

ORDER BELOW EXH. 5 IN R.C.S. NO. 191/2014.

(CNR-MHAH23001788-2014)

01] Plaintiffs have filed suit for partition and separate possession as well declaration. They have filed application for temporary injunction against defendant Nos. 2 to 6 for not alienating property or creating interest in the property in their name till the disposal of suit as per the provisions of Order 39 Rule 1 of the Code of Civil Procedure. Defendant Nos. 2 to 6 have filed their written statement and say via Exh. 25 and objected the application.

Plaintiffs' case in brief as under :-

02] It is the contention of plaintiffs that they have filed suit for partition, separate possession and declaration. It is their further contention that they have given description of family tree of plaintiffs and defendants in para No. 2 of the suit. It is their further contention that suit property is ancestral property of the plaintiff Nos. 1 to 12. It is their further contention that partition of the suit property has not been effected however, only some portion was given to the brother of the plaintiff No. 12. It is their further contention that it was agreed by the brother of deceased Kondabai and plaintiff No. 12 that suit property bearing Gat No. 866/1 will be given to the plaintiff No. 12 and deceased Kondabai. It is their further contention that therefore, their names were recorded to 7/12 extract in other right column of suit property. It is their further contention that plaintiff Nos. 1 to 11 and plaintiff No. 12 have equal undivided share in suit property however, when they demanded their undivided share in suit property defendants refused. It is their further contention that suit property 1A is in the name of defendant No. 2 and defendant No. 1 has sold suit property 1B to the defendant No. 6. It is their further contention that at the time

of said transaction plaintiffs had demanded their share however, it was told that they will be given money. It is their further contention that defendant No. 2 is intending to sell suit property 1A to defendant No. 6 and therefore, they have executed agreement to sell. It is their further contention that defendant No. 1 has executed sale deed in favour of defendant No. 6 on 29/08/2012 without consent of the plaintiffs. It is their further contention that they have neither received their share of suit property nor received money in leave of their share. It is their further contention that considering the relations between plaintiffs and defendants and their names recorded in other right column in 7/12 extract of suit property, it is clear that they have right in suit property. It is their further contention that as they have undivided share in suit property therefore, it is necessary to restrain defendant Nos. 2 & 6 not to create third party interest or alienate property in their names till the decision of suit. It is their further contention that they have made out prima facie case and balance in conveniences lies in their favour. It is their further contention that if application for interim relief is not allowed they will suffer irreparable loss. Hence, application may be rejected.

03] On the other hand, it is argued on behalf of defendant Nos. 2 & 6 that suit as well as application filed by the plaintiffs is not legal, proper and tenable. It is their further contention that plaintiffs have suppressed material facts from Court, they have not added necessary party to the present suit and not given description of suit property proper. It is their further contention that even description of family tree of plaintiffs and defendants is false and present suit is filed on false cause of action and plaintiffs are not entitled for relief claimed. It is their further contention that suit property 1A i.e. Gat No. 866/1 admeasuring 1 H belongs to defendant No. 2 and there is bore well in

the said suit property. It is their further contention that out of suit property 1B bearing Gat No. 866/1, admeasuring 1 H 2 R belongs to defendant No. 2 wherein he has his own house. It is their further contention that there is common well in suit property 1A and 1B, there is common electricity connection and defendant Nos. 2 & 6 have common right over the said well. It is their further contention that said information is not pleaded in the plaint by plaintiffs. It is their further contention that deceased Jaywantrao Taware had deceased daughter Kondabai, plaintiff No. 12 Rajasbai, deceased son Ganpat and other three sons namely Sampatrao, Shivajirao and Jayaji. It is their further contention that deceased Jayantrao Taware was having properties at mauje Hangewadi, mauje Pisore Budruk (Yelpane), Tal. Shrigonda bearing Gat No. 171 and 170. It is their further contention that said properties were divided between their four sons namely Shivajirao, Jayajirao, Ganpat and Sampat prior to 50 years. It is their further contention that at that time, deceased Kondabai and plaintiff No. 12 have relinquished their right. It is their further contention that out of Gat No. 866 Jayajirao and deceased Shivajirao sold some property to Kesharbai and Anita Phatak on 06/01/1981 and their names have been mutated vide M.E. No. 666. It is their further contention that on the same day Jayajirao sold 1/4th share out of Gat No. 1323 to Anita Phatak by registered sale deed. It is their further contention that Kesharbai and Anita sold said property to Lilawati Rajendra Dhansing Jadhav and Aaba Jaysingh Jadhav however, plaintiffs have not stated said facts in plaint. It is their further contention that deceased Sampatrao have sold some property out of Gat No. 866 to Shivaji Borude and Shahaji Borude by registered sale deed however, at that time plaintiff No. 12 and deceased Kondabai have not objected.

