

ORDER BELOW EXH.5

The present application is filed by plaintiffs for restraining defendant from alienating land at Gat No. 85, adm. 87-R from village Kavthal, taluka Sangrampur, District Buldana (here-in-after referred as suit property)

It is the case of plaintiffs that:-

2. The suit property is an ancestral property of plaintiffs. Initially, the property was owned and possessed by Amruta Ekhe. He died in the year 1973. After his death, the property was inherited by his sons viz. Nago Amruta Ekhe and Dashrath Amruta Ekhe. The mutation entry No. 1757 also taken in their favour. Thereafter, Nago Ekhe and Dashrath Ekhe went at Deulgaon and settled there. The plaintiff No.1 is the widow of Nago Ekhe. The plaintiff No.2 and one deceased Ganesh are the sons of Nago Ekhe. The Ganesh Ekhe died. The plaintiff No.3 and 4 are widow and son of deceased Ganesh Ekhe. The plaintiff further submitted that the Dashrath Amruta Ekhe died without marriage.

3. It is further submitted that after the death of Amruta Ekhe, the Nago Ekhe cultivated the suit property for 10 years. However, thereafter, the suit property remained uncultivated. When the plaintiffs require money for medical treatment of Ramesh Ekhe they decided to sell the suit property. Accordingly, the plaintiff when approached to Kavthal on 3.4.2018 they came to know about the possession of the defendant on the suit property. Thereafter, the

plaintiffs obtained a copy of the necessary revenue record. On perusal, they came to know that the defendant by hand in glove with the revenue authority mutated owned name through mutation entry no. 323 to the suit property. The mutation seems to be taken on the basis of one alleged gift deed executed by Nago Ekhe and Dashrath Ekhe. The plaintiff denied the fact regarding the execution of any gift-deed. The plaintiffs also made representation to the revenue authority and the police station. The defendant having no concern with the suit property still illegally he succeeded to mutate own name into the revenue record. The plaintiffs having apprehension that defendant will dispose of the suit property hence by way of the present application the plaintiff prayed for a temporary injunction to restrain the defendant from alienating the suit property and creating third party interest.

4. The defendant by the written statement at Ex 21 admitted certain fact viz. the description of the suit property, suit property owned and possessed by the Amruta Eke, relation pointed out by the plaintiffs. However, the rest of the contention of the plaint is denied. It is submitted that the father of defendant namely Vishram was the real brother of Amruta. They were residing jointly at Kawthl. Till today there was no partition of joint family property. Therefore the defendant also a joint owner of the suit property. It is further submitted that on 18/12/1990 Nago Amruta and Dashrath Amruta executed a Gift deed in favour of the defendant. Since then the defendant is owner and possessor of the suit property. The name of the defendant also mutated

to the revenue record through mutation entry no. 323. Therefore, the revenue record clearly shows the possession of defendant on suit property since long. The plaintiffs never raise any objection until today against the mutation of the suit property in the name of the defendant. Therefore, now the plaintiffs are having no right to institute suit against the defendant also claim any relief. Hence, the suit itself is liable to be dismissed.

5. The defendant also claims that the defendant became the owner by way of adverse possession. The defendant is also entitled to protect his possession in view of section 58 of Maharashtra Tenancy and Agriculture Lands Act, 1948. On that basis, it is prayed to dismiss the suit.

