

RCS No.17/2022

- 1] Shri Dilip Narayan Zode,
age 51 years, Occu.- Farmer,
R/o Konsari, Ta. Chamorshi,
Dist. Gadchiroli.

Plaintiff ...

Vs

- 1] Shri Suresh Narayan Zode,
age 60 years, occu.- Retired,
R/o Yenapur, Ta. Chamorshi,
Dist. Gadchiroli.
- 2] Shri Sadashiv Narayan Zode,
age 56 years, occu.- Private Service,
R/o Illur, Tah. Chamorshi,
Dist. Gadchiroli.
- 3] Shri Anil Sadashiv Wadhav,
Age 35 years, Occu.- Labour,
R/o Konsari, Ta. Chamorshi,
Dist. Gadchiroli.

Defendants ...

Shri K. T. Satpute, Adv for plaintiff.

Shri P. M. Dhait, Adv for defendants.

ORDER BELOW EXH.05

(passed on 06/01/2023)

- 1] This is a suit for declaration and permanent injunction. Plaintiff had filed this application (Exh.5) for temporary injunction under the provision of Order 39, Rule 1 of the Code of Civil Procedure 1908 to restrain the defendants from disturbing the possession of the plaintiff over the suit property.

2] Agriculture land bearing survey No.374/2 admeasuring 1.51 HR situated at mouza Konsari, Ta.Chamorhsi, Dist. Gadchiroli is the subject matter of the suit. (hereinafter referred to as the suit property).

3] **Plaintiff's case, in brief, is as under -**

a) Plaintiff and defendant No.1 and 2 are the son of Narayan Vithu Zode. Defendant No.3 is the son of daughter of Narayan Vithu Zode. Narayan Zode was died on 21/12/2020 and his wife died in the year 2018. Defendant No.3's mother namely Mayabai died due to the cancer at maternal home. Narayan Zode and plaintiff maintain both son of Mayabai after her death. Brother of defendant No.3 died unmarried.

b) Defendant No.1 was working in FDCM. He lost his service since he became handicapped due to the bone TB. Defendant No.1 live separately after his marriage. Defendant No.2 is working in Ashti paper mill and he also live separately at Ellur after his marriage. Defendant No.1 and 2 are living separately from last 20 to 30 years. Defendant No.3 also live separately after his marriage. Defendant No.1 to 3 never gave attention to Narayan Zode and did not look after him.

c) Plaintiff continuously live with Narayan Zode. Plaintiff also cultivated the suit property from 1996-97. Plaintiff look after Narayan Zode till his death. Narayan Zode executed Will in favour of the plaintiff in respect of suit property on 29/11/2019. Suit property is self acquired property of Narayan Zode. Therefore, he had every right to execute the Will of the suit property. After the death of Narayan Zode the plaintiff became absolute owner of the suit property by virtue of Will executed by Narayan Zode. The plaintiff is in the possession of the suit property. Defendants are never in the possession of the suit property.

d) On 29/8/2021 Patwari Konsari has mutated the suit property in the

name of plaintiff and defendants vide mutation entry No.760. Therefore, defendants are claiming the rights over the suit property. Defendants have no right over the suit property. On 21/6/2022 defendants forcibly cultivated the suit property thereby causing the obstruction to the peaceful possession of the plaintiff over the suit property. Defendants are continuously trying to disturb the peaceful possession of the plaintiff. Hence, plaintiff is constrained to file the suit and present application for temporary injunction.

4] Defendants resisted the suit by filing WS and counter claim at Exh.12 which was adopted as the written reply to this application by filing the pursis at Exh.13. Defendants admitted the relationship between plaintiff and defendants. Defendants also accepted that Narayan Zode was owner and possessor of the suit property. Defendants admitted that the defendants are living separately from Narayan Zode since last 25 to 30 years. However, they denied that defendants never gave attention to the Narayan Zode nor look after him when he was alive. Defendants denied all adverse contention. In their special pleading defendants submitted that defendant No.1 to 3 are legal heir of deceased of Narayan Zode. Suit property was allotted to Narayan Zode from government and name of Narayan Zode was mentioned in 7/12 extract of suit property.

5] Although, defendant No.1 and 2 were living at other places but they always visited to Narayan Zode and took care of him. Defendant No.1 and 2 helped their father financially. Defendant No.1 and 2 take care of Narayan Zode when he was ill due to oldness. They took care of their father till his death. In 2017 Narayan Zode have partition the suit property in four equal parts as the family arrangement. Since then Narayan Zode, plaintiff and defendants are in possession of their respective share in the

suit property. After the death of Narayan Zode plaintiff is in possession of the share of Narayan Zode. It was decided between the plaintiff and defendants that share of their father would be equally divided after his death. Narayan Zode died on 29/12/2020. On 29/8/2021 name of the plaintiff and defendants have been mutated in the revenue record of suit property vide mutation entry No.760. Suit property are joint property of plaintiff and defendants. Plaintiff claim his right over the suit property on the basis of so called Will dated 29/11/2019. Will was false and bogus.

