

ORDER PASSED BELOW EXHIBIT NO.33
IN R.C.S. NO.142/2014

01. It is an application filed under Order XXXIX, Rule 4 of the Code of Civil Procedure, 1908. The defendant nos.5,6 have prayed to set aside temporary injunction order below Exh.7 in the present suit.

02. Shortly stated the case of the defendants is that, the block bearing No.624, ad-measuring 8 Hec.60 Aar situated within jurisdiction of village Ambap, Tah. Hathkanagale and Dist. Kolhapur, more particularly described in para 1 of the plaint. (This property here-in-after referred to as the “**suit property**” for the sake of brevity). It is contended that, previously the plaintiff has filed suit for partition in collusion with defendant nos.1 to 4 and filed temporary injunction application at Exh.7 that for not to alienate the suit property. On that, this court grant temporary injunction against defendant no.3 on 12.02.2015. Before this suit, the defendant no.3 has made agreement to sale on 30.01.2013 and on 6.12.2013 for total consideration of Rs.60,00,000/- and received earnest amount of Rs.15,00,000/- from present defendants. Then defendant no.3 is avoided to perform his part of contract, hence present defendants have filed special civil suit no.94/2014, before CJSD Kolhapur for specific performance of contract. Thereafter the present defendants have registered lis pendency deed in Hatkangake sub-registrar office in respect of the special suit. Then to avoid the mutation of lis pendence and to avoid specific performance the plaintiff and defendants have filed this false suit in collusion with each other. When present defendant has come to know about the injunction order, they firstly entered in this suit and by this application, filed

under Order XXXIX, Rule 4 of the Code of Civil Procedure, 1908, they have prayed for setting aside temporary injunction order below Exh.7 on the basis of above these change in the circumstances.

03. The plaintiff has objected the instant application by filing his say at Exhibit 35 and denied all the adverse allegations made by the defendants. The plaintiff has at the outset has contended that, he has undivided share in the suit property as suit property is his joint and ancestral. The partition of the suit property is not took place by meets and bounds. The alleged agreement to sale of the present defendants not binding on him as partition of the suit property is not took place. Thus ultimately, the plaintiff has prayed for rejection of the instant application.

04. I have heard the learned advocates for the respective parties at length.

05. Considering the applications and submissions made on behalf of the respective parties as well, the following points arise for my determination and I have recorded my findings thereon with reasons stated below.

<u>SR.NO.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether the present defendants have made out strong <i>prima-facie</i> case for ... setting aside of temporary injunction order?	<u>YES.</u>
2.	What order ?	... <u>AS PER FINAL ORDER.</u>

REASONS

AS TO POINT NO. 1 :-

06. In order to support their respective claim and defence,

both the parties have placed reliance on various documentary evidence. The reference of which will be made in my discussion at the relevant place.

07. It is an undisputed fact that the defendant no.1 is the father, defendant no.2 is mother, defendant no.3 and 4 are brothers of the plaintiff in relation respectively. The suit property is the ancestral property.

08. It is the specific case of the present defendants that the before this suit the defendant no.3 has made agreement to sale on 30.01.2013 and on 6.12.2013 for total consideration of Rs.60,00,000/- and received earnest amount of Rs.15,00,000/- from present defendants. Then defendant no.3 is avoided to perform his part of contract, hence present defendants have filed special civil suit no.94/2014, before C.J.S.D. court Kolhapur for specific performance of contract. Thereafter the present defendants have registered lis pendence deed in Hatkangake sub registrar office in respect of the special civil suit. Hence the plaintiff and defendant no.3 have filed this false suit to avoid the mutation of lis pendence and to avoid specific performance in collusion. In present suit there is unlawful collusion between plaintiff and defendant nos.1 to 4. However there is previous partition of the suit property. Accordingly present defendants had make above mentioned agreement. The defendant no.3 and plaintiff have deceived them and fraudulently registered present suit without making them parties. Admittedly, strong *prima facie* case is the *sine qua non*, for the setting aside temporary injunction order. Therefore, it is for the present defendants to

establish strong *prima facie* case in their favour for setting aside temporary injunction order below Exh.7.

09. The plaintiff has objected the instant application mainly on the ground that the suit property is not yet partitioned by meets and bounds. No harm caused to the present defendants by the said order below Exh.7. Hence defendant no.3 has no right of alienation in respect of the suit property. The present defendants have filed present application only in order to harass him.