6. Heard learned counsel V. D. Pahurkar for plaintiffs and learned counsel M. R. Gaiki for the defendant at length.

7. Following points arise for my consideration, I have recorded my findings against each of them with the reasons thereon:-

<u>POINTS</u>	<u>FINDINGS</u>
1 Whether plaintiffs prove that, there is a <i>prima facie</i> case in their favour?	...Yes
2 Whether plaintiffs prove that, the balance of convenience lies in their favour?	..Yes

3 Whether plaintiffs prove that, a heavy and irreparable loss will be caused to them if an injunction is refused?

...Yes

4 What Order?

The application is allowed

REASONS

8. In support contention, plaintiffs relied upon the Copy of 7/12 Extract of Gat no. 85, Village form no. 12, copy of mutation entry no. 323, copy of mutation register, copy of the notice, copy of representation to the P.S. Tamgaon, copy of reply of notice by the defendant. Against which the defendant relied on a copy of death certificate of Dashrath Amruta Ekhe, copy of 7/12 extracts of Gut no. 85, form no. 8A, copy of roznama in a proceeding before Sub-Divisional, Officer, Jalgaon in RTS 64/2017-18.

Arguments :

9. The Ld. Counsel for plaintiffs Shri V. D. Pahurekar argued that the defendant admitted the ownership of Amruta Ekhe on the suit property. The defendant also admitted the relation of plaintiffs with Amrutha Ekhe. Therefore, on that basis, it is admitted fact that suit property is an ancestral property of plaintiffs. The defendant is claiming that suit property was transferred to the defendant on the basis of Gift deed but the defendant failed to produce the copy of Gift deed on record. The defendant raised an objection that the plaintiff never assailed the Gift deed but it is a specific case of the plaintiffs that till today no Gift deed is executed therefore there is no question of

challenge any Gift will arise. The defendant also claims rights on the basis of adverse possession but no counterclaim was filed by the defendant on the basis of adverse possession. Even the defendant never claim that the plaintiffs were aware of the possession of the defendant on the suit property. Hence, on that basis, it is submitted that plaintiffs clearly established the prima facie case in their favour. If suit property will be alienated then plaintiffs face irreparable loss. On the contrary, if the defendant will be restrained no loss will be caused to the defendant. Hence, on that basis, it also submitted that balance of convenience also lies in favour of plaintiffs. Hence, the Ld. Counsel Shri Pahurkar prayed to allow the application.

10. In reply, the Ld. Counsel Shri Gaike submitted that no loss will be caused to plaintiffs as rights of plaintiffs are protected by way of lis pendens. The plaintiffs failed to assail the mutation entry in favour of the defendant for a long period. Even an appeal filed by the plaintiffs to set aside the mutation entry is already dismissed by Ld. S.D.O., Jalgaon Jamod. Therefore, no balance of convenience also lies in favour of plaintiffs. In fact, the defendant is not going to alienate the suit property as the suit property itself source of income for the defendant. Hence on that basis, it is prayed to reject the application.

Appreciation :

As to Point no.1 to 3:-

11. Heard both sides. In view of the pleading of parties, it is admitted fact that suit property was own and possessed by Amruta

Ekhe. The plaintiffs are the legal heirs of Amruta Ekhe. The defendant claim that he became owner and possessor of the suit property on the basis of Gift deed executed by the Nagu and Dashrath in favour of the defendant. Initially, no copy of Gift deed was produced on record. But during the course of argument Ld. Counsel Shri Gaike produced a photocopy of the Gift deed.

12. I have perused the copy of Gift deed. At the outset, the alleged gift deed is not a registered document. However, Section 17 of Registration Act, 1908 and 123 of Transfer of Property Act make it obligatory that transfer of immovable property through Gift must be effected by registered instrument only. Therefore, even if it is presumed that the Nago Amruta Ekhe and Dashrath Amruta Ekhe might have executed an unregistered gift deed, then also the alleged gift deed is not sufficient to establish the lawful transfer of ownership in favour of the defendant. Therefore, if the defendant is claiming ownership on the basis of Gift deed he is not entitled to resale the property for want of lawful title on the suit property.

13. The defendant also claims in para no. 18 of the written statement that he became the owner of the suit property on the basis of adverse possession. However, it is important to note that while claiming rights on the basis of adverse possession the defendant vaguely claims that since he is in possession of suit property since last 30 years he became an owner. However, in defendant never disclose whether plaintiffs are aware of hostile possession of defendant on the suit

property. In absence of same even if it is presumed that the defendant is in possession since long still it does not confer any right in favour of the defendant as claimed. Hence, on the second ground of defence also the defendant is not having the right to alienate the suit property.