6] Defendants contended that the suit property cannot be transferred without prior permission of government since suit property was allotted to Narayan Zode as patta. Narayan Zode had no right to transfer the suit property because suit property cannot be transferred without the permission of government. Hence, Will executed by Narayan Zode is illegal. Narayan Zode was mentally and physically ill during his oldness. Therefore, execution of the Will by Narayan Zode in Sub Registrar Office, Chamorshi is unbelievable. Hence, Will is bogus and illegal. Plaintiff tried to grab the suit property by taking undue advantage of Will which is not acceptable to the defendants. Plaintiff is never in the possession of the suit property because after the partition the plaintiff and defendants are in the possession of their respective share in suit property. In order to deprive the legal share of the defendants, plaintiff have filed the present suit and application based on false and bogus Will.

7] Defendants filed the counter claim for declaring the Will as a bogus and illegal and partition of the suit property. With this contention defendants prayed for rejection of the application.

8] Heard Ld adv for the plaintiff and defendants. From pleadings of plaintiffs, document placed on record and submission advanced by the Ld adv for plaintiff and defendants, followings points arose for my determination and, I have recorded my findings against the points with the reason to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1 Whether plaintiff have made out prima facie case ?	<u>In affirmative.</u>
2 Whether balance of convenience lies in favour of plaintiff ?	<u>In affirmative.</u>
3 Whether plaintiff would suffer irreparable loss if temporary injunction is not granted in his favour ?	<u>In affirmative.</u>
4 What order ?	<u>As per final order.</u>

REASONS

AS TO POINT NO.1 TO 3 :-

9] Point No.1 to 3 are inter connected with each other. Therefore, to avoid the repetition they are discussed together. In temporary injunction the most important think to look at is the possession. Admission by the defendants with regard to the separate living from Narayan Zode from last 30 years show that the Narayan Zode was in a possession and after his death plaintiff who was living with the Narayan Zode seems to be in the possession of the suit property. The plaintiff filed affidavit of the adjoining owner who specifically stated that the plaintiff is in the possession of the

suit property from the time when Narayan Zode was alive.

10] The defendants claim the possession of the suit property on the basis of 7/12 extract which bears the name of the plaintiff and defendants. It is well settled law that 7/12 extract is not the conclusive proof of ownership as well as possession. Another contention of the defendants that deceased Narayan Zode had no authority to transfer the suit property by way of Will because suit property belongs to the class-II land. At this stage it is not seen whether Narayan Zode has authority or not to transfer the suit property. The validity of the Will allegedly executed by Narayan Zode in favour of the plaintiff would be decided during the course of trial. Defendants claim the partition of the suit property by Narayan Zode as a family arrangement. But there is no documentary or oral evidence to prove that the partition of the suit property was effected when Narayan Zode was alive.

11] It is not the case of the defendants that they are living with the deceased Narayan Zode. Had defendants been living with Narayan Zode there would have been presumption that the defendants may be in possession of suit property. Defendants themselves accepted that they are living separately from last 30 years. Then question arise as to how defendants are in possession of the suit property. For the sake of argument it is accepted that the partition of the suit property have been effected and defendants are in the possession of their respective share. In that case defendants could have filed the affidavit of the adjoining owner who stated that the defendants have been cultivating the suit property since 2017 when partition took place as per the say of defendants. It is matter of record that 7/12 extract of suit property bears the name of plaintiff and defendants.

Therefore, the possibility of interfering in the possession of the plaintiff by the defendants cannot be ruled out.

12] So far as the illegality of the Will is concerned, the Will is registered Will and registered Will is to be relied upon more than non registered Will. Claim of the defendants regarding the Will prepared when Narayan Zode was not mentally and physically fit would be the part of the evidence. At this stage it cannot be said that whether Will is genuine or bogus. As I said earlier the plaintiff who was living with the Narayan Zode till his death seems to be in a possession of the suit property. Defendants may interfere in his possession based on their name in 7/12 extract of the suit property. Therefore, plaintiff has made out the prima facie case. Irreparable loss would be caused to the plaintiffs if injunction is not granted. Balance of convenience also lies in favour of the plaintiff. Hence, I answer the point No.1 to 3 in affirmative. In the result, in answer to point No.4, I proceed to pass following order.

ORDER

- 1] Application (Exh.5) is allowed.
2. The defendants or anybody on their behalf are hereby restrained from disturbing the possession of the plaintiff over the suit properties till the decision of this suit.
3. The costs of application shall be the costs in the cause.

Date : 06/01/2023.

Sd/-
(N. D. Meshram)
Civil Judge, Jr.Dn.,
Chamorshi.