

MHKO070013622022



Jayprakash Mohandas Bairagi and others  
V/s.  
Smt. Sarladevi Gopaldas Bairagi and others

**ORDER PASSED BELOW EXH. 5 IN SPECIAL**  
**CIVIL SUIT NO. 63/2022**

1] Plaintiffs are seeking temporary injunction restraining defendants from creating any obstruction to plaintiffs legal, undivided right of peaceful enjoyment of the suit properties (*which are mentioned in para Nos. 1A to D of plaint in detail*), till disposal of suit by effecting entry to the property card of the suit property on the basis of suit will deed, by filing present interim application.

2] **Plaintiffs case in brief is as under -**

According to plaintiffs, the above referred suit properties were originally owned by deceased Maruti @ Marutidas Bairagi. After demise of Maruti, it was entered in the name of deceased Tarabai Marutidas Bairagi, being manager of Hindu undivided family.

3] According to plaintiffs, Marutidas and Tarabai gave birth to Balkrushna, Gopaldas (sons) and Kashibai, Akkatai, Rukatai, Champabai, Vimal (daughters). Thus, above heirs i.e. sons and daughters names were entered to the 7/12 extract of the suit properties by mutation No. 3029, being heirs of deceased Marutidas and Tarabai.

4] According to plaintiffs, after partition between heirs of deceased Marutidas and Tarabai, the names of deceased Gopaldas was entered to suit properties 1A, B, C, D, in partition,

5] From the marriage of defendant No.1 Sarladevi and deceased Gopaldas, defendant No.2 Rajendra, deceased Ravindra, deceased Rajashri were born. Deceased Ravindra left behind him defendant No.2, his wife and defendant Nos. 4 and 5, his children's as his heirs.

6] According to plaintiffs, from the marriage of deceased Jayashri and deceased Mohandas, plaintiff Nos. 1 to 3 are born. Plaintiffs have given genealogy in para No.2 of the plaint.

7] According to plaintiffs, the suit property is ancestral property of deceased Gopaldas. When he was in possession of suit properties as his ancestral property, on 29/01/2022 he died.

Plaintiff No. 1 being his direct legal heir applied to the Talathi Abdullat on 21/02/2022 and accordingly mutation entry No. 18067 was filed. Notices were issued to the concern. The present defendants raised objection to said mutation on the basis of alleged Will Deed dtd. 04/10/2021. executed in their favour. The hearing of objection to said mutation is till pending.

8] According to plaintiffs, they received information of alleged Will Deed dtd. 04/10/2021 at first time i.e. during the hearing of N.R.No. 22/2022 (objection of mutation No. 18067). The Will deed above is not legal because the suit properties are not self-acquired properties of deceased Gopaldas. Therefore, he was having no right to execute Will deed dtd. 04/10/2021. Moreover Will deed is not a registered Will deed. No probate is obtained in respect Will deed from competent court. Deceased Gopaldas, at the time of Will deed aged about 82 years. According to plaintiffs deceased Gopaldas was entirely dependent on defendant Nos. 2 to 5. Therefore Will deed is executed under coercion or pressure of defendant Nos. 2 to 5. The said will deed is silent in respect of mode of acquisition of ownership by deceased Gopaldas in respect of the suit property. The Will Deed is ambiguous. Thus, it is illegal.

9] Plaintiffs share is existing in the suit properties as those are ancestral properties of plaintiffs and defendants. Therefore, the

Will Deed in favour of defendant Nos. 1 to 5 in respect of suit properties is illegal. The share of plaintiffs mother and defendant No.1 and 2 as well deceased Ravindra in the suit properties was in existence at the time of execution of said will deed and therefore, it is not binding on plaintiffs.

10] According to plaintiffs, in order to receive 1/4th undivided share of plaintiffs mother in the suit properties, they requested partition of suit properties to the defendants on 10/07/2022, at that time defendants refused the plaintiffs request. According to defendants, they are owners of the suit properties on the basis of will deed dtd. 04/10/2021. Therefore, they threatened plaintiffs that, plaintiffs should not interfere in their rights acquired in the suit properties by said will deed.

11] According to plaintiffs, they are seeking their 1/4th share alongwith its possession in the suit properties by way of filing present suit. If during pendency of suit, on the basis of alleged illegal will deed, if defendants succeed to create third party interest in respect of the suit properties, the entire purpose of the suit will be frustrated. Moreover, if defendants succeed to enter their names on revenue record of the suit properties, on the basis of alleged will deed dtd. 4/10/2021, by making collusion with revenue authorities, it will create complications in the suit proceedings. Moreover the

defendants are obstructing plaintiffs possession over suit properties on the basis of said Will deed. Their possession too is required to be protected by restraining defendants obstruction till decision of suit i.e. ascertaining and handing over plaintiffs share in suit property, by way of decree of court. Hence, this application.