14. The third ground raised by the defendant is about protection under Section 58 of Maharashtra Tenancy and Agricultural lands Act, 1948. However, on perusal of said provision, it speaks about the restriction on the manager to sell or lease property except for prior permission of Collector. Hence, the provision which pointed out by the defendant is having no concern with the present matter. Even otherwise the defendant never claims that he is declared as a protected tenant by the competent authority. Therefore, the ground raised by the defendant is vague and has no worth in view of available facts of the matter.

15. The defendant also coming with the theory that suit property is also an ancestral property of the defendant. The defendant claims that suit property was own and possession by Amrutha Ekhe and Vishram Ekhe (i.e. father of defendant). However, the defendant failed to produce any documentary evidence to establish the said fact. Even if it is presumed that the defendant is in relation with plaintiffs as claimed. But even by showing family relation, the fact regarding joint family property cannot be presumed. As it is settled law that there is presumption as to joint family and no presumption as to joint family property. In entire pleading, the defendant is silent how the suit

property was joint family property, whether it was inherited by Amruta for forefather or it was purchased out of joint family income. In absence of same the fourth defence also claimed without any supportive evidence. Hence, on that ground also the defendant failed to establish ownership.

16. On perusal of revenue records produced by both parties, it clearly reveals that suit property was transferred in favour of Nagu and Dashrath after the death of Amruta Ekhe. The name of the defendant was recorded on the basis of the alleged gift deed. But as I have already held that alleged gift deed is not sufficient to transfer lawful title in favour of the defendant. The defendant also produced the copy of mutation entry in his favour, however, it is settled law mutation entry is for revenue purpose only, it is not sufficient to establish the transfer of ownership. Hence, prima facie fact remains that being legal heirs of Nagu and Dashrath the plaintiffs are lawful owners of the suit property.

17. If the defendant will alienate the suit property by taking advantage that suit property standing in his name into revenue record, then there is every possibility that plaintiff will face unnecessary complication, a multiplicity of litigation and their rights to get property being defeated by the purchaser by creating equities in his favour by making an investment. On the contrary, if interim relief will be granted defendant will not face any irreparable loss, especially in view of argument of Ld. Counsel for the defendant that the defendant does not

intend to alienate the suit property.

18. Hence, plaintiffs clearly pointed all three ingredients viz prima facie case, the balance of convenience and irreparable loss in their favour to allow an application under Order 39 rule 1 and 2 of Code of Civil Procedure. Hence, finding to the **point no. 1 to 3** is recorded in **positively**.

As to Point no. 4:-

19. The Ld. Counsel Shri Gaikar argued that there is no need to grant an injunction as an interest of plaintiffs is already protected under section 52 of Transfer of Property Act. However, on that point already Hon'ble Division bench of Hon'ble Bombay High Court settled the law in *Prakash Gobindram Ahuja v. Ganesh Dhonde*, 2016 (6) AIR Bom. R. 745 that if plaintiffs clearly pointed out three ingredients for granting temporary injunction there is no bar of Section 52 for granting relief under order 39 Rule 1 and 2 of Code of Civil Procedure, the protection afforded by order of injunction can in no way be called as illusory, but it is definitely an effective protection.

20. Hence, in view of the above legal position and circumstance of present matter plaintiffs entitled to protect his interest by way of temporary injunction as claimed till the decision of the suit; Hence, I pass following order.

ORDER

1. Application is allowed.
2. The defendant is temporarily restrained from alienating or

creating third party interest in suit property till adjudication of suit.

3. Costs in the cause.

Sangrampur

Date :- 21/11/2019

(Santosh R. Bharad)

C. J. J. D., Sangrampur