

MHKO120005232022



Order below Exh.5 in
R.C.S. No.143/2022
(Vikas Vs. Ashok)

The plaintiff has filed present application for the relief of temporary injunction.

2. The plaintiff has instituted present suit for perpetual injunction as well as for declaration of ownership.

3. Before dealing with application, it would be appropriate to mention facts of the case in brief.

4. It is the case of the plaintiff that suit property situated in the premises of Sarojini Devi Vishwanath Sah. Gruhnirman Soc. Ltd. bearing plot no. 37 and Grampanchayat Milkat No. 3459 and 3460 as described in para 1A of the plaint is suit property. (Hereinafter shall be referred as 'suit property').

5. It is averred in the application that plaintiff and defendant no. 1 are real brothers. Deceased Anandrao Chavan is the father of plaintiff and defendant no. 1. The defendant no. 2 is wife of deceased brother of plaintiff namely Rajendra who died on 16/12/2007. The defendant no. 3 and 4 are the children of plaintiffs deceased brother Rajendra. Deceased Laxmibai is mother of plaintiff and defendant no. 1. Anandrao died on 16/05/2013 and Laxmibai died on 23/01/2020. The plaintiff and defendant no. 1 to 4 are co-owners of the suit property. The defendant no. 5 is Co-op. Housing Society.

6. It is further averred by the plaintiff that deceased Anandrao Chavan was the member of said society. Deceased Anandrao died intestate during his lifetime. He had never executed any document regarding alienation of suit property. Deceased Laxmibai during her lifetime with the consent of all the family members entered her name over the share certificate and Gram Panchayat Milkat extract of the suit property. There were several ancestral agricultural lands and house properties. The oral partition of all the properties including suit property had effected amongst the family members of plaintiff. The said partition was effected during the lifetime of deceased Laxmibai. That oral partition had occurred in presence of witnesses Jaywant Chorage, Sambhaji Nikam and Dhanaji Dange. As per the said partition, plaintiff acquired the agricultural property and some of the portion of suit property is given to defendant no. 2 to 4 and defendant no. 4 has also acquired some of the western side of suit property. In this manner, partition of suit property has been effected.

7. It is further averred by plaintiff by that he demanded the copies to defendant no. 5. On 13/02/2022, plaintiff obtained said copies and there upon got the knowledge that her deceased mother Laxmibai had executed deed of will dated 08/11/2019 in favour of defendant no. 1. As per the said deed of will, deceased Laxmibai bequeathed the suit property in favour of defendant no. 1. In fact, the defendant no. 1 was well acquainted with the fact that partition of suit property has been already taken place, but, then also, with malafide intention executed the deed of will and made attempt to grab the entire suit property. The deed of will is not binding upon the plaintiff.

8. It is further averred by the plaintiff that even if the oral partition had taken place, but, it was agreed in between plaintiff and defendant no. 1 to 4 that for the purpose of convenience, suit property will remain in the name of deceased Laxmibai and after her demise written document will be executed as per the agreed terms and conditions of oral partition. At present, tenant namely Rajendra Adurkar lives in the suit property on rental basis and paying the rent to plaintiff and defendant no. 1 and 2.

9. It is further averred by the plaintiff that Laxmibai due to age oldness became ill and she was dependent. She was under the treatment of Dr. Suresh Kadav. On 23/01/2020 she died. Thereafter, plaintiff made inquiry and defendant no. 5 stated that they are going to enter the name of defendant no. 1 over the share certificate of the suit property on the basis of deed of will which is fraudulently executed. Hence, cause of action accrued. Hence, plaintiff is constrained to institute present suit. Accordingly, plaintiff prayed that deed of will dated 08/11/2019 executed by deceased Laxmibai in favour of defendant no. 1 is not binding. The defendant no. 1 be restrained of alienating the suit property or from creating the third party interest. It is further prayed that defendant no. 5 be restrained from making entry over share certificate of suit property in favour of defendant no.1.

10. The defendant no. 2 to 4 appeared and filed their written statement and prayed to decree the suit. The suit is proceeded against the defendant no. 5 without written statement.

11. The defendant no. 1 appeared and filed his written statement and say towards present application vide Exh. 23. According to defendant no. 1, suit property was self acquired

property of deceased Anandrao Chavan. After his demise deceased Laxmibai entered her name over the share certificate of suit property. On 05/08/2019, the resolution is also passed by the defendant no. 5 and mutated the name of deceased Laxmibai. She became the absolute owner of suit property within the meaning of Section 14 of Hindu Succession Act, 1956 (for short 'H.S.Act'). She was enjoying the suit property in her lifetime.

