

Order passed below Ex.No. 5 in Spl. C.S.No. 58/2011
between Sau. BhuLaxmi—vs- Sau. Laxmibai and one

1. Plaintiff moved this application U/O 39 Rule 1 and 2 of C.P.C. R/W Section 151 of the C.P.C for grant of temporary injunction. The brief facts of the application are as under.

2. Suit property is situated at village Bhendala Tq: Zari Jamni, Dist. Yavatmal, bearing old S.No. 42, 11/30, New S.No.107. It is admeasuring 4 H 05 R. Plaintiff contended that, she is legal heirs of deceased Bhaurao Gangaram Gyagalwar. She further contended that, long back in the year 1970, there is amicable partition in between Late Shivram Gangaram Gyagalwar, and Late Bhaurao Gangaram Gyagalwar. That mutation entry is dt- 22-11-1970. Since 1970, father of plaintiff named Bhaurao is in possession of suit property. When Bhaurao died at that time, plaintiff was minor aged about 3 years. At that time, her mother, who was widow of Bhaurao, performed second marriage. At that time, wife of Late Shivram i.e. defendant no. 1 Laxmibai, was looking after the whole property. Suit property is ancestral property of plaintiff. But, defendant no. 1 Smt. Laxmibai behind the back of plaintiff and without notice of the plaintiff mutated suit property in her name. It is contended that, prior to that, defendant no. 1 Smt. Laxmibai had stopped giving plaintiff her share in the agricultural income arising out of the suit property. Plaintiff contended that, she made complaint about the defendant before Tahsildar Zari-Jamni, and requested to enter her name with the suit property. That proceeding is pending, however, it is learnt that, defendant no. 1 is negotiating with defendant no. 2 Virangana Steel Ltd. for the sale of the suit property. Plaintiff have filed the suit for declaration and partition.

She has submitted that, she is having share in the ancestral property and if the temporary injunction, as per prayer is not granted then hardship will be on her to get recovered her share from the suit property . Hence, she has filed the application and prays for temporary injunction.

3. Defendant No.1 Smt. Laxmibai appeared and filed her say at Exh.19. She has denied that, plaintiff is daughter of deceased Bhaurao Gangaram Gyagalwar. She has denied that, deceased Shivram and Bhaurao were owners and in possession of suit property. She denied the suit claim. She submitted that, Bhaurao died on 13.1.1977, and plaintiff born on 8.1.1978 and therefore, plaintiff could not be a legal heir of deceased Bhaurao. She submitted that, suit property is belongs to Shivram who is her husband. Said Shivram died and therefore, she is absolute owner of the suit property. Finally, she submitted that, application is not tenable and hence, liable to be rejected with costs.

4. In view of pleading on record, following points arises for my determination, to which, I recorded my findings against them with the reasons stated thereunder.

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether plaintiff have prima facie case ?	 No
2. Whether balance of convenience is in favour of plaintiff ?	 Yes
3. Whether hardship will be on plaintiff if injunction is not granted ?	 Yes
4. What order ?	.. As per final order.

REASONS

5. **As to Point Nos. 1 to 3 jointly:-** Heard, arguments of Ld. Counsel for the plaintiff and the Ld. Counsel for the defendants. Perused record. Plaintiff submitted that, she is daughter of Bhaurao Gangaram Gyagalwar. She submitted that, Bhaurao died when she was 3 years old. This fact is denied by the plaintiff. Therefore, I have to see whether prima facie, plaintiff is daughter of Bhaurao or not, so as to claim, succession of the deceased Bhaurao. At Exh. 3/10, she has filed death extract of Bhaurao, which proves that, Bhaurao Gangaram Gyagalwar, died on 13-1-1977 at village Ardhawan, Tq: Maregaon, Dist. Yavatmal. She has further filed her age certificate at Exh. 3/11. From the birth certificate it is proved that Bhulaxmi Bhaurao Gyagalwar, born on 8-1-1978. She has further filed her school leaving certificate at Ex.13/13 in which, her birth date is mentioned as 8-1-1978. Thus, it is proved fact that, after death of Bhaurao about one year later plaintiff born. Ld. Counsel for the defendants submitted that, plaintiff cannot be a daughter of Bhaurao, because, she borne within 270 days after death of Bhaurao. The documents on record prima facie proves that, plaintiff born after 360 days after death of Bhaurao. Hence, prima facie plaintiff cannot be a daughter of Bhaurao. It is the presumption of section 118 of Evidence Act, that a child born within 270 days is presumed to be the child of a person having access with other spouse. Therefore, I am of the view that, prima facie plaintiff could not be daughter of Bhaurao.

6. Plaintiff contended that, suit property is ancestral property. She has filed the mutation extract at Ex.3/1 on record which support that,

Bhaurao and Shivram have oral partition in the year 1970. Therefore, prima facie suit property is belongs to deceased Bhaurao. She has further filed extract showing that in the year 1964 and 1965 Bhaurao was cultivating S.No.11/30 which is now suit property. In the partition, said field comes to the share of Bhaurao Gangaram Gyagalwar and S.No.11/32 comes to share of Shivram Gangaram Gyagalwar. From this extract, it is crystal clear that, suit property is belongs to deceased Bhaurao. Defendant no.1 Smt. Laxmibai in support of her defence, did not filed any document on record. Prima facie she is not owner & in possession of suit property. Therefore, I am of the view that, balance of convenience is not in favour of the defendant. If the temporary injunction is not granted then obviously defendant no. 1 Laxmibai may create third party interest in the suit property. Obviously, it will be the hardship on the alleged plaintiff who is claiming heirship or succession through deceased Bhaurao. On the contrary, if the temporary injunction is granted there will be no hardship on either side. Defendant did not filed any document to prove that, she is going to execute any sale deed for any necessity, in favour of the third person. Hence, I answer Point No. 1 in the negative , Point No. 2 in the affirmative and Point No. 3 in the affirmative. With this ,I pass the following final order.

ORDER

Application allowed in the following terms.

Defendants, their servants, agents, are hereby restrained not to creates third party interest in the suit property till the decision of the main suit.

(G.S.Shegaonkar)
Civil Judge (Sr.Dn.)
Kelapur Dist: Yavatmal.

Dt-09-07-2012

