

MHAM160005392024



Order Passed below Exh.-5 in R.C.S.No. 14/2024
Prakash Vs. Dhanraj.

The applicant moved present application thereby prayed to grant temporary injunction against the non-applicants under Order XXXIX Rule 1 and 2 read with Section 151 of the Civil Procedure Code in respect of agricultural land which is more particularly mentioned in Para No.2 of the plaint.

02 - Description of suit property is as follows:-

The agricultural land bearing block/gat No.93, ad-measuring 2 H. 57 R., occupancy class I, assessment of Rs. 10.00 paisa, which is situated at village Fubgaon, Tq. Nandgaon Kh., Distt. Amravati. It is bounded as towards East – agricultural land of Shri. Raut, towards West – agricultural land of Shri. Bala Divekar, towards South – agricultural land of Shri. Raut and towards North – Nala/canal (hereinafter be referred as “suit property”).

03 - The facts of the applicant's case are as under:-

The applicant is real brother of non-applicant No.2. The non-applicant No.1 is the son of the non-applicant No.2.

Thus, the non-applicant No.1 is nephew of the applicant. One Vishwanath Vithobaji Junghare was father of applicant & non-applicant No.2 and grandfather of non-applicant No.1. Vishwanath was died on 08/09/2018 leaving behind four sons i.e. applicant, non-applicant No.2, one Suresh and Dinesh. A partition was effected among deceased Vishwanath and his four sons. In said partition, deceased Vishwanath got suit property as his share. Therefore, the suit property became self-acquired property of deceased Vishwanath in view of said partition. The non-applicant No.1 does business of marriage ceremony hall and catering since last 15-20 years. Therefore, the non-applicant No.1 resides at Amravati. On few occasions, the non-applicant No.1 visits and resides at village Fubgaon for cultivation purpose. Deceased Vishwanath was residing with the applicant. He used to look after deceased Vishwanath by all means.

04 - The applicant further pleaded that deceased Vishwanath loved his four sons equally. On 17/09/2004, deceased Vishwanath executed registered Will Sr. No.1485/2004 thereby bequeathed his agricultural and house properties among his sons in order to avoid disputes in future. At relevant time, deceased Vishwanath was physically and mentally fit. As per said Will, an agricultural land ad-measuring 1 H. 27 R. from Northern portion of east-west division of the

suit property was given to the applicant and an agricultural land ad-measuring 1 H. 28 R. from Southern portion of east-west division of the suit property was given to the non-applicant No.2. Deceased Vishwanath also bequeathed an agricultural land bearing gat/block No.69/1 and house property in view of said Will. Thus, late Vishwanath equally and without bias distributed all properties among his sons. No one has raised any objection in respect of said Will. The applicant was aware about said Will. However, said Will was in possession of the non-applicant No.2. Thus, he himself and the non-applicant No.2 became owners of half share of the suit property on the basis of Will dt. 17/09/2004.

05 - The applicant further averred that since 2013 deceased Vishwanath was ill and also physically and mentally weak due to old age. Therefore, deceased Vishwanath was not aware what he was doing. Deceased Vishwanath stayed at house of non-applicant No.1 for 4-5 days for medical purposes. At that time, the non-applicant No.1 took advantage of physical and mental weakness of deceased Vishwanath and prepared a bogus Will. However, deceased Vishwanath never executed said Will voluntarily. If deceased Vishwanath intended to execute second Will then he would have described all properties which are mentioned in Will dt. 17/09/2004. Moreover, deceased Vishwanath did not mention his intention to cancel Will dt.

17/09/2004. More importantly, deceased Vishwanath gave half share of the suit property to the non-applicant No.2 as per Will dt. 17/09/2004. Therefore, deceased Vishwanath never had intention to execute second Will. Thus, the non-applicant No.1 prepared second Will in order to grab the suit property.

