

MHDH070004312021



R.C.S. No.10/2021

Sau. Kalpana Sharad Patole & ors.

Vs.

Budha Hiranman Pawar & ors.

ORDER BELOW EXH.5

(Order passed on 10th January, 2022)

This is a suit wherein the plaintiffs have claimed partition, separate possession and perpetual injunction in respect of the suit properties mentioned in the plaint para No. 3.

2] **Description of the suit properties;**

Schedule – A

Sr. No.	Village Name	Gat No.
1]	Bharwade	49
2]	Bharwade	50
3]	Bharwade	52/1
4]	Bharwade	52/2
5]	Bharwade	53/1
6]	Bharwade	70/2
7]	Vikharan Budurk	7
8]	Vikharan Budurk	184/1/B
9]	Vikharan Budurk	189/3
10]	Vikharan Budurk	185/1/A/1/A/1
11]	Tekwade	215/2/B

Order below Exh. 5	// 2 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

Schedule – B

Sr. No.	Village Name	Property No.
1]	Vikharan Budruk	883
2]	Vikharan Budruk	1265
3]	Vikharan Budruk	944
4]	Vikharan Budruk	884
5]	Vikharan Budruk	905
6]	Vikharan Budruk	1720
7]	Vikharan Budruk	1368
8]	Vikharan Budruk	903
9]	Vikharan Budruk	904
10]	Vikharan Budruk	1264
11]	Vikharan Budruk	1391
12]	Vikharan Budruk	1110

(Hereinafter referred as ‘the suit properties’)

3] Pending final hearing of the suit, it is apprehension of the plaintiffs that the defendants are likely to alienate the suit properties and thereby create third party interest, therefore, the plaintiffs have filed application for temporary injunction under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908.

4] It is the contention of the plaintiffs that the plaintiff No. 2 is the first wife of defendant No.1 and the plaintiff No.1 is the daughter of plaintiff No.2 and the defendant No.1. The defendant No.2 is the second wife of defendant No.1, the defendant No.3 and 4 are sons of defendant No.1 and defendant

Order below Exh. 5	// 3 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpna Patole & ors. Vs. Budha Pawar & ors.

No.2. The defendant No.5 is the daughter of defendant No.1 and defendant No.2. The defendant No. 6 is the wife of defendant No.3. The defendant No. 7 is the wife of defendant No.4.

5] The plaintiffs further contended that the suit properties mentioned in Schedule A and Schedule B are the joint family properties of the plaintiffs and defendants. The defendants have mutated some properties in the name of defendants for the family arrangements. The said properties have been purchased from the income of joint family. The plaintiffs have share in the said suit properties. On 15.12.2019, the plaintiffs requested their share in the suit properties from the defendants, but in vain. Thereafter, on 06.02.2020, the plaintiffs have sent a notice through their advocate for claiming the partition in the suit properties. However, the defendants have not given their share to the plaintiffs in the suit properties. Therefore, the plaintiffs are constrained to institute the present suit for partition, separate possession and perpetual injunction. During the pendency of the suit, the plaintiffs have apprehension that the defendants are likely to alienate the suit properties and thereby create third party interest in the suit properties, therefore, the plaintiffs have filed the present application for temporary injunction.

6] The defendant No.1 to 7 have appeared through learned advocate Shri. P. P. Indait and they have resisted the claim of the plaintiffs by filing their written statement at Exh. 21. The defendants have denied all the adverse contentions of the plaintiffs.

Order below Exh. 5	// 4 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

7] The defendants have admitted the relationship with the plaintiff No. 1. They further contended that the plaintiff No.2 is residing separately from defendant No.1 for more than 50 years. According to them, the defendant No. 2 is the first wife of defendant No.1, but the relationship of the plaintiff No.2 with the defendant No.1 is dissolved as per their customs.

8] The defendants further contended that the suit properties described in the schedule A and schedule B are not the joint family properties. The defendant No. 1 does not possess any ancestral property. The defendant No. 3 and 4 have purchased the properties from their own sources. The suit properties are not the joint family of the plaintiffs and defendants. Therefore, the plaintiffs have not share in the suit properties. Moreover, the said suit properties are the self acquired properties of the defendants. Lastly, they prayed to reject the application.

9] Heard learned advocate Shri. V. B. Patil for the plaintiffs and learned advocate Shri. P. P. Indait for the defendants.

