

**ORDER BELOW EXH.05 IN RCS NO.230/2017**  
(Sudhakar & Others V/s. Shriram & Others)

1] The plaintiffs have filed the application for Temporary Injunction to restrain defendant no.2 from obstructing the peaceful possession of the plaintiffs over the suit property.

2] It is contention of the plaintiffs that, the suit properties mentioned in para 1 i.e. Gut No.25 and Gut No.2386, situated at Shrigonda are Joint Hindu Family properties of plaintiff and defendant no.1, 3 to 10. It is contended that, the original ancestral was Ganesh Govind Khardekar who died on 10.04.1960 and his wife Saraswati died in the year 1969. deceased Bhalchandra, deceased Bhaskar, deceased Shridhar and plaintiff (Sons) and deceased Pramila Kukde, deceased Nirmala Badwe, deceased Malati Pathak, deceased Vasudha Bhanage and deceased Indumati (daughters) are the legal heirs of deceased ancestral Ganesh Khardekar. It is further contended that, except plaintiff, other brothers and sisters of plaintiffs are expired and plaintiff no.2 to 15 and defendant no.1, 3 to 10 are the legal heirs of deceased brothers and sisters of plaintiff.

3] It is contended by the plaintiffs that, the suit properties are ancestral and Joint Hindu Family Properties. The suit properties are inherited by the plaintiff and defendants in view of sanctioning Mutation Entries No.17692, 15381, 15507, 15860 and 11641. It is further contended that, even though name of plaintiff and defendant no.1 are mutated on 7/12 extract. The suit properties are in joint possession of plaintiffs and defendants since long. As plaintiff and defendant no.1, 3 to 10 are residing out of the station, plaintiff no.1 is cultivating another suit properties on behalf of joint family properties since long.

4] It is specifically contended that, plaintiffs and defendants have not partitioned the suit properties and had given separate possession to any of the legal heirs till date. Defendant no.1 and plaintiff no.1, 8 to 10 have no right to sell any partition out of the suit property. Despite of this fact, defendant no.1 executed a sale deed, out of suit property by showing boundaries therein by registered sale deed in favor of defendant no.2 on 23.03.2017 bearing no.1015/2017 the alleged sale deed is without possession. Defendant no.1 had not received any portion of possession out of suit property. Plaintiffs and defendants are having undivided share in the suit property. It is further contended that, defendant no.2, on the basis of sale deed, is trying to take possession out of suit property and obstructing the possession of the plaintiff over the suit property and thus, the cause of action arose and the suit came to be filed and accordingly the present application.

5] Defendant no.2 filed his written statement and say to the application below Exh.25 and resisted the same. It is contended that, the plaintiffs are not having any right locus-standi to complaint in regard of registered sale deed dated 23.03.2017. It is contended that, plaintiff no.1 on behalf of all the co-owners have handed over possession out of suit property to defendant no.2 on agreement. Plaintiffs are not having any agricultural instruments till date. Defendant no.2 was having knowledge of possession of partition between the parties. Defendant no.1 and 8 to 10 were desired to sale their share and they have asked defendant no.2 in that regard. Defendant no.2 asked plaintiff no.1 in regard of the transaction and plaintiff no.1 has consented the transaction and they have involved in the transaction. Accordingly, consideration amount of Rs.31,00,000/- was determined. Defendant no.2 had given paper publication on 04.03.2017 in Dainik Pudhari and no one has objected within limitation. Accordingly, on

22.03.2017, defendant no.2 got executed registered sale deed out of Gut No.25, admeasuring:- 58R from the eastern side out of Gut No.2386, admeasuring:-1H – 07.125R from eastern side from defendant no.1, 8 to 10. The possession of said property was handed over by defendants to defendant no.2 on the date of sale deed. Since that date, the properties describes in the sale deed are in possession of defendant no.2. On 12.10.2017, as there was some technical mistake in the sale deed. It was accordingly, rectified. It is further contended that, defendant no.2 is bonafide purchaser for value without notice and he has made expenditure over the suit property and developed the same. Hence, requested to reject the application.