06 - The applicant further submitted that deceased Vishwanath was sick for 4 to 5 years before his death. Moreover, deceased Vishwanath was physically and mentally weak. Deceased Vishwanath lost his memory. Deceased Vishwanath was unable to read, understand and sign the document. He was not in position to dictate the contents of documents and transfer the property. The non-applicant No.1 took benefit of said facts and prepared Will dt. 13/01/2014 by deceiving and cheating deceased Vishwanath. Thus, Will dt.13/01/2014 is invalid and illegal one. Therefore, the non-applicant No.1 does not get ownership right over the suit property on the basis of Will dt. 13/01/2014. In fact, Will dt. 17/09/2004 is not disputed one. Will dt. 17/09/2004 is legal one and last Will of deceased Vishwanath. In view of Will dt. 17/09/2004, his name and name of the non-applicant No.2 were mutated in revenue record of the suit property in the year 2019. He himself and the non-applicant No.2 are cultivating their respective shares of the suit property. Thus, Will dt. 17/09/2004 is acted upon. Thus, he is owner of the half share

of the suit property. However, the non-applicant No.1 is trying to mutate his name in the revenue record of the suit property on the basis of false Will dt. 13/01/2014. The non-applicant No.1 filed an appeal before Sub-divisional Officer, Chandur Rly. for cancellation of mutation entry. On 15/01/2024, an order was passed in said matter thereby cancelled mutation entry No.1372 and deleted his name and name of the non-applicant No.2 from 7/12 extract of the suit property. However, he filed an appeal before Additional Collector, Amravati against said order. The said matter is pending one. The non-applicant No.1 is trying to alienate suit property on the basis of said order. If the non-applicant No.1 succeeded in his attempt then he will suffer irreparable loss. With this, he prayed to restrain the non-applicant No.1 from creating third party interest in view of Will dt. 13/01/2014. Moreover, he also prayed to restrain implementation of any operation on the basis of Will dt. 13/01/2014. Lastly, he prayed to allow present application.

07 - The non-applicant No.1 appeared and filed his written statement cum reply at Exh.-09. He admitted their relation with applicant. He also admitted their relation with deceased Vishwanath. He further admitted description of suit property. He admitted fact of partition among deceased Vishwanath and his sons. He also admitted that the suit property was came in the share of deceased Vishwanath. He

further admitted that the suit property was self acquired property of deceased Vishwanath. He also admitted that he preferred appeal before Sub-divisional Officer, Chandur Rly. for cancellation of mutation entry. He further admitted that an order was passed in said matter on 15/01/2024 thereby cancelled mutation entry No.1372 and names of the applicant and non-applicant No.2 were deleted from 7/12 extract of the suit property. He denied further averments of present application.

08- He contended that deceased Vishwanath was having five sons namely the applicant, non-applicant No.2, Suresh, Dinesh and deceased Ramdas. However, the applicant concealed said fact. The applicant did not add all legal heirs of deceased Vishwanath in present matter. Thus, the applicant does not come before the Court with the clean hands. Therefore, present application is liable to be rejected.

09- The non-applicant no.1 further contended that deceased Vishwanath partitioned properties among his five sons. The suit property came in the share of deceased Vishwanath in said partition. Therefore, the suit property was self acquired property of deceased Vishwanath. The suit property was in ownership and possession of deceased Vishwanath. Therefore, deceased Vishwanath was having legal

right to dispose of the same. The applicant ill treated deceased Vishwanath. Therefore, deceased Vishwanath used to reside with him. At that time also, he was having possession over the suit property. He look after deceased Vishwanath during his lifetime by all means. On 13/01/2014, deceased Vishwanath executed registered Will in his favour thereby bequeathed suit property to him. At relevant time, deceased Vishwanath was physically fit. In said Will, deceased Vishwanath specifically mentioned that he is cancelling earlier Will dt. 17/09/2004. Thus, Will dt. 13/01/2014 is legal and last Will of deceased Vishwanath. Other legal heirs of deceased Vishwanath did not take objection on Will dt. 13/01/2014.