10] On hearing both the parties and after going through the record, the following points arise for my determination which are produced herein below along with my findings thereon.

<u>No.</u>	<u>Points</u>	<u>Findings</u>
01	Whether the plaintiffs prove that they have prima facie case ?	No.

Order below Exh. 5	// 5 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

02	Whether the plaintiffs would suffer irreparable injury if their prayer for temporary injunction is not granted ?	No.
03	Whether the balance of convenience is in favour of the plaintiffs ?	No.
04	What order ?	As per final order.

REASONS

As to Points No. 1 to 3 :-

11] The points No. 1 to 3 are interlinked and connected to each other, therefore to avoid repetitions, they are discussed together. While considering the application, under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908, the Court has to take into consideration three principles i.e. prima facie case, balance of convenience and irreparable loss of the parties. In the present case at hand, the plaintiffs have sought relief of temporary injunction against the defendants that they should not alienate the suit properties till final decision of the suit. The plaintiffs have to prove prima facie case and also have to prove the balance of convenience lies in their favour and if temporary injunction application is rejected then they would suffer irreparable loss.

12] The plaintiff No. 1 Kalpana Patole has filed her affidavit in support of the application at Exh 6. Apart from this affidavit, the plaintiffs have relied upon some documents filed alongwith list at Exh. 3. The plaintiffs have filed on record the 7/12 extracts of agricultural lands situated at village Bharwade

Order below Exh. 5	// 6 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpna Patole & ors. Vs. Budha Pawar & ors.

bearing Gat Nos. 49, 50, 52/A, 52/2, 53/1, 70/2. They have also filed 7/12 extracts of the agricultural lands situated at village Vikharan bearing Gat Nos. 7, 184/1/B, 189/3, 185/1/A/1/A/1. They further filed the 7/12 extract of agricultural land bearing Gat No.215/2/B situated at village Tekwade. The plaintiffs have also filed the Form No. 8 of the properties situated at village Vikharan bearing property No. 883, 1265, 944, 884, 905, 1720, 1398, 903, 904, 1264, 1391 and 1110.

13] On the other hand, the defendant No. 1 has his affidavit in support of their written statement. They have relied upon some sale deeds filed alongwith list at Exh. 26. The defendants have filed copy of sale deed of Gat No. 7, situated at village Vikharan, the copy of sale deed of Gat No. 49 situated at village Bharwade, the copy of sale deed of Gat No. 52/1 situated at village Bharwade, the copy of sale deed of Gat No. 185/1/A/1/A/1 situated at village Vikharan, the copy of sale deed of Gat No. 52/2 situated at village Bharwade, the copy of sale deed of Gat No. 70/2 situated at village Bharwade, the copy of sale deed of Gat No. 50 situated at village Bharwade, the copy of sale deed of Gat No. 189/3 situated at village Vikharan and the copy of sale deed of Gat No. 215/2-B situated at village Tekwade.

14] It is argued by the learned advocate Shri. V. B. Patil that the suit properties are joint family properties of plaintiffs and defendants. The plaintiffs have share in the suit properties. The defendants are intending to alienate the suit properties. If the suit

Order below Exh. 5	// 7 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpna Patole & ors. Vs. Budha Pawar & ors.

properties are alienated during the pendency of the suit then the legal rights of the plaintiffs would be violated and it will cause legal injury to the rights of the plaintiffs. The possession of the suit properties is with the defendants, therefore no prejudice will be caused to the defendants if they are restrained from alienating the suit properties and creating third party interest in the suit properties. He further argued that in order to avoid multiplicity of the proceeding the temporary injunction is required to be granted. Lastly, prayed to allow the application.

15] On the other hand, the learned advocate Shri. Indait has argued that the application is not maintainable and the suit is also not maintainable in the present form. He admitted that the defendants are in possession over the suit properties. The learned advocate Shri. Indait has invited my attention towards the copy of sale deeds filed alongwith list at Exh. 26. He has argued that the said properties are purchased by the defendants from their own income source. The suit properties are not the joint family properties. The marital relationship with plaintiff No.2 of defendant No.1 is extinguished by the customary divorce. Therefore, the plaintiffs have no share in the suit properties. He further argued that in order to show the suit properties as of joint family properties neither single mutation entry has been brought on record by the plaintiffs. Lastly, prayed to reject the application.