6] Heard Ld. Advocate A. G. Pathan for the plaintiffs and Ld. Advocate R. K. Acharya for defendant no.2. Considering the rival contentions and the documents filed on record following points arise for my consideration and I have recorded my findings along with the reasons as below:

<b><u>Sr.No.</u></b>	<b><u>Points</u></b>	<b><u>Findings</u></b>
1.	Whether the plaintiff proved the Prima Facie?	In the affirmative.
2.	Whether the balance of convenience lies in favor of plaintiffs?	In the affirmative.
3.	Whether the plaintiff will suffer irreparable loss if the injunction is not granted?	In the affirmative.
4.	What order ?	As per final order...

**REASONS**

7] Plaintiffs have filed Certified Copy of 7/12 Extract of Gut No.25, and Gut No.2386, Certified Copy of Mutation Entry Nos.17692, 15381, 15507, 15860 and 11641, Certified Copy of registered sale deed bearing no.1015/2017 executed in favor of defendant no.2 on 23.03.2017, defendant no.2 has filed documents below Exh.50, a demand application for water tap connection, Office copy of application given by defendant no.2 to C.E.O. Municipal Corporation, xerox copy of paper publication, Certified Copy of Special C.S. No.25/2012, xerox Copy of rectification deed executed between defendant no.2 and defendants dated 12.10.2017.

8] It is submitted by Ld. Advocate for the plaintiff that, the suit is filed for partition and separate possession of the suit property. It is submitted that, the suit properties are ancestral and Joint Hindu Family properties of plaintiffs and defendants. It is specifically contended and submitted that, the suit properties have not yet been partitioned by meets and bounds. Despite of having knowledge of the fact, defendant no.1 executed registered sale deed in favor of defendant no.2 on 23.03.2017 by showing specific boundaries therein. It is submitted that, defendant no.1 has no right to mention the boundaries as the shares of parties have not yet been determined and defendant no.1 has not got the title of the property which is mentioned in the sale deed. Defendant no.2 on the basis of said sale deed is obstructing the peaceful possession of plaintiff over the suit property and hence, prayer to allow the application and submit that, if the application is not allowed defendant no.2 will continue obstructing the possession of the plaintiffs and irreparable loss, certainly be caused to the plaintiffs. Plaintiffs have made out prima facie case and balance of inconvenience lies in their favor and prayer to allow the application. To support their contentions, Ld.

Advocate for the plaintiff relied upon **2009(2) M.L.J. 894 (SC) Ramdas Vs. Sitabai and others**, wherein the Hon'ble Apex Court has held that, undivided share of co-sharers may be subject matter of sale, but, possession cannot be handed over, vendee unless property is partitioned by meets and bounds amicably and through mutual settlement or by decree of Court, Ld. Advocate also submitted a copy of Judgment delivered by **Bombay High Court bench at Aurangabad in Civil Application No.274/2014 dated 19.03.2014 Baburao vs. Tukaram & Others** delivered by Hon'ble Justice A.I.S. Cheema.

9] On the other hand, Ld. Advocate for defendant no.2 submitted that, the property mentioned in the sale deed was allotted to defendant no.1 and accordingly defendant no.2 has purchased out of suit property and since the date of sale deed defendant no.2 is in possession. Defendant no.2 has given paper publication in regard of purchase of property out of suit property and no objection was raised. It is submitted that, the original ancestral Ganesh and his wife are dead, but, the plaint does not show date of death for the reason that, on death shares of co-parceners persons are determined. It is submitted that, Joint Hindu property has presumption of Joint Hindu Family and that property is not of any single co-parceners. It is submitted that, defendant no.2 has developed the property as a boundaries mentioned in the sale deed. Defendant no.2 is not obstructing the possession. Plaintiffs has not made out any prima facie case. It is specifically submitted that, while considering the prima facie case, the Court has to considered only the documents which are on record. It is submitted that, defendant no.2 has purchased the property through registered sale deed, which has evidential value and it has to be considered at the time of deciding temporary injunction application without going into the merits of the case. It is

submitted that, while deciding temporary injunction application where the partition has held or not could not be taken into consideration as it is a part of evidence. The possession of defendant no.1 is legal and it is to be considered while deciding temporary injunction application. Wherein the possession is handed over by specifically mentioned 4 boundaries. It is submitted by Ld. Advocate for the defendant no.2 that, the authorities of Sitadevi (Supra) could not be considered at this stage as the ratio led down in the authority is held in second appeal, it means the trial was conducted and matter was decided finally this is the not situation/case for the present matter. So, the ratio led down in the Sitadevi (Supra) case is not applicable to the present case in hand. It is submitted that, defendant no.2 has incurred expenditure over the out of suit property. If he is restrained defendant no.2 will suffer from irreparable loss. It is further submitted that, defendants have sold some properties to other person also, but, plaintiff is only seeking injunction against defendant no.2. Hence, the plaintiff has not come with the clean hands before the Court. Hence, requested to reject the application.