10- The non-applicant No.1 further pleaded that he became owner and possessor of the suit property on the basis of Will dt. 13/01/2014. The applicant was never having possession over the suit property. He filed an appeal No. RAAK/RTS-64/Fubgaon/02/2020-21 before the Sub-divisional Officer, Chandur Rly. for cancellation of mutation entry No.1372. The Sub-divisional Officer, Chandur Rly. allowed said appeal thereby cancelled mutation entry No.1372 and names of the applicant and non-applicant No.2 were deleted from 7/12 extract of the suit property. Hence, the applicant does not have right to file present application. With this, he prayed to reject present application.

11- The non-applicant No.2 appeared and filed his written statement cum reply at Exh.-15. It is replica of written statement and reply filed by the non-applicant No.1. Therefore, I did not produce contents of it in order to avoid repetition.

12 - Heard Ld. Adv. A.S. Bawankule for applicant and Ld. Adv. P.M.Thakare for non-applicant No.1 and Ld. Adv. Smt.Choudhari for non-applicant No.2 at length. I have minutely scrutinized all documents adduced by the both parties.

13- Following points arise for my determination and I have recorded my findings thereon for the reasons discussed below:-

Sr. No.	Points	Findings
1.	Whether applicant is having prima-facie case ?	No.
2.	Whether balance of convenience lies in favour of applicant ?	No.
3.	Whether applicant would suffer irreparable loss, if temporary injunction is not granted ?	No.
4.	What order ?	The application is rejected.

REASONS :-

14 - The applicants adduced certified copy of 7/12 extract of the suit property for year 2019, photocopies of mutation entry No.1372, Will Sr. No. 1485/2004 dt. 17/09/2004, Will Sr. No. 110/2014 dt. 10/01/2014 and death certificate of deceased Vishwananth Vitthoba Junghare. Per contra, the non-applicant No.1 produced photocopy of order passed by Sub-divisional Officer, Chandur Rly. dt. 15/01/2024.

As to Point Nos.1 to 3 :-

15 - For the sake of brevity and in order to avoid repetition, I discussed Point Nos.1 to 3 together.

16 - Ld. Adv. A.S. Bawankule for the applicant submitted that deceased Vishwananth was father of the applicant and the non-applicant No.2 and grandfather of the non-applicant No.1. Deceased Vishwananth partitioned his properties among his sons equally. The suit property was came in the share of deceased Vishwananth in said partition. Thus, the suit property was self acquired property of deceased Vishwananth. During his lifetime, deceased Vishwananth voluntarily executed registered Will Sr.No.1485/2004 on 17/09/2004 thereby bequeathed half share of the suit property in favour of the applicant and half share in favour of the non-applicant No.2. Thus, the applicant

and non-applicant No.2 became owners and possessor of their respective shares from the suit property on the basis of Will Sr.No.1485/2004 dt. 17/09/2004. The names of applicant and non-applicant No.2 were mutated in revenue record of the suit property in the year 2019. The applicant and non-applicant No.2 are cultivating the suit property. Thus, Will Sr. No. 1485/2004 dt. 17/09/2004 was acted upon. Other legal heirs of deceased Vishwanath did not object Will Sr. No. 1485/2004.

17 - Ld. Adv. A.S. Bawankule further argued that the non-applicant No.1 used to reside at Amravati. Deceased Vishwanath was ill since 2013 due to old age. Moreover, deceased Vishwanath did not physically and mentally fit. Deceased Vishwanath stayed at house of non-applicant No.1 for 4 to 5 days for medical treatment. At relevant time, the non-applicant No.1 took benefit of physical and mental weakness of deceased Vishwanath and prepared a bogus Will. Thus, Will dt.13/01/2014 is illegal one. On the other hand, deceased Vishwanath voluntarily executed first Will Sr. No. 1485/2004. Half share was given to the non-applicant No.2 also. No one has objected Will Sr. No. 1485/2004 till date. Thus, Will Sr. No. 1485/2004 is first and last Will of deceased Vishwanath. With this, he submitted that the applicant is having prima-facie case. Balance of convenience lies in favour of the applicant. On the basis of second Will, the non-applicant No.1 is trying to mutate

his name in revenue record of suit property. The non-applicant No.1 is trying to alienate suit property. Thus, it is necessary to restrain the non-applicant No.1 from doing so. Lastly, he prayed to allow present application. In support of his submissions, he relied on the following authorities:-