04] It is their further contention that defendant No. 3 have

sold 1 H, 2 R property out of suit property bearing Gat No. 866/1 on 30/05/2006 to Bhausahab Shahaji Borude for consideration of Rs. 1,80,000/-. It is their further contention that plaintiff No. 11 have signed as witness No. 1 on said sale deed and vide mutation entry No. 2611 their names has been recorded to 7/12 extract. It is their further contention that defendant No. 1 have sold 1 H, 2 R property out of suit property to purchase land at Shikrapur and do repay loan and for other domestic purposes. It is their further contention that said fact was known to the plaintiffs. It is their further contention that at that time plaintiff No. 1 had told defendant No. 2 instead of selling suit property to third person sell it defendant No. 6 therefore, sale deed was executed in favour of defendant No. 6 on 29/08/2012 to which defendant No. 2 to 5 have consented. It is their further contention that defendant No. 2 has sold 1 H property out of Gat No. 866/1 to purchase other property at mauje Hangewadi, sold said property to Ramesh Shivaji Borude on 07/02/2014. It is their further contention that plaintiffs have filed false suit with intention of garb money. It is their further contention that there is no prima facie case made out by the plaintiffs and balance of convenience not lies in their favour. It is their further contention that if application is rejected no irreparable loss would cause to plaintiffs. Hence, application may be rejected.

05] Defendants No. 1, 3 to 5 though appeared in the suit failed to file their say and written statement therefore, order was passed below Exh. 1 to proceed matter 'Ex-parte' against them.

06] In view of the above said facts and pleadings of the plaintiffs and defendants No. 2 and 6, following points arises for my consideration and I have given my findings to each of them with reasons as stated below.

SR. NO.	POINTS	FINDINGS
1	Whether plaintiffs makes out prima facie case ?	In the affirmative.
2	Whether plaintiffs shows balance of convenience lies in his favour ?	In the affirmative.
3	Whether plaintiffs are entitled for interim relief as claimed?	In the affirmative.
4	What order ?	As per final order.

REASONS

07] Plaintiffs have relied on documents filed vide list Exh. 3, 28 and 44.

AS TO POINTS NO. 1 to 3 :-

08] It is argued don behalf of plaintiffs that they have filed suit for partition, separate possession as well as declaration in respect of suit property. It is further argued that plaintiffs and defendants No. 1 to 5 are relatives. It is further argued that Jaywantrao was ancestor of plaintiffs and defendants No. 1 to 5 and he was having ancestral property at mauje Hangewadi, Tal. Shrigonda. It is further argued that partition was not effected between plaintiffs and defendants No. 1 to 5 however, after the death of Jaywantrao on the basis of application of Shivajirao vide Mutation Entry No. 661 names of Kondabai and plaintiff No. 12 was recorded as legal heir. It is further argued that Kondabai and Rajasbai had demanded their shares in the ancestral property with their brothers however, they were told that they will be given shares however, they were not given their share. It is further argued that suit property 1A was in the name of defendant No. 2 and he sold said property to defendant No. 6 vide registered sale deed on 29/08/2012. It is further argued that after the demise of Kondabai

defendant No. 1 sold property in his name. It is further argued that suit property is ancestral property and therefore, it is necessary to restrain defendant Nos. 2 & 6 not to create third party interest or alienate the same till the disposal of suit. It is further argued that they have made out prima facie case and balance of convenience lies in their favour. It is further argued that if application is not allowed defendants No. 2 and 6 may alienate the property in their name and it will lead to multiplicity of proceedings and even, irreparable loss would cause to plaintiffs. Hence, application may be allowed.

09] On the other hand, it is argued on behalf of defendants No. 2 and 6 that suit as well as application is not tenable as all legal heirs are not party to the suit. It is further argued that even all properties are not mentioned in suit which are joint family properties. It is further argued that deceased Jaywantrao was having other properties at mauje Pisore Bdk. Tal. Shrigonda bearing Gat No. 171 & 170. It is further argued that said property was partitioned between Sampat, Shivajirao, Jayajirao and Ganpat who are sons of deceased Jaywantrao 50 years back. It is further argued that 1/ 4th share of Jayajirao and Shivajirao in suit property Gat No. 866 are sold to Kesharbai and Anita Phatak on 06/01/1981 and even their names are recorded vide M.E. No. 666 to revenue record. It is further argued that even Sampatrao sold property out of Gat No. 866 to Shivaji Borude and Shahaji Borude by registered sale deed however, at that time deceased Kondabai or her legal heirs have not objected to the said transaction. It is further argued that defendant No. 1 had sold property out of suit property admeasuring 1 H, 2 R to purchase property at Shikrapur and to repay loan. It is further argued that defendant No. 1 has executed sale deed in favour defendant No. 6 and defendant Nos. 2 to 5 have consented for same and in view of M.E. No. 3649 names of defendant

No. 6 has been entered to revenue record. It is further argued that defendant No. 2 has executed sale deed out of suit property admeasuring 1 H on 07/02/2014. It is further argued that the said transactions are legal and valid therefore, plaintiffs have no right to claim any injunction against defendants. It is further argued that plaintiffs have failed to make out prima facie case even of balance of convenience does not lie in their favour. It is further argued that as defendant No. 6 has purchased property by registered sale deed therefore, if application is allowed he will suffer irreparable loss rather than plaintiffs. Henec. Application at Exh. 5 may be rejected.

