

ORDER BELOW EXH. 5 IN R.C.S NO. 370/2018

[CNR NO. : MHAU-05-001937-2018]

This is an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure moved by plaintiffs.

2. It is contended that block No. 201 out of which 7 H 12 R land of Mouje Shivrai, Tq.Vaijapur and 6H52 R agricultural land of of block no. 100 of Mouje Golwadi, Tq.Vaijapur are ancestral property of plaintiffs and defendants. (Here-in-after called as “suit property”).

3. It is further contended that the suit property was originally in the name of one Dagadu Bhanuse who was family head of joint family of plaintiff and defendants. Thereafter, after demise of Dagadu Bhanuse he has three son Tanaji, Hari and Vithal and one daughter also. The said three son of Dagadu was also died and they have their legal heir which are more particularly described in nomenclature column of the present plaint. In short, it is contended that the plaintiffs are legal heir of one deceased Hari whereas defendants are legal heir of deceased Tanaji and Vithal.

4. It is further contended that the ancestral property ie suit property of plaintiff was divided by son of Dagadu viz. Tanaji and Vithal and they had not given any share to their brother viz. Hari. Therefore, the plaintiff, by present application seeks temporary injunction against defendants for not to alienate suit property as well as to restrained defendants from disturbing the possession of plaintiff over

the suit property.

5. Defendant no. 2 to 4, 5 to 11 and B-1 to 8 filed their say vide Exh 17 and defendant no. 3, 6 and 8 adopted the say and thereby strongly resisted the present application. It is contended that there was a partition of ancestral property between three sons of Dagadu Bhanuse. In the said partition, the plaintiff no. 1 to 3s' father ie Hari was not given any share. The reason for it that Hari was already given his share in the form of property of admeasuring 16Acre 38 Gunthe of block no. 110. The said property though appears to be in the name of Hari, was originally purchased by Hari's, Vithal and Tanaji's father in the name of Hari out of income of ancestral property. Therefore, the plaintiff no. 1 to 3 's father was allotted share in the said partition and the same was binding on plaintiffs also. It is further submitted that the plaintiffs have not established their possession over any part of the suit property. Therefore, question of causing obstruction to their possession does not arise. Therefore, finally it is submitted that the present application is devoid of merit and liable to be rejected.

6. The following points arise for my determination, I have given my findings thereon for the reasons mentioned below.

| Sr. No. | Points | Findings |
|----------------|--|---------------------------|
| 1. | Do plaintiffs prove prima facie case ? | ...partly in affirmative |
| 2. | Do plaintiffs prove that balance of convenience lies in their favour ? | ... partly in affirmative |

| | | |
|----|---|--------------------------------|
| 3. | Do plaintiffs prove that if temporary injunction is not granted, irreparable loss will be cause to them ? | ...partly in affirmative |
| 4. | What order ? | Application is partly allowed. |

REASONS

7. In support of application Exh.5, the plaintiffs have filed following documents:-

- (1) Photo copy of Pahani Patrak 1946 to 1989 (Exh. 4/1),
- (2) Xerox copy of 7/12 extract of the block no. 201 of Mouje Shivrai (Exh. 4/2),
- (3) Xerox copy of 7/12 extract of the block no. 201 of Mouje Shivrai of the year 2012 to 2013 and 2015 to 2016 (Exh. 4/3)
- (4) Xerox copy of 7/12 extract of the block no. 201 of Mouje Shivrai the year 1996 – 1997 to 2011-12 (Exh.4/4)
- (5) Xerox copy of Mutation entry No. 696 of block no. 201 (Exh 4/5),
- (6) Xerox copy of Mutation entry No. 2435 of block no. 201 (Exh 4/6)
- (7) Xerox copy of Mutation entry No. 2909 of block no. 201 (Exh 4/7),
- (8) Xerox copy of Mutation entry No. 3119 of block no. 201 (Exh 4/8),
- (9) Xerox copy of Mutation entry No. 3131 of block no. 201 (Exh 4/9),
- (10) Block no. 100 Pahani Patrak (Exh.4/10),
- (11) Xerox copy of 7/12 extract of the block no. 100 the year 1965 – 1966 and 1985 to 95 (Exh. 4/11)
- (12) Xerox copy of 7/12 extract of the block no. 100 the year 2010 – 2011 to 2015 to 2016 (Exh. 4/12)
- (13) Xerox copy of Mutation entry No. 617 of block no. 100 (Exh 4/13)
- (14) Xerox copy of Mutation entry No. 1536 of block no. 100 (Exh 4/14)
- (15) Xerox copy of Mutation entry No. 2108 of block no. 100 (Exh 4/15),

- (16) Present 7/12 extract of block no. 100 (Exh 4/16),
- (17) Xerox copy of power of attorney (Exh 4/17),
- (18) Identity card of plaintiff (Exh 4/18),
- (19) Xerox copy of power of attorney (Exh 19/1).

