN THE COURT OF ADDITIONAL JUDGE, SMALL CAUSES
COURT AND JOINT CIVIL JUDGE, SENIOR DIVISION, PUNE.**

(Presided over by Harsha C. Shende-Kulkarni)

Spl.Civil Suit No.1580/2013
Exh.

1. Smt. Sangeeta Vilas Saste.

Age : 39 Yrs., Occupation : Agri.,
R/o: Avhalwadi, Post Wagholi,
Tal. Haveli, Dist. Pune.

2. Sau Chaitrali Chandrashekhar Tate.

Age : 23 Yrs., Occupation : Agri.,
R/o: Chandannagar, Kharadi, Pune – 14.

3. Sau Sampada Rahul Avhale.

Age : 22 Yrs., Occupation : Agri.,

4. Sau Vimal Shivaji Avhale.

Age : 60 Yrs., Occupation : Agri.,

Plff. Nos. 3 & 4 R/o: Avhalwadi, Malwadi,
Post Wagholi, Tal. Haveli, Dist.:Pune.

.... Plaintiffs.

V/s.

1. Shri Namdev Shankar Saste.

Age : 77 Yrs., Occupation : -Agri.,

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2. Shri Sagar Kailash Saste.

Age : 25 Yrs., Occupation : - Agri.,

3. Shri Arjun Kailash Saste.

Age : 25 Yrs., Occupation : - Agri.,

4. Shri Kailash Namdeo Saste.

Age : 50 Yrs., Occupation : - Agri.,

5. Sau Sonabai Namdeo Saste. (DELETED)

Deft. Nos. 1 to 4 R/o: Moshi, Tal. Haveli,
Dist.:Pune.

.... Defendants.

Suit for declaration and injunction.

APPEARANCES :

Shri S.P. Kapare, Adv. for the plaintiffs.

Shri V.D. Tapkir, Adv. for defendants.

: ORAL JUDGMENT :

(Delivered on this 22nd day of August, 2016)

1] This is a suit for declaration and permanent injunction.

2] The brief facts that, the lands described in Para No.1 of the suit are the ancestral properties of the plaintiffs and defendants. The partition is not taken place in between them as per metes and bounds. The defendant No.1, who is being head of the branch of plaintiffs and defendants also having his undivided share in the said properties. The family tree of plaintiffs and defendants given in Para No.3 of the plaint and their interse relations mentioned in Para No.4

According to the plaintiffs, the defendant No.1, 4, 5 and plaintiff No.2 and deceased Vilas are having 1/5th share in the properties.

Deceased Vilas was husband of plaintiff No.1. After his death, plaintiff Nos. 1 to 3 being heirs of deceased Vilas become owners of the undivided share of Vilas in the suit properties. As the partition of the suit properties not taken place so the defendant No.1 does not have any right to transfer the land by any mode, i.e., by sell, gift etc. still, the defendant No.1 transferred the total share of plaintiffs in the said land by executing gift-deed dt. 24/10/2011 in favour of defendant Nos. 2 and 3. The said deed registered at Sr. No.10366/11. The Plaintiff has also objected the process of taking names of defendants on revenue record. As per the further contention of plaintiffs, the defendant No.1 only with intention to deprive the plaintiffs from their legal right, executed the gift-deed in question without taking consent of the plaintiffs and they are trying to create third party interest in the said land. So the suit brought by the plaintiffs with the prayer to declare the said gift-deed registration No. 10366/11 not binding upon the plaintiffs so it be declared as cancelled so also to restrain to defendant Nos. 2 and 3 or any person on their behalf from transferring the said lands to anybody.

3] In respond to the suit summons, defendants appeared in the matter. Defendant No.4 has filed his Written Statement and say as per **Exh.17** and the same is accepted by defendant Nos. 1 to 3 and No.5 as their Written Statement by filing pursis Exh.19 and 21. Defendant No.5 died during pendency of suit.

According to the defendants, the plaintiffs has filed false suit without any cause of action. The Court does not have jurisdiction to try the suit. The plaintiffs are not having locus standi to file the suit. Defendant No.1 not partitioned the suit properties in between his deceased son Vilas and defendant No.4 so the present plaintiffs does

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not have any right to file the suit. The properties not specifically described in the plaint. The plaintiff No.4 will get right in a property after the death of defendant No.1 so she also does not have any right in the properties. Further, as per defendant No.1, he is having right to transfer his undivided share and accordingly he has executed gift deed dt. 24/10/11 in favour of his own grandson, i.e., defendant Nos. 2 and 3. it is registered document. The plaintiff does not have any right to ask for cancellation after death of Vilas in the year 1992. so the suit required to be dismissed with costs.