16] Pleadings are the basic foundation of the litigation. On perusal of the plaint, it prima facie appears that the plaintiffs are

Order below Exh. 5	// 8 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

pleaded that the suit properties are joint family properties. Prima facie on perusal of the 7/12 extracts filed alongwith list at Exh. 3, it appears that the agricultural land bearing Gat No.49 is situated at village Bharwade is stands in the name of Krantikumar Pawar. The agricultural land bearing No.50 is situated at village Bharwade is stands in the name of Komalsing Pawar. The agricultural land bearing No.52/1 is situated at village Bharwade is stands in the name of Krantikumar Pawar. The agricultural land bearing No.52/2 is situated at village Bharwade is stands in the name of Komalsing Pawar. The agricultural land bearing No.53/1 is situated at village Bharwade is stands in the name of Komalsing Pawar. The agricultural land bearing No.70/2 is situated at village Bharwade is stands in the name of Komalsing Pawar. The agricultural land bearing No.7 is situated at village Vikharan is stands in the name of Kusumbai Pawar. The agricultural land bearing No. 184/1-B is situated at village Vikharan is stands in the name of Komalsing Pawar. The agricultural land bearing No. 189/3 is situated at village Vikharan is stands in the name of Komalsing Pawar. The agricultural land bearing No. 185/1/A/1/A/1 is situated at village Vikharan is stands in the name of Komalsing Pawar and the agricultural land bearing No. 215/2/B is situated at village Tekwade is stands in the name of Komalsing Pawar.

17] On perusal of copy of Form No. 8 filed alongwith list at Exh. 3, it appears that the property situated at village Vikharan bearing property No. 883 is standing in the name of Budha

Order below Exh. 5	// 9 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

Hiraman Pawar, Sumanbai Budha Pawar, Kusumbai Budha Pawar. The property bearing No. 1265 is standing in the name of Government and occupant is Budha Hiranman Pawar. The property bearing No. 944 is standing in the name of Krantikumar Pawar. The property bearing No. 884 is standing in the name of Krantikumar Pawar and Kalpana Pawar. The property bearing No. 905 is standing in the name of Krantikumar Pawar. The property bearing No. 1398 is standing in the name of Government and occupant is Krantikumar Budha Pawar. The property bearing No. 903 is standing in the name of Komalsing Pawar and Yashodabai Pawar. The property bearing No. 904 is standing in the name of Komalsing Pawar. The property bearing No. 1264 is standing in the name of Government and occupant is Komalsing Pawar. The property bearing No. 1720 is standing in the name of Government and occupant is Krantikumar Pawar. The property bearing No. 1398 is standing in the name of Government and occupant is Komalsing Pawar. The property bearing No. 1110 is standing in the name of Government and occupant is Sumanbai Pawar. The plaintiffs have not taken pain to describe in the plaint as to how each and every property is mutated in the name of the defendants. In that regard, the plaint is too vague.

18] The defendants have relied upon the copy of sale deeds alongwith list at Exh. 26. On perusal of the said sale deeds, the prima facie it appears that Kusumbai has purchased agricultural land bearing Gat No. 7 situated at village Vikharan on 16.07.1987 from Ragho Patil for the consideration amount of ₹ 21,000/-. The

Order below Exh. 5	// 10 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

copy of sale deed of Gat No. 49 situated at village Bharwade shows that Krantikumar Pawar has purchased said agricultural land on 22.03.2001 from Sakharam Makkan Patel for the consideration amount of ₹40,000/-. The copy of sale deed of Gat No. 52/1 situated at village Bharwade shows that Krantikumar has purchased the said agricultural land on 22.03.2001 from Sakharam Patel for the consideration amount of ₹ 90,000/-. The copy of sale deed of Gat No. 70/2 situated at village Bharwade shows that Komalsing has purchased the said agricultural land on 04.03.2003 from Machindra Gujar for the consideration amount of ₹1,52,000/-. The copy of sale deed of Gat No. 50 situated at village Bharwade shows that Komalsing has purchased the said agricultural land on 05.12.2002 from Brijlal Patel and others for the consideration amount of ₹60,000/-. The copy of sale deed of Gat No.189/3 situated at village Vikharan shows that Komalsing has purchased the said agricultural land on 20.07.2006 from Shobhabai Patil for the consideration amount of ₹ 93,000/-. The copy of sale deed of Gat No. 215/2-B situated at village Tekwade shows that Komalsing has purchased the said agricultural land from Shubhangi Chaudhari for the consideration amount of ₹ 10, 54,000/-.