12] Defendant No. 1 vide Exh.14 and defendant Nos. 2 to 5 vide Exh. 15 resisted the claim of plaintiffs by filing their detail Written Statement and say to the instant application. According to them, the suit properties were received by Gopaldas after demise of his father Marutidas. Those were exclusively owned by Gopaldas till his demise. Thereafter, son of Gopaldas, Ravindra, died during lifetime of Gopaldas. Defendant No.3 is wife of deceased Ravindra and daughter-in-law of deceased Gopaldas. Defendant Nos. 4 and 5 are grand children's of deceased Gopaldas. Defendant Nos. 1 to 5 were residing alongwith deceased Gopaldas till his demise. They have taken care of deceased Gopaldas till his demise and therefore, Gopaldas during his lifetime i.e. on 04/10/2021 had executed will deed in respect of the suit properties.

13] According to defendants, on the basis of said will deed, defendant No.2 has received 1/3rd share while defendant Nos. 3 to 5 have received 1/3rd share in joint. Defendant No.1 has also received independent 1/3rd share in the suit properties alongwith amounts

standing in the name of deceased with various banks and financial institutions.

14] According to defendants, defendant No.1 is old aged therefore, defendant Nos. 2 to 5 are taking his care. Accordingly defendant No.1 in respect of his share in the undivided suit properties, executed registered sale deed dtd. 25/02//2022 bearing No. 920/2022 in favour of defendant Nos. 2 to 5.

15] According to these defendants, plaintiffs are heirs of deceased Gopaldas being his deceased daughters children's. Deceased Gopaldas had performed marriage of his daughter Rajashri, during his lifetime by making huge expenses. He also given financial aid to the heirs of deceased Rajashri as per his own capacity.

16] According to these defendants, suit is bad for non-joinder of necessary parties because the heirs of deceased Balkrushna and Ramdas are not parties to the suit. According to them, plaintiffs have not disclosed many important things before court in their pleadings therefore, not entitled for relief of injunction. As plaintiffs are having no any rights or interest in the suit properties, they are not entitled for main relief as well interim relief of injunction claimed by them. Hence, application is sought to be rejected.

17] Heard both sides. Gone through record. Considering rival contentions of both parties, following points arise for my determination which I have recorded my findings thereon along with detail reasons to follow.

<b>Sr.No</b>	<b>Points</b>	<b>Findings</b>
1.	Whether plaintiff has made out prima facie case in his favour ?	<b>... Partly Affirmative.</b>
2.	Whether balance of convenience lies in favour of plaintiff ?	<b>... Partly Affirmative.</b>
3.	Whether plaintiff will suffer irreparable loss, if injunction is not granted in his favour ?	<b>... Partly Affirmative.</b>
4.	What order?	<b>As per final order.</b>

### **REASONS**

#### **AS TO POINT NOS. 1 TO 4**

18] As above points are interlinked with each other, I have discussed them in together. In order to establish their contentions, both plaintiffs at Exh.3, as well defendants at Exh. 22 to 25 have relied on various documents, those will be referred at relevant times.

19] Defendants relied on affidavits of various witnesses to the Will Deed dtd. 04/10/2021. Original of it is at Exh. 22 and xerox at Exh. 3/6.

20] The affidavit of witness Ashok Gopal Joshi at Exh. 23 shows that, the stamp for Will Deed was purchased from him. He is scribe of Will. Other witness on Will signed on Will before him. The affidavit of Laxman Krushna Kadam is at Exh. 24. The affidavit of witness Sadashiv Nemu Sutar is at Exh. 25. These witness at Exh. 24 and 25 seems to be attesting witness on Will at Exh. 22. In my opinion, neither recitals of Exh. 22 nor the validity of evidence of witness from 23 to 25 can be considered at this stage without trial as Will is disputed by plaintiffs.

21] The documents from Sr.No. 1 to 5 at list Exh. 3 shows that, the suit properties mentioned in the plaint are till in the name of Gopaldas, Ramdas, Balkrushna and Tarabai who are heirs of deceased Marutidas. The record further shows that, other heirs Kashibai, Akkatai, Champabai, Vimal and Rukabai are shown in the column of "इतरहक्क". Thus, from the recitals of plaint as well documents on record, it appears that, suit properties are yet not partitioned by operation of law i.e. decree of the court or by act of the parties i.e. deed of partition.