4] From the rival pleadings of the parties and documents on record, following issues framed by me at **Exh.23** and I have given my findings thereon with reasons are as follows:

<u>ISSUES</u>	<u>FINDINGS</u>
1] Whether the plaintiffs prove that the suit property are ancestral properties?	.. In the affirmative.
2] Whether the suit properties are properly described?	.. In the affirmative.
3] Whether the suit is properly valued?	.. In the affirmative.
4] Whether the plaintiffs prove that gift deed No.1036/2011 dt. 24/10/2011 is liable to be cancelled?	.. In the affirmative.
5] Whether the plaintiffs are entitled for relief of injunction?	.. In the affirmative.
6] Whether the plaintiffs are entitled for relief claimed?	.. In the affirmative.
7] What order and decree?	.. As per final order

: REASONS :

5] The plaintiff No.1 Smt. Sangeeta Vilas Saste filed her affidavit of examination in chief at **Exh.39** and has filed certified copy of 7/12 extract of suit properties, i.e.,. Gat No. 166, 172, 185, 207, 210, 214, 225, 230, 236, 240, 251, 236, 240, 251, which are at **Exh.40 to 50**, the 7/12 extract of land Gat No.406 is at **Exh.51**, Form 8A is at **Exh.52**, extract of mutation entry No.9250 is at **Exh.53**, extract of Form No.8A is at **Exh. 54**, the registered Sale-Deed No.10366/11 is at **Exh.55**, order dt. 24/02/2014 of Circle Officer, Bhosari is at **Exh.56**, order dt. 24/02/2014 of Circle Officer, Bhosari is at **Exh.57**. The plaintiff has also examined Sau Vimal Shivaji Avhale (**P.W.2 Exh.60**).

The defendant No.4 Mr. Kailash Namdev Saste examined himself as (**D.W.1 Exh.70**) for and on behalf of defendant Nos. 1 to 3 and 5 and also has examined Kumar Arjun Kailash Saste witness No.2 **Exh.82**.

AS TO ISSUE Nos.1 and 2 :-

6] The plaintiff No.1 Smt. Sangeeta Vilas Saste, is a widowed daughter in law of defendant No.1 Shri Namdev Shankar Saste. Defendant Nos. 2 and 3 are sons of defendant No.4. Mr. Kailash Namdeo Saste, who is son of defendant No.1 and brother in law of plaintiff No.1. Plaintiff Nos. 2 and 3 are the children of plaintiff No.1 while plaintiff No.4 is a daughter of defendant No.1. This is the admitted position and relations between the parties. But the defendants have categorically denied about non partition of the suit property by metes and bounds in between them as alleged by plaintiffs.

As per the defendants, the suit property has been partitioned in between the brothers, i.e., defendant No.1 his brother Mr. Changdeo and deceased Sopan. It is further defence of the defendants that, the gift in question is made by the defendant No.1 for his own undivided share in the property and he is having full right to transfer his share to his own grandsons, i.e., defendant Nos. 2 and 3. The suit, therefore, not maintainable in eye of law. The plaintiff not asked for the partition is also a ground raised for dismissal of suit.

It is very interesting to mention here that, the plaintiff along with his affidavit of examination in chief has filed on record, the 7/12 extracts of the suit properties along with list Exh.3, which are at Exh.64 to 75. She has also filed the mutation entry No. 357, which is at Exh.63. It can be seen from the documents on record, i.e., 7/12 extract and the mutation entry referred above that, the suit properties are ancestral properties of the plaintiff and the defendants.

In addition to it, here, I would like to mention that, the defendant Mr. Kailash Namdeo Saste, i.e., defendant No.4 accepted in his evidence that, the suit properties are their ancestral properties and previously owned by his grandfather Mr. Shankar Ramji Saste, who died in the year 1976. After his death, the suit properties came in the possession of the plaintiffs and defendants. The entry of heirs taken as per the mutation entry No. 357, which is at Exh.63 filed on record by the plaintiff. It has also been accepted by the defendant No.4 that, the name of defendant No.1 and the names of his brothers are mentioned in the columns of ownership in the 7/12 extract of the suit properties and there is no written partition taken place in between them all so far as the properties are concerned. The suit bearing Reg.C.S.No. 191/2013 filed by Mr. Changdeo Saste, who is real brother of

defendant No.1 Namdeo in Pimpri Court accepted by defendant No.1. It is crystal clear from the evidence and the admissions given by the defendants about it that suit properties are the ancestral properties.