19] The learned advocate Shri. Indait has rightly argued that the plaintiffs have not brought on record the mutation entries showing that the suit properties are joint family properties. It is well settled presumption of law that the entry in the revenue record do not confer title on the person whose name appears in

Order below Exh. 5	// 11 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpna Patole & ors. Vs. Budha Pawar & ors.

the record of rights. These entries are made only for a fiscal purpose, however, the entries in the revenue record have certain presumptive value under the provisions of Section 157 of the Maharashtra Land Revenue Code, 1966. Therefore, unless and until the contrary is proved by the plaintiffs by adducing probable evidence we will have to presume that the said suit properties are the self acquired properties of the defendants. Unless and until the full fledged evidence is recorded and opportunity of cross examination is given to both the sides, it is very difficult to find out whether the said properties are purchased from the income of joint family properties. Moreover, there is no presumption that the property owned by the Hindu Joint Family is joint family property.

20] Even, if it assumed for the sake of argument that the all suit properties are joint family properties of plaintiffs and defendants, in that circumstances also, the injunction cannot be granted in favour of plaintiffs in view of doctrine of lis pendens stipulated in Section 52 of the Transfer of Property Act, 1882. Section 52 of Transfer of Property Act, 1882 provides adequate protection to the parties from the transfer pendente lite and such transferee are neither required to implead nor can claim impleadment. They can not resist the execution proceeding. The provisions of Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 is only an enabling provision, enabling the Court to grant temporary injunction to restrain transfer pendente lite and said provisions could be invoked only if the protection is

Order below Exh. 5	// 12 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpna Patole & ors. Vs. Budha Pawar & ors.

provided by Section 52 of the Transfer of Property Act, shown to be inadequate. The plaintiffs have not shown as to how protection of Section 52 of Transfer of Property Act is said to be inadequate and as to why an injunction would be necessary. In such circumstances, the judgment of Hon'ble Bombay High Court in the case of **Kachhi Properties Vs. Ganpatrao Shankarrao Kadam reported in (2010) 5 Mh.L.J. 903**, assumes important, wherein the Hon'ble Bombay High Court has held that;

“The plaintiff need not at all worry about transfer of pendente lite and so, occasions for invoking powers under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 would arise only in rare cases, where plaintiff can demonstrate that rule of lis pendens is inadequate to protect plaintiffs interest”.

21] The aforesaid enlightenment of Hon'ble Bombay High Court can also be applied to the facts and circumstances of the present case. It is apprehension of the plaintiffs that defendants are likely to alienate the suit properties and thereby they will be deprived from their valuable right and interest in the undivided joint family suit properties. However, as enlightened by the Hon'ble Bombay High Court in the case law (cited supra), the doctrine lis pendens would applicable to the intending purchaser and they will have to bind by the decree which will be passed in the suit. Under such circumstance, I am of the opinion prima facie case does not lie in favour of the plaintiffs. So also, balance of convenience lies in favour of the defendants as they have purchased some of the properties on payment of consideration

Order below Exh. 5	// 13 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

amount. Therefore, balance of convenience lies in favour of defendants. As stated above, no irreparable loss would be caused to the plaintiffs as doctrine of lis pendens would come to their help. Therefore, I record my findings as to point No. 1 to 3 in the negative.

As to point No. 4 :-

22] In view of negative findings at to point No.1 to 3, the application is liable to be rejected. To answer point No.4, I pass the following order.

ORDER

- 1] The application at Exh. 5 is rejected.
- 2] Costs in cause.

Place: Shirpur.
Date : 10.01.2022.

(V. B. Shitole)
Jt. Civil Judge, Junior Division,
Shirpur.

Order below Exh. 5	// 14 //	Regular Civil Suit No. 10/2021
CNR NO. MHDH-07-000431-2021		Kalpana Patole & ors. Vs. Budha Pawar & ors.

C E R T I F I C A T E

I certify that the contents of this P.D.F. file are word to word as per Original order.

Name of the Stenographer : M. M. More
Name of the Court : Court of Jt.C.J.J.D. and J.M.F.C., Shirpur.
P.D.F. Uploading Date : 12.01.2022

Sd/-xxx
Stenographer-III