- i) Anshul S/o. Shrikant Wankhede Vs. Sau. Kanchan Ravi Sable writ petition No.3718/2021 decided by Hon'ble Bombay High Court,**
- ii) H.V. Nirmala & anr. Vs. R. Sharmila & anr. 2018 (4) ALL MR 425 (S.C.) decided by Hon'ble Apex Court.**

18- Per Contra, Ld. Adv. P.M. Thakare for the non-applicant No.1 vehemently contended that deceased Vishwanath got suit property in partition. Therefore, suit property was self-acquired property of deceased Vishwanath. The applicant ill treated deceased Vishwanath during his life time. Therefore, deceased Vishwanath used to reside with the non-applicants. The non-applicant No. 1 not only took care of deceased Vishwanath but also maintained him by all means. At relevant time also, the non-applicant No.1 is having possession over the suit property. Considering love and affection towards non-applicant No.1, deceased Vishwanath voluntarily executed second and last registered Will Sr. No. 110/2014 thereby bequeathed suit property in favour of the non-applicant No.1. Deceased Vishwanath specifically mentioned Will Sr. No.

110/2014 that he is revoking his first Will 1485/2004 dt. 17/09//2004. At relevant time, deceased Vishwanath was physically and mentally fit to execute second Will. It is well settled law that second Will prevails over first Will. Thus, the non-applicant No.1 became owner and possessor of the suit property in view of Will Sr. No. 110/2014. With this, he contended that the non-applicant No.1 is having prima-facie case. The non-applicant No.1 is having more balance of convenience as compare to the applicant. Moreover, the applicant did not adduce documents which shows that the non-applicant No.1 is trying to alienate suit property. Thus, if present application is allowed then the non-applicant No.1 will suffer serious loss and he will be prejudiced. With this, he prayed to reject present application.

19 - Ld. Adv. Chaudhari Madam for non-applicant No.2 argued in consonance with the contentions of the non-applicant No.1. therefore, I did not mention her argument for the sake of brevity.

20 - I have considered rival submissions of both parties. I have gone through documents adduced on record. Both parties admitted relation interse. Moreover, both parties admitted their relations with deceased Vishwanath. Furthermore, both the parties admitted description of the suit property. It is also

admitted fact that partition was effected among deceased Vishwanath and his sons and deceased Vishwanath got suit property as his share. Thus, it is admitted fact that suit property was self acquired property of the deceased Vishwanath. In the background of these admitted facts, I proceed to adjudicate present application.

21 - In instant case, both parties are claiming that they are having possession over suit field. The applicant relied on the first registered Will Sr. No. 1485/2004 dt. 17/09/2004 and 7/12 extract of the suit property of year 2019. I considered all these documents. Perusal of photocopy of registered Will Sr. No. 1485/2004 dt. 17/09/2004 reveals that deceased Vishwanath bequeathed an agricultural land ad-measuring 1 H. 27 R. from Northern portion of east-west division of the suit property was given to the applicant and an agricultural land ad-measuring 1 H. 28 R. from Southern portion of east-west division of the suit property was given to the non-applicant No.2. Perusal of 7/12 extract shows that the name of the applicant and the non-applicant No.2 are mutated in ownership column of the suit property in regard to their respective shares. However, perusal of photocopy of second Will Sr. No. 110/2014 depicts that deceased Vishwanath bequeathed suit property in favour of the non-applicant No.1 on 13/01/2014. Therefore, it appears that there are two Wills in respect of suit property. It is

seen that both Wills are registered one. However, it is sound law that second Will prevails over the first Will.