So for reasons mentioned above, I straight way conclude that the plaintiffs succeeded in proving that the suit properties are the ancestral properties of family of plaintiffs and defendants.

It has also been averred by defendants that the suit properties more particularly the property involved in the matter not properly described .

In answer to it, the Learned Advocate for the plaintiffs in his argument pointed out that the said gift-deed is filed on record and the defendants have also accepted that the said gift-deed executed by them in favour of defendant Nos. 3 and 4. Actually, the whole suit is based on the said gift-deed, which is challenged by the plaintiffs. It is further submitted by the Learned Advocate for the defendants that, the defendants themselves have not described the properties which alleged to have been given to defendant Nos. 2 and 3 by way of that gift-deed, in that gift-deed itself. So, as per the plaintiffs, according to that gift-deed, they have mentioned the property in their suit and the property gifted by defendant No.1 so he himself and the rest defendants are well aware about the properties. The property can specifically identified on the basis of gift-deed. So there is no force in the objection that the property is not properly described.

On this backdrop, after going through the record, it appears that, the defendant No.1 have specified the property in the alleged gift-deed, as same, as it is described in para No.1 of the plaint. So in my opinion, the property is properly described by the plaintiffs as mentioned in gift-deed of defendant No.1. So, it can be specifically

identified by the defendants. No question would therefore arise about improper description of the property.

In the circumstances, I am of the firm opinion that, the plaintiffs have succeeded in proving that the property is ancestral property and it is properly described. So I answer issue Nos. 1 and 2 in the affirmative accordingly.

AS TO ISSUE No. 3. :-

7] The defendants have raised the objections about the valuation of the suit. According to them, the suit is liable to be rejected, as it is not properly valued.

As per the plaintiffs, they have filed suit for declaration and injunction of the said registered gift-deed at Sr. No.10366/11 executed by the defendant No.1 in favour of defendant Nos. 2 and 3 regarding his undivided share in the properties mentioned in Para 1-A and 1-B of plaint. So far as the share in land is concerned which according to the defendant No.1 transferred by him to defendant Nos. 3 and 4 is 0 Hecter 3.555 Are.

According to the plaintiffs, by considering the alleged transfer by gift and the area of the land which was gifted by the defendant No.1 to the defendant No.3, they have calculated the market rate of the said land as per the Government rate and according to the said calculation, the market price of the land, which is mentioned in the gift-deed is 31,79,500/- so they have paid full, legal stamp accordingly. Considering the record and no rebuttal evidence from defendants to it, in my opinion, the objection about improper valuation of the suit taken by the defendants is not sustainable. The suit is properly valued and

the Court fees paid accordingly on it by plaintiffs. So, I answer issue accordingly in the affirmative.

AS TO ISSUE Nos. 4, 5 and 6 :-

8] The main dispute involved in the matter is regarding the gift-deed bearing registration No. 10366/11 dt. 24/10/11. The said gift-deed is filed at **Exh.55**. According to the plaintiffs, the plaintiff Nos. 1 to 4 being heirs and the rests defendants and the members of plaintiff and defendants family are having their undivided shares in the suit property mentioned in Para No.1A and 1B of the plaint. So, the defendant No.1 is not having any right and authority to transfer the same by way of gift-deed in favour defendant Nos. 2 and 3, more particularly, without consent of the co-parceners of the said family.

9] As per the defendants, the defendant No.1 transferred his own share in favour of his own grandson because after death of his son Vilas, the plaintiff No.1 went at the house of her father and she has not maintained any relations with their family. On the other hand, defendant Nos. 2, 3 and 4 are taking care and giving love and affection to him and his wife Sau. Sonabai. In returned to it, he has transferred his undivided share in the property in favour of defendant Nos. 2 and 3 by way of the said gift-deed. So the execution of the gift-deed and more particularly transfer of undivided share from the suit properties by way of that gift-deed not denied by the defendants also.