8. The defendants have not filed any documents.

AS TO POINT NOS. 1 TO 3:-

9. All these points are interlinked with each other, therefore, they are taken for common consideration.

10. The learned advocate for the plaintiffs submitted that the plaintiffs are legal heirs of one Hari. The said Hari had two brothers viz. Tanaji and Vithal and one sister also. All the aforesaid brothers were dead at present. Thereafter, the legal heir of Hari instituted the present suit against the legal heir of Tanaji and Vithal. The reason for instituting the present suit is that the plaintiff no.1 to 3 s' father i.e Hari was not given any share in the suit property, though the said property is an ancestral property and he is a co-parcener. Therefore, the said partition was not binding on legal heir of Hari i.e. Plaintiff. In fact the fact of said partition between Vithal and Dagadu in regards to suit property came to the knowledge of plaintiffs only in the year of 2018 when they visited their village at Vaijapur. Therefore, the plaintiffs instituted the present suit with a prayer that the suit property be partitioned and plaintiffs be allotted 1/3rd share of it along-with defendants be restrained from creating any third party interest over it. The plaintiffs have a prima facie case and if defendants are not restrained, then there will be irreparable loss caused to them. Therefore, it is submitted that, the present application be allowed.

11. Per contra, Ld. Advocate of defendants submitted that the suit property was partitioned between all the three brothers viz. Hari, Vithal and Tanaji. In the said partitioned, the part of suit property was not given to Hari as he was already given as a share the property at block no. 110. Therefore, there is no question of depriving the share of one Hari. Furthermore, the present suit was instituted only to blackmail and harass the defendants. The 7/12 extract and mutation which are brought on record by plaintiffs were recorded by concerned officer after due verification and the same are legal ones. Furthermore, the plaintiffs have not given any explanation of the said mutation, 7/12 extract and Pahani Patrak etc. Therefore it is submitted that the present application does not have any merit and it liable to be rejected.

12. Perused the record. Here it is important to state that, it is an undisputed fact that suit property is ancestral property of plaintiffs and defendants. Furthermore, it is undisputed fact that the partition was caused in regard to suit property between Vithal and Tanaji. Now here only the fact need to be considered whether the father of plaintiff no. 1 to 3 i.e Hari was allotted any share in the partition effectuated between his brothers viz. Dagadu and Vithal. On the said point, Ld. Advocate of plaintiffs submitted that there father was not allotted any share out of suit property and the same is established from the documents on record filed along with list Exh 4. Per contra, Ld. Advocate of defendants submitted that the father of plaintiff no. 1 to 3's i.e Hari was given the property of block no. 110 admeasuring 10Acre 38 Gunthe which was a joint family property though purchased in the name of Hari. Therefore, the said partition is binding on Hari as well as

his legal heirs i.e plaintiffs. Here it is necessary to state that neither party has brought on record the partition deed if any. However, from the say of defendants, they have relied on the fact that the plaintiff no.1 to 3' father was given the property i.e block no. 110 as a share in partition between their fathers i.e Dagadu and Vithal. However, nothing is brought on record which prima facie shows that the said property i.e block no. 110 was purchased out of the income of suit property. Therefore, from the say of defendants itself, it is clear that plaintiff no. 1 to 3s' father Hari was having title of the said property. Thus prima facie defendants have failed to brought on record the fact that the Hari was given a share in the partition in which was effected between Dagadu and Vithal. Whereas the plaintiffs have prima facie brought a case which shows their father ie Hari though coparcener in suit property was not given any share. The same need to be adjudicated on merits.

13. Now coming to the aspect of balance of convenience and irreparable loss, I had already hold that the plaintiffs has prima facei proved his case. If at all the injunction is not granted against the defendants in the form of restraining them from selling and as well as creating any third party interest over the suit property, it will further leads to complication in the present matter.

14. Now coming to the second prayer of plaintiffs i.e defendants be restrained from disturbing their possession over the suit property. It is the duty on the part on plaintiffs to brought something on record which shows that on the date of filing of the present suit they were in possession over suit property. However, nothing has been

brought on record which shows the plaintiff's possession over the suit property. Therefore, the said prayer of restraining defendants from disturbing their possession over the suit property cannot be allowed and hence, the said prayer is hereby rejected. Hence, in view of aforesaid discussion I answer point Nos.1 to 3 partly in affirmative.

AS TO POINT NO. 4 :-

15. In view of the above said discussion and my findings on point Nos. 1 to 3, the application deserves to be partly allowed. In the result, I pass the following order.

ORDER

1. The application is partly allowed.
2. Defendants are hereby temporarily restrained from selling out or creating any third party interest over the suit property, till final disposal of the suit.
3. Costs of the application shall be caused in suit.

Date : 10.10.2019

(S.R.Shinde)
3rd Jt. Civil Judge, J.D.,
Vaijapur.

C E R T I F I C A T E

I affirm that the contents of this P.D.F. file order are same, word to word, as per the original order.

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|--|---|--|
| Name of the Stenographer | : | Mulla.H.I. |
| Court | : | Shri.S.R. Shinde, 3 rd Jt. CJJD & JMFC., Vaijapur, Dist.Aurangabad. |
| Date | : | 10.10.2019, |
| Order signed by the presiding officer on | : | 17.10.2019, |
| Order uploaded on | : | 17.10.2019. |