22] The documents on record shows that, Gopaldas is one of the heir of deceased Marutidas and Tarabai. The documents on record apparently shows that, the suit properties are joint Hindu family properties. Needless to mention that, nothing is on record

shows that, all the heirs of Marutidas and Tarabai are separated and they are in separate possession in respective of their shares acquired by partition. It is matter of record that, present plaintiffs are seeking partition through their predecessor mother Rajashri who was daughter of deceased Gopaldas. It appears that, present plaintiffs are seeking undivided share of their deceased mother Rajashri which she would have received in partition alongwith her brothers Ravindra and Rajendra being heirs of deceased Gopaldas and Sarladevi, as per Section 6 of Hindu Succession Act, 1956.

23] It is matter of record that, deceased Gopaldas, during his lifetime executed registered Will deed, the copy of which is at Exh. 3/6. The said Will deed dtd. 04/10/2021 shows that deceased Gopaldas had bequeathed his properties i.e. movable as well immovable (including suit properties) in favour of defendants excluding the mother of present plaintiffs i.e. deceased Rajashri. The recitals of Will deed dtd. 4/10/2021 original of which is at Exh. 22 and xerox at Exh at Exh. 3/6 shows that, deceased Gopaldas has specifically mentioned that, he had no any intention to transfer any of his properties in favour of Rajashri i.e. his daughter.

24] According to present plaintiffs, deceased Gopaldas was having no any right to transfer the portion of suit properties in favour of his other heirs excluding their predecessor Rajashri who

was daughter of deceased Gopaldas and Sarladevi. According to plaintiffs, the suit properties are ancestral properties and therefore, the Will deed at Exh. 3/6 is void abinitio. Moreover, they are challenging the validity of Will on the ground of suspicion in respect of its execution due to old age of deceased Gopaldas at the time of its execution. Plaintiffs have also sought cancellation of said Will deed in respect of their alleged shares receivable in portion from the suit properties, as according to them suit Will deed is not binding on their portion of the suit properties and so required to be declare as void and cancell on their portion of suit property.

25] In my opinion, though defendants claim that, plaintiffs are not having any shares in the suit properties due to execution of Will deed in favour of them by deceased Gopaldas, it is not acceptable at this preliminary stage of suit. It is necessary to decide during trial, whether deceased Gopaldas was empowered to execute such Will deed in favour of defendants excluding predecessors of plaintiff. Certainly it will take its own time.

26] At present plaintiff are having apprehension that, on the basis of Will deed Exh. 3/6, defendants if succeed in entering their names in the revenue record as the owners of the suit properties, they will create third party interest in respect of the suit properties. Needless to mention here that, the proposed mutation entry

No.18067 is already challenged by present plaintiffs before revenue authorities. In such situation possibility of alienation or creation of third party interest by the present defendant in respect of the suit properties after entering their names in revenue record as owners on the basis of disputed Will deed during pendency of present suit can not be ruled out.

27] In my opinion, considering the nature of suit and valuable legal rights which are to be adjudicated by court in present suit during trial, the legal status of suit properties in respect of its title as well possession is required to be preserved as it is. Whether suit properties were exclusively owned by deceased Gopaldas and he was empowered to execute suit Will deed Exh. 3/6 is matter of adjudication. Without trial no conclusion in respect of its validity can be drawn by the court at this stage. Therefore, I am of the opinion that, plaintiffs have established their prima facie case showing that, suit properties are ancestral properties. Considering the nature of suit and reliefs sought by plaintiffs, though they will get protection of Section 52 of Transfer of Property Act, 1972, it will be irreparable loss to the plaintiffs if defendants succeed to alienate the suit properties during the trial. The entire purpose of filing suit by plaintiffs will be frustrated. The loss suffered by them can't be compensated by money. Therefore, in my opinion, the nature of suit properties is required to be preserved till decision of suit, by

restraining defendants from alienating or transfer of any part of suit property, till decision of suit on merits.

28] As far as possession of suit properties is concerned, it is matter of record that, it is yet not partitioned. The shares of plaintiffs and defendants are not ascertained. If plaintiffs are claiming their undivided share in the suit properties, they can not claim injunction in respect of possession because their possession is to be ascertained only during trial.

29] Learned Advocate appearing on behalf of the defendants submitted that, plaintiffs have not made all co-sharers of Hindu. Joint family property as parties to suit so suit for partition is not maintainable. Plaintiffs will not be entitled for partition i.e. main relief, unless all co-shares are made parties to suit, so they will not entitled for interim relief of injunction. In support of this, they relied on;

(1) *Woodland Manufacturers V/s. Shankar Prasad Garg, reported in AIR 2015 (NOC) 590 (CAL)*, wherein Hon'ble Calcutta High Court held that, when plaintiffs are seeking partition without making all co-shares as parties to suit, they will not be entitled for partition.