Very interesting to mention here that, out of all the defendant Nos. 1 to 4, the defendant No.4 Mr. Kailash Namdevo Saste appeared in the matter. He has filed Written Statement (Exh.17) and his Written

Statement accepted by defendant Nos. 1 to 3 by filing pursis Exh.19. Defendant No.5 Sonabai who is mother-in-law of plaintiff died during pendency but she has also accepted the said Written Statement by filing pursis Exh.21. During trial, evidence is given by defendant No.4 Kailash Namdeo Saste for himself and on behalf of all the rests defendants though he is not party to the deed, he is not donar or donee of the said gift. The actual contesting parties, i.e., defendant Nos. 1 to 3 not step into witness box for defending the claim of the plaintiff Nos. 1 to 4.

10] The defendants by way of their Written Statement and evidence, objected claim made by defendant No.4 by mentioning that she is not entitled for any share till the survival of defendant No.1 and so she cannot ask for any partition also. Actually, there is no such dispute and issue before me because the suit is for declaration and injunction and more particularly regarding declaration for gift-deed only. So no question of asking partition by plaintiff No.4 or any issue relating to it before this Court. In this regard, it is worth to mention here that one suit is for partition filed by Mr. Changdeo Shankar Saste against the defendant No.1 in Pimpri Court in which, he has asked partition of the family properties, i.e., the same properties from and out of which, the alleged gift-deed for the alleged undivided share of Mr. Namdeo Saste executed by him. So once the suit for partition of same properties has already been filed and pending before the Court, there is no need for asking separate partition through this present suit by plaintiffs.

11] The important question which is to be decided before the Court is whether the gift under question is validly made by defendant No.1 Namdeo Saste?, whether he is having any legal right to transfer his undivided share in the suit properties?

As the question and the issue moving around the gift-deed executed by Mr. Namdeo Saste defenant No.1 for his undivided share in the family property so it is very necessary to look into the provision of Gift given under the Transfer of Property Act. As per the definition of gift given in the Section 122 of the Transfer of Property Act, *“gift is a transfer of certain existing movable or immovable property made voluntarily without consideration by one person or the donar, to another, or the donee and accepted by or on behalf of the donee.”*

So it is clear from the definition of gift mentioned above, the gift is a transfer of “certain” existing movable or immovable property and the transfer of the property is taken place as same as goods sold.

Here, in this matter, though the defendant No.1 has submitted that he has transferred his own undivided share out of the properties mentioned in Para No.1 of the plaint but at the same time, it must be kept in the mind that, the properties are ancestral properties and the defendants have also accepted that, the partition of the properties by metes and bounds not taken place. In gift deed also, it has been mentioned by defendant No.1 that, “he is transferring his undivided share out of the properties”. More to it, Mr. Changdeo , who is brother of Namdeo, i.e., defendant No.1 filed Reg.Civil Suit in Pimpri Court for partition of their ancestral properties. It itself shows that as the plaintiffs and defendants are admittedly members of one family and if the properties are ancestral properties then they are all having their undivided shares in the properties.

It is worth to mention here that, the present defendants are also the defendants in the above mentioned suit filed by Mr. Changdeo Saste for partition. The present defendants have filed their Written Statement. The certified copy of which filed on record by the plaintiff, which is at Exh.84, in which the present defendants have raised their right of preemption over the suit properties without mentioning about the gift which alleged to have been executed.

12] As mentioned earlier, the plaintiffs and defendants are the co-parceners of their family after death of Mr Shankar Saste then naturally they are having their undivided share in the property. With this relevancy, the Learned Advocate for the plaintiffs relied on the provisions of Hindu law regarding the gift of undivided share in the property. For the purpose, he relied upon the Principles of Hindu Law from Mulla's Hindu Law, 5th edition. As per the article 357, "a Hindu whether governed by the Mitakashara or Daibhga school may dispose of his separate or self acquired property subject in certain cases to the claim for maintenance of those to whom he is legally bound to maintain by gift. But the (co-parceners) under the Mitaskhara law has no such powers to dispose of his share unless he is the sole surviving co-parceners or without obtaining consent of the order. The transaction if taken place, i.e., transfer of share by way of gift then it is void altogether. The Learned Advocate for the plaintiffs further relied upon the judgment *V.K. Surendra Vs. V.K. Thimmaiah and others, reported in Mh.LJ. 2014 (2)*

Hindu Law : *Joint family – If a Coparcener of a joint family claims that the properties are his self acquired properties, the burden is on him to prove that the same are self-acquired properties – Character of joint*

family property cannot be changed by Karta by transferring same either under a Will or a gift to any party without consent of other coparceners.

