

Regular Civil Suit No.44/2011.**ORDER PASSED BELOW EXH.5**

1. This application is filed by plaintiffs under Order 39 Rule 1 and 2 r.w. Section 151 of Civil Procedure Code praying therein to restrain defendants from causing obstruction to peaceful possession of plaintiffs over the suit property as well as from alienating suit property in any manner till disposal of suit.

2. **Facts of application in short as under :-**

It is the case of plaintiffs that agricultural land out of Gat No. 191 admeasuring 4 H. 42 R. situated at village Chipri, Tal.- Shirol (which is more particularly described in para No.1 of the application and hereinafter referred as 'suit property') was originally owned by Narahar Ganesh Kundalkar. Father of plaintiffs and Krishnat Yadav i.e. father of defendant No.1 were tenants in the said property and each of them were cultivating $\frac{1}{2}$ of the suit property as tenants. Out of said property, 80 R. land was acquired by the Government for project affected persons. Out of remaining property, plaintiffs have purchased 1 H. 44 R. land from owner of suit property namely, Madhukar Kundalkar and Mandakini Kundalkar vide registered sale deed in the year

1994. At the same time, predecessor of defendant No. 6 to 8 namely, Shamrao Krishna Yadav has also purchased 1 H. 41 R. land from Omkar Kundalkar and Dattatraya Kundalkar. In the sale deed, boundaries of the land purchased were not mentioned. Thus, plaintiffs as well as predecessor of defendant Nos. 6 to 8 had purchased undivided land from the owner. After execution of aforesaid two sale deeds, 72 R. land was remained with the original owner and that was also in the possession of plaintiff and Krishna Yadav as a tenants. Though they had resigned tenancy rights in the year 1963, still they used to send tenancy price (Khand) to the defendant Nos. 2 to 4 and they were also received said price from the plaintiffs and Krishna Yadav and thus as per mutual understanding between the parties, they were cultivating said 72 R. land also. It is further mentioned by plaintiffs that as per mutual understanding between the parties, plaintiffs and their predecessor were cultivating $\frac{1}{2}$ portion of the land from northern side, while defendant Nos. 4 to 8 and their predecessor were cultivating $\frac{1}{2}$ portion from southern side, though land was not partitioned by metes and bounds. Thereafter, defendant No.1 purchased 36 R. land by mentioning four boundaries out of remaining 72 R. land from the father of defendant Nos. 2 to 4 and thereafter he filed Reg. Civil Suit No. 23/1998 for partition. That suit was decided on merit and same was dismissed. However, in that

suit, it was held by the Court that there is common enjoyment of plaintiffs as well as other co-sharers and it was also held that yet partition of the said property is not effected by metes and bounds. Against said order, appeal was filed by plaintiff in that suit and same was dismissed. Thus, yet partition is not effected between the parties by metes and bounds still defendants are executing sale deed of suit property by mentioning four boundaries. So also they are causing obstruction to possession of plaintiffs over the suit property. Hence, this suit and present application.

3. Defendant No.1 filed his say at Exh.33. He also admitted that Court has given findings in Reg. Civil Suit No. 23/1998 that yet partition of suit property is not effected between the parties by metes and bounds and hence there is not question of separate cultivation or independent possession of plaintiff over any portion of suit property. He has denied that plaintiffs are cultivating $\frac{1}{2}$ portion of suit property from northern side and defendants are cultivating $\frac{1}{2}$ portion of suit property from southern side. With these submissions, he prayed for rejection of application.

4. Defendant Nos. 5 to 8 filed their say at Exh.30. They also stated that yet partition is not effected between the parties by metes and bounds. Already competent Court has

decided that plaintiffs are not tenants in the said property and thereafter plaintiffs have obtained false order in collusion with revenue officer as per Section 70(b), which is not binding on this defendants. Plaintiffs were never possessor of suit property as owners. Defendants have every right to sell out their undivided interest from the suit property and they can not be restrained by way of injunction. Hence, they prayed for rejection of application.

5. It is necessary to mention here that during the pendency of suit defendant No.1 has died and thereafter his legal heirs have been brought on record. Suit summons was served on them, however they did not appear and hence suit as well as present application proceeded ex-parte against them.

6. Heard both sides and gone through the record. Considering rival contentions of both parties, following points arise for my determination and I have recorded my findings therein alongwith reasons to follow.

Sr. No.	Points	Findings
1.	Whether plaintiffs have made out prima facie case in their favour ?	Partly in the affirmative.

2.	Whether balance of convenience lies in favour of plaintiffs ?	Partly in the affirmative.
3.	Whether plaintiffs will suffer irreparable loss, if injunction is not granted in their favour?	Partly in the affirmative.
4.	What order?	As per final order.

REASONS

As to point Nos.1 to 3 :-

7. I have gone through the judgment passed by my learned predecessor in Reg. Civil Suit No. 23/1998. It appears that said suit was filed by defendant No.1 for possession on the basis of sale deed executed by predecessor of defendant Nos. 4 to 8 in his favour in respect of 36 R. land out of remaining 72 R. land. It appears that in the said judgment there was a issue as to whether plaintiff is a owner of suit property and while giving finding, it is held by the Court that yes he is co-owner alongwith defendant Nos. 5 to 9. Defendant No. 9 in that suit is the plaintiff in the present suit. It was also held by the Court that yet partition between plaintiff and defendant Nos. 5 to 9 is not effected by metes and bounds and hence that suit for possession was dismissed. Besides that, defendants in this suit have clearly admitted that

yet suit property is not partitioned by metes and bounds. It also appears that plaintiffs are in possession of some portion of suit property. From perusal of written statement of defendants, it becomes clear that they are trying to obstruct possession of plaintiffs as well as trying to execute sale deed of suit property. It is no doubt true that defendants have every right to execute sale deed of their undivided interest from the suit property. However, unless and until partition is effected between the parties, possession of that property which is sold out can not be given to purchaser. Prima facie it appears that defendants are causing obstruction to possession of plaintiffs. Partition of suit property is not effected between plaintiffs and defendants and in such circumstances, it is to be presumed that plaintiffs as well as every defendants are possessor of each and every part of suit property. In such circumstances, plaintiffs have every right to enjoy suit property peacefully. Therefore, defendant needs to be restrained from causing obstruction to enjoyment of plaintiffs over the suit property. In result, point Nos.1 to 3 are answered partly in the affirmative.

As to point No. 4 :-

8. Considering findings recorded to point Nos.1 to 3, in answer to point No.4, I pass following order.

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Regular Civil Suit No.44/2011. (Exh.5 order)
CNR NO.: MHKO07-000208-2011.

ORDER

- (1) Application (Exh.5) is partly allowed.
- (2) Defendants are hereby temporarily restrained from causing obstruction to enjoyment of plaintiffs over the suit property alongwith other co-sharers till final decision of the suit.

Dt.: 08.08.2018.

Sd/-
(K.G. Sawant)
Jt. Civil Judge Senior Division,
Jaysingpur.