12. It is further contended by the defendant no. 1 that deceased Laxmibai was suffering from diabetics and she was taking the treatment at the Shradha Hospital of Dr. Bipin Gonjari. Defendant no. 1 beard the expenses of her medical treatment and out of love and affection had taken proper care of deceased Laxmibai. On 08/11/2019, deceased Laxmibai executed deed of will in favour of defendant no. 1. The witnesses were also present. The will was executed before Notary. At the time of preparing the deed of will Laxmibai was physically and mentally fit. After her demise, the defendant no. 1 performed funeral-rites. Thereafter, defendant no. 1 made application at the office of defendant no. 5 to enter his name over the share certificate of suit property.

13. It is further contended by the defendant no.1 that concern housing society is registered society and governed by the provisions of Maharashtra Co-Op. Societies Act, 1960 (for short 'M.C.S. Act'). Therefore, prior to institution of the suit, notice within the meaning of Section 164 of M.C.S. Act was expected to the served on defendant no. 5. Therefore, plaintiff cannot ask any relief of injunction particularly against the defendant no. 5. The defendant no. 2 grabbed the amount of 25 lacs. which he obtained from fund. The defendant no. 2 also entered her name over the share certificate of another property and grabbed the property belonging to deceased

Laxmibai. In that regard defendant no. 1 is going to take resort of Criminal Law. The plaintiff has made false and baseless allegations. On all these grounds, defendant no. 1 prayed the reject the application.

14. After considering the contents of application following points arise for my determination along with my findings thereon.

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the plaintiff proves that he is having prima-facie case ?	<i><u>Affirmative to the extent of defendant no.1</u></i>
2.	Whether the plaintiff proves that balance of convenience lies in his favour ?	<i><u>Affirmative to the extent of defendant no.1</u></i>
3.	Whether the plaintiff proves that he will suffer irreparable loss if the injunction is not granted ?	<i><u>Affirmative to the extent of defendant no.1</u></i>
4.	What Order ?	<i><u>As Per Final Order</u></i>

AS TO POINT NO. 1 TO 3:-

15. These points are interlinked with each other and for the sake of convenience they are discussed together.

16. I have perused the written argument filed by defendant no. 1 vide Exh. 33. In the light of this aforesaid points, it would be appropriate to mention the oral argument advanced by both sides

17. The learned advocate for the plaintiff Shri. G. T. Thakur has argued that plaintiff has come with clean hands before the Court.

According to him, oral partition has been already effected and suit property is also partitioned by metes and bounds. The plaintiff has become owner of some of the portion of suit property. The said oral partition was effected in presence of deceased Laxmibai. He further argued that even if, as per the contention of defendant no. 1 is considered that suit property was self acquired property of deceased Anandrao, but, deceased Laxmibai has merely filed an application to enter her name over the share certificate of suit property. But, that does not mean that she became absolute owner of suit property. He further argued that there is no valid document made to that effect such as deed of will made by deceased Anandrao in favour of his wife Laxmibai or even there is no any kind of registered or unregistered deed. Therefore, title is not passed in favour deceased Laxmibai. Hence, she was not capable to make deed of will in favour of defendant no. 1. Therefore, plaintiff has prima-facie shown the title/interest in the suit property.

18. The Ld. advocate for the plaintiff has further argued that although, the defendant no. 5 being the society is governed by the provisions of M.C.S. Act. But, the present suit is not liable to be decided by Co-operative Court. The nature of suit is not such that it is touching the business of society and therefore, as per Section 9 of Code of Civil Procedure (for short 'C.P.C. '), this Court is having jurisdiction to decide the Suit on merit. Therefore, the Suit is not by the provisions of Sections 91,163,164 of M.C.S. Act.

19. The Ld. advocate for the plaintiff has further argued that case laws relied by the defendant no. 1 are on the legal aspect that co-sharer cannot ask injunction against co-sharer regarding not to disturb the peaceful possession. But, plaintiff has not sought such kind of relief, rather, plaintiff has sought the relief that defendant no.

1 be restrained from creating the third party interest or from alienating the suit property. Hence, those case laws are not applicable. On all these grounds, he prayed to allow the application.