With the help of it, the Learned Advocate Mr. Kapare for plaintiffs vehemently argued that the gift, therefore is void, not have binding force in eye of law. When the actual partition is not taken place between the co parceners individual out of them cannot transfer his undivided share by way of gift.

The Learned Advocate for the defendant in reply to the same argued that the Hindu law does not prohibit the Hindu (co-parceners) from selling his undivided share from co parcenry properties, as same is the gift. In this matter, the defendant No. 1 transferred his own share out of the property to his own grandson and it is not prohibited in law.

13] On the background of the evidence laid by both sides and the argument advanced by them, if we consider the legal provisions including the definition of gift given in **Section 122** of Transfer of Property Act, in my opinion, the undivided and unidentified share in the (co-parcenery) property is not certain share so no valid gift can be made of such share which is not certain. The provision is made just to protect the other co parceners from causing any prejudice because of such gifts. Unless and until, the shares are certain, definite identifiable, the co parcener cannot make valid gift of the same. It is all together void.

Here in this matter, the plaintiffs are the co parceners who certainly caused prejudice because plaintiff Nos. 1 to 3 are the heirs of deceased Vilas Saste, who is son of Mr. Namdeo Saste so they certainly have their right in the co parcenery property and the property involved in the alleged gift deed. Plaintiff No.4 is sister of defendant No.4 – her

entitlement is questioned but it is not direct issue in the matter. The gift deed executed without obtaining any consent from the plaintiffs and the other co parceners, in my opinion, as per provisions of law, the defendant No.1, therefore, not entitled or having any legal right to make such gift. So the gift is void as per Section 31 of the Specific Relief Act. As this gift deed prejudicially affect the plaintiffs so it requires to be cancelled, as asked by the plaintiffs.

14] Now, let is turn towards the question of injunction. Actually there is no previsions in law to give injunction against the rest co-parceners of the ancestral or joint family properties because they are all owners and having their constructive possession over the properties through the all other persons who are holding the properties for the rest all co-parceners unless it is prejudicially affect the rights of the other persons in a peculiar circumstances.

15] In my opinion, when this Court comes to the conclusion that transfer of the undivided share from the Co parcenery property by way of gift by defendant No.1 in favour of defendant Nos. 2 and 3 is a void gift and out of it, defendant Nos. 2 and 3 not get benefited then possibility cannot be ruled out that they may transfer the property to anybody on the basis of the alleged gift-deed. The acts of the defendants is self sufficient to prove that their acts are affecting and prejudicially the interest of the plaintiffs so this is a peculiar circumstances in which it is necessary to issue the injunction orders restraining the defendant Nos. 2 and 3 specifically restraining from transferring or alienating the properties , i.e., property mentioned in the gift in favour of any person. So, I answer the issue Nos. 4,5 and 6 in the affirmative accordingly.

16] At last, cumulative effect of the reasoning given above to the issue No. 4, 5 and 6 is that the plaintiff succeeded in proving that gift bearing No.10366/2011 dt. 24/10/2011 is void in a law and liable to be cancelled and that the defendant Nos. 2 ad 3 are required to be restrained by the order of injunction, as mentioned above.

17] In the result, he is entitled for the relief claimed by him in the suit. Hence, by answering the issue numbers 4,5 & 6 accordingly in the affirmative.

To sum up, I proceed to pass the following order :

: ORDER :

1. The suit is decreed with costs.
2. It is hereby declared that the gift deed registered at Sr. No. 10366/2011 dt. 24/10/2011 is cancelled. It be informed to the Registrar, Haveli No.19 accordingly.
3. The defendant Nos. 2 and 3 are hereby restrained from alienating, transferring the suit property mentioned in suit and in the gift-deed in any manner.
4. Decree be drawn up accordingly.

PUNE.
DATE : 22/08/2016.

(Harsha C. Shende - Kulkarni)
Addl. Small Cause Judge,
& Jt. Civil Judge, Sr.Dn., Pune.

The the contents of this PDF file Judgment are same word for word as per original Judgment.

Name of the Steno : V.A. Endgallu. (H.G)
Name of the Court : Harsha C. Shende Kulkarni.
Addl. Judge,
Small Causes Judge, & Jt.
Civil Judge, Sr.Dn., Pune.
Date : 22/08/2016.
Judgment signed by Presiding Officer on : 22/08/2016.

