

ORDER BELOW EXH. 5 IN R. C. S. No. 284/2021

1] Plaintiff in present suit has filed this application under Order XXXIX Rule 1 and 2 of Code of Civil Procedure, 1908, seeking temporary injunction against defendant no.1 to restrain him from alienating the suit property and thereby creating third party interest therein, till final disposal of present suit. Defendant No.1 has resisted the application by filing his written statement cum say at Exh.24. Perused the application and say. Heard, learned pleaders appearing on behalf of respective parties. Having regards to the rival contention of both the parties, argument advanced by the pleaders of both the parties and basic factors which are required to be considered while entertaining an application for temporary injunction, following points have been arisen for my discussion and determination to which, I answer alongwith my findings thereon.

<u>Sr.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the applicant/plaintiff has <i>prima facie</i> case?	No.
2.	Whether balance of convenience lies in favour plaintiff ?	No
3.	Whether plaintiff would suffer an irreparable loss in case of rejection of present application?	No.
4.	What order?	Application stands rejected.

:: REASONS ::

AS TO POINT No. 1 to 3:-

2] Point no. 1 to 3 are inter-linked and inter-connected with each other. Therefore, in view to avoid repetition of fact, I am discussing all the points, simultaneously. Through present suit, plaintiff has sought the declaration and cancellation of Gift deed dated 11/05/2018, executed in his favour of defendant no.1 by his mother. He has also sought the partition of the suit property, claiming $\frac{1}{2}$ share in the suit property. From overall pleading of parties, it appears that the relationship between the parties *interse* has not been controverted. Even it has not been disputed that the suit property has been purchased through registered sale deed and mother of defendant no. 1 is vendee to said sale deed. Moreover, execution of Gift deed by Vithabai in favour of defendant No. 1 has not been controverted.

3] In view to show his right and interest in the suit property, plaintiff has projected the theory that 10 years prior to purchase of the suit property, joint family of him and father of defendant No. 1 namely Yashwant was in existence and they were cultivating their ancestral land in common. It is further contention of plaintiff that from the common income of joint family, suit property has been purchased in the name of wife of Yashwant namely Vithabai. In order to show that prior to purchase of suit property and even after purchase of suit property, joint family of him and his brother Yashwant was existing, plaintiff tried to establish some circumstances through his pleading. Probability of facts pleaded by the plaintiff is

essential to be assessed for ascertaining as to whether or not the joint family property of plaintiff and his brother Yashwant was existing before and after purchase of suit property.

4] Admittedly, one Balu Ghanwat is common ancestor of plaintiff and defendants. Even it is admitted factum that Balu died leaving behind three sons namely Anna, Yashwant and Narayan (plaintiff). In order to establish the circumstances under which Anna had separated himself from joint family and eventually joint family of plaintiff and Yashwant came into existence, plaintiff has pleaded that, his another brother namely Anna was residing separately as he had instituted the suits against his two brothers, in respect of joint family property. However, plaintiff has not produced any document showing that his brother Anna had instituted the suit against him and Yashwant. Moreover, pleading of the plaintiff to that regard seems to be vague as plaintiff has not clarified as to whether Anna has succeeded in those suits and whether partition was effected by metes and bounds between the three sons of Balu. If the partition is assumed to have been taken place among the three sons of Balu, on effecting partition, jointness of family of plaintiff and his two brothers must have been ceased. Even it is not contention of the plaintiff that on effecting partition between him and his two brothers, common share was allotted to him and his brother Yashwant. If plaintiff could produce a document showing that common share was allotted to him and his brother Yashwant, it would have been assumed that after effecting partition between plaintiff and his two brothers, joint family of plaintiff and Yashwant

had come into existence. However, due to failure on part of plaintiff to produce the document showing that common share was allotted to him and his brother Yashwant, theory projected by plaintiff seems to be improbable.

5] Though, through his pleading, plaintiff tried to show that joint family of him and his brother Yashwant was in existence and they were cultivating the land in common, neither plaintiff has produced any document nor he could establish any circumstance showing the existence of joint family of him and his brother Yashwant. Therefore, in absence of documentary evidence and merely on the basis of pleading of plaintiff, it cannot be assumed that the joint family of plaintiff and his brother Yashwant was existing and they were cultivating the land in common. In view to show that joint family of him and Yashwant was existence even after purchase of suit property, plaintiff has pleaded that in the year 1989, partition was effected between him and his brother Yashwant and by virtue of partition, 5 acre land each was allotted to him and his brother Yashwant. However, plaintiff has not produced any document showing that in the year 1989, partition was effected between himself and Yashwant and 5 acre land each was allotted to him and his brother Yashwant. Therefore, for want of documentary evidence and merely on the basis of pleading of plaintiff, theory projected by plaintiff with regards to effecting partition and allotment of 5 acre land to him, seems to be improbable.

6] Though, it is contention of the plaintiff that out of the

common income of joint family, suit property has been purchased in the name of wife of his brother namely Yashwant, the copy of sale deed, by virtue of which Vithabai has purchased the suit property, has not been tendered on record. If, the copy of sale deed by virtue of which Vithabai has purchased of suit property was tendered on record and there were recitals in sale deed with regards to payment of consideration from the common income of joint family, an inference would have been certainly drawn that the suit property has been purchased in the name of Vithabai by making the payment of consideration from the common income of joint family. However, in absence of sale deed and merely on the basis of pleading of the plaintiff, it cannot be assumed that the suit property has been purchased from the common income of joint family of plaintiff and his brother Yashwant.

7] From overall pleading of the parties and document tendered on record, it appears that through registered sale deed, mother of defendant no.1 namely Vithabai had purchased the suit property. On the contrary, plaintiff has not produced any document showing that from the common income of joint family, suit property has been purchased in the name of Vithabai. Therefore, payment of consideration can be said to have been made by Vithabai in her individual capacity. As Vithabai had purchased the suit property through registered sale deed, she had become absolute owner of the suit property. Being absolute owner of suit property, Vithabai was fully authorized to alienate suit property as per her wish and will. On the contrary, plaintiff has not produced any document showing his

right and interest in the suit property. Thus, Gift deed executed by Vithabai in favour of defendant No. 1 cannot be said to be illegal. As plaintiff has not produced any document showing that out of the common income of joint family, suit property has been purchased in the name of Vithabai, he is not likely to succeed in getting the suit property partitioned. Even he is not likely to succeed to get the gift deed cancelled. By virtue of gift deed executed by Vithabai, defendant No. 1 became the owner of the suit property. It is settled position of law that injunction can not be granted against the true owner. Defendant no. 1 is not having any right and interest in the suit property, therefore no question arise as to granting the temporary injunction against him. Neither the plaintiff has *prima facie* case nor the balance of convenience lies in his favour. Not the plaintiff but defendant no.1 would suffer irreparable loss, if temporary injunction is granted in favour of plaintiff. Hence, I answer point no. 1 to 3 in negative and pass the following order for point no.4 :-

:: ORDER ::

1. Application at Exh.5 stands rejected.
2. Cost in cause.

Shrigonda
Date: 26/02/2024

sd/-xx
(H. J. Pathan)
3rd Jt. Civil Judge(S.D.), Shrigonda.