22 - The applicant challenged second Will Sr. No. 110/2014 on the grounds that deceased Vishwanath was ill before 4 to 5 years of death. Deceased Vishwanath was not physically and mentally fit. Deceased Vishwanath was not in position to execute Will. The non-applicant No.1 took benefit of said facts and got executed second Will Sr. No. 110/2014 by deceiving and cheating deceased Vishwanath. I considered these grounds. It appears that deceased Vishwanath executed registered second Will on 13/01/2014. Perusal of death certificate of deceased Vishwanath shows that he died on 08/09/2018. Therefore, it is seen that deceased Vishwanath executed registered second Will prior to 3 and half year ago before his death. Thus, date of execution of second Will and date of death of Vishwanath are not so proximate to create doubt about genuineness of execution of second Will. Moreover, the applicant did not adduce documents in support of his submissions. Thus, there is lack of documentary evidence on record to fortify submissions of the applicant. I am of the view that mere submissions are not sufficient to prima facie prove any fact. The applicant ought to have file documents in support of his submissions. Moreover, the applicant can prove said facts during the trial. Thus, I am of the opinion that it is not to doubt

second Will Sr. No. 110/2014 in absence of cogent and convincing evidence.

23 - In *Anshul case (Supra)*, Hon'ble Bombay High Court held in para No.10 that “it is no doubt true that while considering an application under Exh.-5, the Courts are not required to conduct mini trial. At the same time, it can not denied that for arriving at prima-facie finding, the nature of the document, the transaction enumerated therein, has to prima-facially be tested upon the touch stone of the law as applicable. It is well settled position of law that in case there is any suspicious circumstances surrounding the Will it is for the propounder to explain them, even on prima-facie basis”. I considered said ratio. In present matter, the applicant failed to show suspicious circumstances regarding second Will. Therefore, ratio laid down in *Anshul case* is not applicable to present matter.

24 - In *H.V.Nirmala case (Supra)*, Hon'ble Supreme Court held in para No.17 that “.....in order to prevail the last Will over the earlier one, the reference of revocation of the earlier Will was necessary in the later Will.....” . I considered said ratio. In present matter, it is specifically mentioned in second Will that deceased Vishwanath is cancelling his first Will Sr. No. 1485/2004 dt. 17/09/2004. Therefore, ratio laid down

in *H.V.Nirmala case (Supra)*, is goes against the applicant.

25 - In present matter, there are two Wills in respect of suit property. Out of it, first Will favours to the applicant and second Will favours to the non-applicant No.1. It also appears that first Will was cancelled by the deceased Vishwanath. The applicant prima facie failed to show that there are suspicious circumstances about execution of second Will. As mentioned supra, last Will prevails over earlier one. Therefore, at this juncture, I rely on the second Will Sr. No. 110/2014. In view of said Will, the non-applicant No.1 became owner of the suit property. It is admitted fact that the Sub-divisional Officer, Chandur Rly. passed an order on 15/01/2024 thereby cancelled mutation entry No.1372 and names of the applicant and non-applicant No.2 were deleted from 7/12 extract of the suit property accordingly. Moreover, the applicant mentioned in his application that he challenged said order. Thus, it appears that he has remedy available to him. Therefore, I find no ground to stop implementation of operation of Will Sr. No. 110/2014. Furthermore, there is nothing on record which shows that the non-applicant No.1 is trying to alienate the suit property. More so, there is lack of evidence which entails that the applicant is having possession over the suit property.

26 - In view of aforesaid discussion, it is crystal clear that the applicant does not adduce cogent evidence to prove his

possession. Furthermore, there is lack of evidence on record which depicts that the non-applicant No.1 is trying to alienate suit property. Furthermore, the applicant challenged order passed by Sub-divisional Officer, Chandur Rly. In such premises, there is no need to stop implementation of any operation of second Will. Hence, I hold that the applicant does not have prima-facie case. Moreover, balance of convenience does not lie in his favour. Therefore, no prejudice will be caused to the applicant if injunction order is not passed in his favour. Accordingly, I answered to Point Nos. 1 to 3 in negative.

As to Point No.4 :-

27 - In view of above discussion, I arrived at the conclusion that present application deserves to be rejected. Resultantly, I pass following order to answer Point No.4:-

ORDER

1. Application is rejected.
2. Costs-in-cause.

Date:- 30/07/2024

Place:- Nandgaon Kh.

(Chhaya Shamkumar Mehare)
Joint Civil Judge Jr. Div.,
Nandgaon Khandeshwar,
Distt. Amravati.