(2) On same point of law, they relied on judgment delivered by Division Bench of Hon'ble Calcutta High Court in, *FMAT No. 1083*

of 2018, with CAN 8471 of 2018, in case of Sajli Kishku V/s. Talamoyee Kishku and others, decided on 09/08/2019; wherein Hon'ble Calcutta High Court reiterated the principle that in a suit when co-sharers are not joined as parties, which amount to non-maintainability of suit. In said case, due to non-joinder of co-shares in partition suit, it was held that plaintiffs will not be entitled for interim relief of injunction.

3) Raman Hosiery Factory V/s. J.K. Synthetic and others reported in AIR 1974 Delhi (207), wherein Hon'ble Delhi High Court while dealing with provisions of Order 39 Rule 1 and 2 of C.P.C. read with provisions of Section 38 of Specific Relief Act, 1963, held that in a suit for permanent injunction, if final relief can not be granted, temporary relief of injunction can never be granted.

30] In my humble view, the facts on record though shows that, suit property is ancestral, some of co-shares may not be joined by plaintiffs, but at this stage when they are challenging the Will deed in suit to the extent of their mother's share which their paternal grandfather has excluded in his last Will, the plaintiffs prayer for restraining the defendants and revenue authorities from acting upon such Will till decision of suit can not be rejected.

31] The alienation of suit property by giving effect to such Will under challenged before this court by revenue authorities by

making hands with defendants, as apprehend by plaintiffs, will frustrate purpose of entire suit of plaintiff.

32] Thus, in my opinion, the aspect of non-joinder parties can be decided during trial. It will not be fatal for plaintiffs in getting temporary injunction in respect of alienation due to different facts of present case than that of the above cited cases.

33] Learned Advocate for defendants further submitted that, plaintiffs can not claim injunction in respect of their alleged possession over suit property, because it is their own theory that, suit properties are not partitioned. Thus as per settled law if they claim to be co owners of the suit properties, they can not claim injunction against the other co-owner in respect of possession. In support of this contention relied on;

(1) **Smt. Bhimabai Mahadeo Kambekar (D) Th.Lrs. V/s. Arthur Import and Export Company and others, reported in AIR 2019 Supreme Court 719,** wherein Hon'ble Apex Court held that mutation in revenue records does not creaste or extinguish title nor it has presumptive value on title. It only enables person in whose favour mutation is ordered to pay land revenue in question.

(2) **Mahesh Zangoji Ghotekar V/s. Prayas Sakhare and another, reported in 2016(4) Mh.L.J. 134,** whrein hOn'ble Bombay High Court dealing with Section 6 of Specific Relief Act, 1963 held that merely

because property is joint family proerty, possession of one co-owner can not be treated as possession of all co-owners.

34] I have carefully gone through the ratio in above cited case laws and facts on record, in my opinion those are perfectly applicable to case in hand, being co-owner, plaintiffs will not be entitled for injunction in respect of possession. Moreover record shows that, plaintiffs are seeking mesne profit in the suit properties. If they seek mesnes profit from defendants certainly they are admitting that defendants are in possession of the suit properties. Considering this aspect also in my opinion, plaintiffs will not be entitled for injunction in respect of their alleged possession.

35] In my opinion, the facts on record shows that, plaintiffs have failed to establish their exact portion or location of possession over the suit property, they will not be entailed for relief of possession. Unless and until they succeed in suit and get ascertained their share in final decree. However, as already discussed above by me, in my opinion, they are entitled for relief of injunction in respect of alienation. Hence, in view of my reasons recorded above, I am inclined to answer point Nos. 1 to 3 accordingly and in order to answer point No.4, proceed to pass following order.

**ORDER**

- (1) Application Exh. 5 is partly allowed.

- (2) Defendant Nos. 1 to 5 or anybody acting on their behalf are hereby restrained from taking entry to the property card of the suit properties on the basis of suit Will deed as well from creating any kind of third party interest in respect of the suit properties, till disposal of the suit.
- (3) The prayer of plaintiffs in respect of injunction restraining defendants from obstructing their peaceful possession and enjoyment over the suit property is hereby rejected.
- (4) No order as to costs.

Sd/-

**(B.A. Gaikwad )**

Civil Judge Senior Division,  
Jaysingpur.

Date : 17/06/2023.