10] To support his contentions advocate relied upon;

- a. ***Tatyasaheb and another vs. Baburao and others.***  
***reported in Special Leave to Appeal No.12401/2014 and***  
***Civil Appeal No.8026/2014***
- b. ***Mandabai Ashokrao Tingne V/s. Mohd. Mumtajim Mohd.***  
***Jainuddin Mullaji & Others***  
***reported in 2012 (2) M.L.J. 866***

Wherein the Hon'ble High Court has held that, defendant purchaser would be entering into the shoes of co-parceners from whom he has purchased the suit property and in that case, he would be the defendant in

the suit for partition and separate possession, hence, provisions of Order 39 rule 1(A) of C.P.C. is not at all attracted.

**c. Chaudhary Abdul Majid Shahadat & Others V/s. Shehnaj Abdulla Shahadatt & Others**

**reported in 2010 (7) M.L.J. 167**

Wherein, the Hon'ble High Court held that, the Court cannot be held among trial of granting temporary injunction and examined various aspects of case.

**d. Sunila Sapra & Another V/s. Pramila Ravindra Mardolkar & Others**

**reported in 2011 (7) All M.R. 5**

**e. Pralhad Jagannath Jawale & Others V/s. Sitabai Chander Nikam & Others**

**reported in 2011 (7) All M.R. 255**

**f. Vinayak Vishnu Khasnis & Others V/s. Shashikant Venkatesh Khasnis**

**reported in 2018 (2) M.L.J. 227**

**g. Raghuveer Agencies Pvt. Ltd. & Others V/s. Santosh Anantrao Jagtap & Others**

**reported in 2017 (3) M.L.J. 636**

are in regard of consideration of 3 golden rules at the time of considering temporary injunction application.

**h. Sanjay Shrikrushnaji Somani V/s. Vishnupant Shashankrao Shahane**

***reported in 2007 (6) M.L.J. 550***

Wherein it is held that, power of impounding of document cannot be exercised at the stage of considering the application for temporary injunction. It is pertinent to note that, this authority is not applicable to the case in hand.

***i. Virupakshaiah V/s. Sarvamma & another  
reported in 2009 (4) M.L.J. 337***

Wherein, the Hon'ble Apex Court has held that, Joint Family presumption in regard of existence of gets weaker and weaker from distant to distant can be rebutted by adding slight evidence of separate possession of properties.

***j. Digambar Adhar Patil V/s. Devram Girdhar Patil &  
another  
reported in 1995 STPL 2342 (SC)***

***k. Shekoji Bhimrao & Others V/s. Motiram Maruti  
Maratha  
reported in 2007(1) ALL M.R. 593***

Wherein the Hon'ble High Court has held that, Joint Hindu Family Property, status of which ceases to be so, immediately the shares are define whether by an agreement between the parties or otherwise partition is complete.

***l. Venubai Nathu Mankar & Others V/s. Vimalbai  
Keshavrao Thakre & Others  
reported in 2013(3) M.L.J. 895***

Wherein, it is held that, once the shares are defined by partition, the partition becomes complete, parties may divide the property by meets and bounds and they may continue to leave together and in which the property common as before.

11] I have respectfully gone through all the authorities given by both the parties. Defendants have relied upon the authorities where it is held that, once the shares are determined, the partition is completed. It is pertinent to note that, determination share is disputed question in the present matter. The plaintiffs are contended that, partition has not yet been effected, on the other hand, defendant no.2 has come with the specific case that, he has purchased out of the suit property, the shares of defendant no.1, 8 to 10, so, the authorities which are relied are not useful at this stage in the present matter. Moreover, the authorities relied by plaintiff Sitadevi(Supra) is settled law. So far as the authority Baburao(Supra) is concerned, it is in regard of temporary injunction to restrain the vendee from disturbing the peaceful possession of the co-parceners out of suit property. The said application for temporary injunction was filed in first appeal by the parties and being aggrieved by the order of the District Court appeal from order was preferred before the Hon'ble High Court and the Hon'ble Justice Cheema has held and allowed the temporary injunction application relying to the view and taken in case of Sitadevi (Supra). Ld. Advocate for the defendant has filed order of Hon'ble Supreme Court in case of Tatyasaheb (Supra) wherein the appeal was preferred arising out of the Judgment given by the Hon'ble Bombay High Court Justice Cheema in case of Baburao. Wherein, the Hon'ble Apex Court has passed order by hearing arguments of the parties that, the parties should maintain status-quo as on today and has not discussed and given findings on the appeal. It means, it can be concluded