10. The learned advocate for the defendants has forcefully argued that the plaintiff has suppressed the material facts from this Court. The relief of injunction is an equitable relief and therefore, the party who seeks equity must approach to the Court with the clean hands. On perusal of record, it reveals that in the instant case the plaintiff has suppressed that previous agreement to sale in between defendant no.3 and the present defendants dated 30.01.2013 and 06.12.2013. He also suppressed the institution of the Special Civil Suit No.94.2014 in hon'ble civil judge senior division Kolhapur, related Lis Pendence deed no.6482/2014. The plaintiff has also suppressed the details of alleged partition mutation no.9539. The plaintiff has not pleaded about the memorandum of the alleged partition and its notarization. It is pertinent to note that the defendant no.3 has deliberately suppressed details of agreement, special civil suit, lis pendence registration and alleged previous partition especially when relief of injunction claimed only against him. If it is so, the aforesaid argument of the learned advocate for the defendants that the plaintiff and defendant no.3 have suppressed the material facts from this

Court holds water. In this context I would like to place reliance on these authorities, **Smt. Bhikhani Devi and Others Vs. Amar Lal, AIR 2006 Patana 141 and Bharat Petroleum Corporation Ltd., and another Vs. M/s. Juthanand Thakorbas Karachiwala and others, 1999(1) ALL MR 319**. Wherein, it has been held by hon'ble lordship that when the party has not approach to the Court with the clean hands, is not entitled to the relief of injunction. Therefore, the ratio laid down in the authorities cited, is very well helpful to the defendants. Therefore, the plaintiff is not entitled to the equitable relief of the injunction.

11. The present defendants have also stated that mutation of memorandum of partition was took place on 8.8.2011 at Exh.16/3. which is not yet cancelled. So also oral partition of suit property was took place on 20.7.2011, accordingly in that effect mutation no.9539 was took place. Accordingly there are separate shares mentioned in the 7/12 extract of suit property. Per contra learned advocate for the plaintiff has submitted that partition by meets and bound was not took place. But questions of joint status, entitlement of partition in respect of suit property required to considered after detail evidence which is possible at the end of the suit. In view of the provision of Section 157 of the Maharashtra Land Revenue Code, the said entries of or in the revenue record of the suit property are presumed to be true unless contrary is proved. However, the said presumption is rebuttable. On perusal of record at this stage no rebuttable documentry evidence available on record. Hence I found substance in the argument for defendants.

12. In the instant suit, previously, the plaintiff had pray the relief of temporary injunction restraining the defendant no.3 from alienating or transferring the suit property during the pendency of the instant suit. Thereby got order of injunction below Exh.7 by suppressing material facts from court. However, the plaintiff has not established any *prima facie* case to continue said order or reject this application, on the contrary it becomes crystal clear that he has suppressed material facts from the court and got said order. Hence ratio laid down in Cases cited (*supra*) rightly applicable to the facts and circumstances of the instant case, I am of the considered view that, the defendants have successful to establish strong *prima facie* case for setting aside temporary injunction below Exh.7. Hence, I answer point No.1 in the affirmative.

AS TO POINT NO.2 :-

13. Before passing the final order it would be very important to mention that the observations made in this order are based on the documents filed on record and for the purpose of this application only. Thus no party shall draw an inference to perpetuate the observations for any other purpose. Moreover, the observations shall be subject to the evidence that may be adduced at the time of final hearing. Thus, in view of my findings to the aforesaid point no.1, temporary injunction order passed below Exh.7 is required to be set aside. Thus the instant application is liable to be granted. Hence, in answer to point No.2, I proceed to pass the following order.

ORDER

- 1) Application at Exhibit 33 is allowed and temporary injunction order below Exh.7 is hereby set aside.
- 2) There shall be no order as to costs.

sd/-

(S.M.Jadhav)

Dt. 09. 01. 2017.

2th Jt. Civil Judge, Junior Division,
Pethvadgaon.

CERTIFICATE.

I affirm that the contents of this P.D.F. file Judgment are same, word to word, as per the original Judgment.

Name of the Stenographer	:-	Sou. Rajashari Rajendra Sawant(L.G.)
Name of Court	:-	Shri. 2 nd Jt.Civil Judge, Jr.Dn., and J.M.F.C. Peth-Vadgaon.
Date of Dictation	:-	09.01.2017.
Judgment signed by the P.O. on	:-	09.01.2017
Judgment uploaded on	:-	30.03.2017.