10] Perused application, say and documents filed on record. Heard both parties. It appears from the pleadings of parties that plaintiffs and defendant Nos. 1 to 5 are relatives and deceased Jaywantrao was their ancestor. It is pertinent to note that though defendants No. 2 & 6 have pleaded in their written statement that description of family tree is wrong, however, they have not disputed relationship between them. It is the contention of the plaintiffs that suit property described in para 1 of the suit is ancestral, it is pertinent to note that defendants No. 2 and 6 have filed their written statement, however, they have not specifically denied that said fact. On the contrary, it appears from contention of the defendants No. 2 and 6 that deceased Jayantrao Taware had deceased daughter Kondabai, plaintiff No. 12 Rajasbai, deceased son Ganpat and other three sons namely Sampatrao, Shivajirao and Jayaji. Further, it is the contention of the plaintiffs that on the basis of application of deceased Shivaji names of legal heirs were recorded to revenue record after the demise of Jaywantrao. On perusing extract of Mutation Entry No. 661 filed on record vide list Exh. 3 at Serial No. 2, it appears that after the demise

of Jaywantrao Taware on the basis of application given by Shivajirao on 19/04/1981, names of Sampat, Balasaheb, Shivaji and Jayaji and daughters Kondabai and Rajasbai. Further, names of legal heirs of deceased son Ashok Mansingh, Subhash and Lila Laxman Navale were recorded as the legal heirs of deceased Jaywantrao. Even, on perusing 7/12 extract filed on record vide list Exh. 3 at serial No. 1, it appears that names of Kondabai and plaintiff Nos. 12 and other legal heirs are entered in other right column. This shows that the property was ancestral and even plaintiffs have undivided share in the suit property.

11] It is pertinent to note that though defendants No. 2 and 6 have pleaded that partition has been effected in respect of other joint family properties i.e. Gat No. 170 and 171 situated at Mauje Pisore Budrak, (Yelpane) between deceased Sampat, deceased Shivaji, Jayaji and deceased Ganpat. However, it is not the specific contention of the defendants No. 2 and 6 that even partition has been effected between legal heirs of deceased Jaywantrao in respect of suit property. Thus, as discussed above plaintiffs have undivided share in the suit property. Further, it is settled law that undivided share can be sold but possession cannot be given unless partition has been effected. On perusing Mutation Entry No. 3645 filed on record vide list Exh. 3 at serial No. 3, it appears that defendant No. 1 has sold area admeasuring 1 H, 02 R out of suit property to defendant No. 6 on 20/09/2012. Further, on perusing copy of sale deed dated 29/08/2012 filed on record vide list Exh. 3 at serial No. 4, it appears that defendant No. 1 sold 1 H, 02 R out of suit property to defendant No. 6 and defendants No. 2 and 3 as well as one Lilavati Laxman Navale and Putalabai Vitthal Jagtap have given consent to said sale deed. It is pertinent to note that names of defendants No. 2 and 3, Lilavati Laxman Navale

and Putalabai Vitthal Jagtap appears in the other right column in 7/12 extract of suit property. Thus, it appears that even though name of plaintiff No. 12 appearing in the other right column her consent is not obtained to sale deed dated 29/08/2012. Even, consent of legal heirs of deceased Kondabai, whose name appearing in the other right is not obtained to sale deed dated 29/08/2012.

12] Further, it appears from record that defendant No. 1 has not only sold some property out of suit property to defendant No. 6, even possession is also handed over with boundaries which prima facie appears to be against settled principles of law. Further, name of defendant No. 6 is recorded to 7/12 extract of suit property. As per the contention of the plaintiffs suit property 1A and 1B are in the name of defendants No. 2 and 6. Therefore, defendant Nos. 2 & 6 are not restrained from alienating said properties they may alienate or will create third party interest in said the properties. Further, it will create complications and will cause prejudice to the right of plaintiffs of their undivided share in the suit property. Moreover, if third party right is created it will lead to multiplicity of proceedings and plaintiffs will suffer irreparable loss. Therefore, I am of the view that plaintiffs have made out prima facie case against the defendant Nos. 2 and 6. Even, balance of convenience lies in their favour. If, application is not allowed greater hardship will cause to the plaintiffs. Hence, I answer the points No. 1 to 3 in the affirmative and in answer to point No.4, I pass following order.

ORDER

- 1] Application Exh. 5 is hereby allowed.
- 2] Defendant Nos. 2 & 6 are hereby temporarily restrained from alienating or creating third party interest in the suit

property No. 1 A and 1B till the disposal of suit.

3] Costs in main suit.

Place : Shrigonda.
Date: 14/10/2019

(Sangram S. Shinde)
Civil Judge, Senior Division,
Shrigonda.