that, the Hon'ble Apex Court has not overruled or dissented the view taken by Hon'ble High Court in case of Baburao V/s. Tukaram (Supra), it means, the ratio led down in case of Sitadevi(Supra) and Baburao can be safely considered while deciding the application of temporary injunction. In that contention, the argument advanced by the Ld. Advocate for the defendant that, the said authorities cannot be relied at the stage of temporary injunction do not have any force.

12] It is pertinent to note that, the 7/12 extract shows the names of plaintiff and defendants and the Mutation Entry shows that, after demise of co-parceners, names of legal heirs are mutated to the suit properties. It is more pertinent to note that, on perusal of registered Sale Deed executed by defendant no.1 in favor of defendant no.2 wherein, recitals in para 1 specifically mentioned that, the suit properties are ancestral properties of defendants. It is pertinent to note here that, recitals in the Sale Deed do not disclose anywhere that, property mentioned in the Sale Deed more particularly as described by showing 4 boundaries in the Sale Deed has received or allotted to defendant no.1 by way of partition or by any other family arrangements between plaintiffs and defendants. Prima facie, this shows that, the suit properties are ancestral and Joint Hindu Family properties. It is contention of the plaintiffs that, the suit properties are not yet partitioned and the documentary evidence supports the contentions of the plaintiffs. On the other hand, defendant no.2 has specifically pleaded in his written statement that, defendant no.2 has purchased the share of defendant no.1, 8 to 10. Prima facie it is duty of defendant no.2 to show that, the partition as alleged was held between plaintiffs and defendants and the property which is purchased by defendant no.2 is out of the share of defendant no.1, 8 to 10. It is pertinent to note that, no documentary

evidence is brought on record in that regard. The issue of partition is a disputed question which is to be decided by leading cogent evidence by parties. Thus, a disputed question is raised in the present matter, thus, the plaintiffs have shown their prima facie case.

13] As discussed above, the documents also prima facie shows that, the suit properties are ancestral and Joint Hindu Family Properties. Thus, defendant no.1, 8 to 10 have behind back of plaintiffs executed the alleged Sale Deed in favor of defendant no.2 which shows that, properties were jointly in the name of plaintiff and defendants. The matter is still to be finally decided and there is not reason why possession of plaintiff should not be protected. If the plaintiffs loses possession of the suit property or part of it which has not been divide by meets and bounds, plaintiffs would suffer irreparable injury. In such circumstances, to avoid further litigations and looking into the rival claims, balance of inconvenience lies in favor of plaintiff. It is settled law that, whether the properties which are in joint possession and the co-parceners have not fixed or determined their shares by meets and bounds, possession of co-parceners has to be protected from the vendee. If the injunction is not granted in favor of plaintiff, certainly plaintiff would suffer from irreparable loss as the share of plaintiff have not yet been determined and plaintiffs are entitled for possession over all the suit properties. On the other hand, defendant shall not suffer irreparable loss if the injunction is granted in favor of plaintiff. Hence, balance of convenience is lies in favor of plaintiff and considering the facts and legal aspects as mentioned above I answer point no.1 to 3 in the affirmative and in result of point no.4 I pass following order.

**ORDER**

- 1) The application vide Exh.05 is allowed.
- 2) Defendant No.2 and his relatives, servants, or any person on behalf of defendant no.2 are hereby temporarily restrained from obstructing the peaceful possession of plaintiffs over the suit property till the final disposal of the suit.
- 3) Cost in cause.

Date: 02/02/2019

**(R. B. KULKARNI)**  
2<sup>nd</sup> C.J.J.D, Shrigonda,  
Ahmednagar.