20. On the other hand, Ld. advocate for defendant no. 1 Shri. S. D. Bhosale has argued that plaintiff himself in his case has averred that he and defendant no. 1 to 4 are co-sharers. Therefore, one co-sharer cannot seek injunction against another co-sharer. In this regard he relied upon the following case laws :-

i) Ram Pasricha vs. Jagannath laws (SC)-1976-8-13 wherein the plaintiff (respondent) was the co-owner of the suit properties and suit was filed for eviction on the ground of default in payment of rent and personal requirement. The Ld. trial Court and Hon'ble Appellate Court decreed the suit and held that the plea the personal requirement for use of family member has been established. But, the Hon'ble High Court reversed the Judgment. While dismissing the appeal, the Hon'ble Apex Court held that co-owner is as much an owner of entire property as any sole owner of property is.

ii) Dnyanu Rau Dalavi and Anr. vs. Hari Rau Dalavi and Anr., Spl. Civil Appln. No. 1573/1976 wherein the Hon'ble Bombay High Court has held that one co-sharer cannot seek injunction against another co-sharer.

21. The Ld. advocate for defendant no. 1 has further argued that the deceased Laxmibai became absolute owner by virtue of Section 14 of H.S. Act, and therefore, she was capable to make will in favour of her son i.e. defendant no. 1. Therefore, defendant no. 1 is having valid title and therefore, suit is not maintainable.

22. The Ld. advocate for defendant no. 1 has further argued that the suit is hit by the provision of Section 164 of M.C.S. Act for

want of serving the notice to defendant no. 5. He further argued that society being the legal entity cannot be restrained from performing their legal duty. If, the relief of injunction is granted, then, it will amount to curtail the powers of exercising the legal right upon the application put forth by the defendant no. 1 to enter his name over the share certificate of suit property. Lastly, he argued that plaintiff has failed to show prima-facie case. The balance of convenience is not lying in his favour. If the relief of injunction is granted defendant no. 1 will suffer irreparable loss rather than plaintiff. Hence, for all these grounds, he prayed the reject the application.

23. The plaintiff has come with the case that already oral partition is taken place in between plaintiff and defendant nos. 1 to 4. In short, the plaintiff is claiming the title to some of the portion of suit property. On the other hand, defendant no. 1 is claiming to be owner of entire suit property on the basis of deed of will executed by deceased Laxmibai. Hence, whether the title has been validly passed in favour of deceased Laxmibai is the material aspect which requires to be taken into consideration.

24. For the sake of moment, as per the contention of defendant no. 1 it is assumed that suit property was self acquired property of deceased Anandrao Chavan, then also, merely by making the application at the office of defendant no. 5 deceased Laxmibai has entered her name over the share certificate of suit property. But, it is not the case of defendant no. 1 that deceased Anandrao Chavan by executing valid document transferred the suit property in favour of deceased Laxmibai during his lifetime. Here, it would be apt to take in to consideration the provision of Section 14 of H. S. Act. The said Section reads as under :-

(1) Any property possessed by female Hindu, whether acquired before or after the commencement of this Act shall be held by her as a full owner thereof and not as a limited owner.

Explanation – In this Section “Property” includes both movable and immovable property acquired by female Hindu by inheritance or device or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person whether relative or not, before, at or after her marriage or by her own schemes or exertion or by purchase or by prescription or in any manner whatsoever and also any property held by her as a *Stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any instrument or under a decree or order of Civil Court or under an Award where the terms of gift, will or other instrument or the decree, order or award prescribed a restricted estate in such property.

25. After careful perusal of said Section the word ‘acquired’ used in sub-section (1) plays important role. The explanation of said sub-section recognizes the acquisition made by some modes of alienation such as inheritance, partition, gift or skill of such woman or exertion or by prescription. Although, it has been further mentioned in the Section that in any other manner whatsoever, if any woman acquires the property, then, such woman will be the full owner of that property. If the entire Section read in its entirety then it has to be said that it is expected that woman should acquire property by such modes which is having some sort of recognition in the eyes of

law. Therefore, the words, used in Section 'any other manner whatsoever' has to be interpreted in a sense that such mode which is having some legal sanctity.

26. Considering the case in hand deceased Laxmibai has made the application at the office of defendant no. 5. It is mentioned in the application that Anandrao Chavan is died on 16/05/2013 and name of Laxmibai is mutated over the Gram Panchayat Milkat Number of suit property. Accordingly, society by passing the resolution dated 13/08/2019 allowed the application.

27. It is well settled principle of law that mutation of entities are made for fiscal purpose and mutation entries neither creates title nor extinguishes title. There is a latin magazine '*Nemo that quod non habet*' which says that no one can transfer better title than he has. Prima-facie, it can be said that even if the resolution is passed in favour of deceased Laxmibai, but, that does not ipso facto mean that Laxmibai became the full owner of suit property.

28. As mentioned earlier, the acquisition by the woman within the meaning of Section 14 of H. S. Act, should have some legal recognition. Reference is essential to the case **Mukatlal vs. Kailash Chand Through Lrs. SCC online SC 964** wherein the Hon'ble Apex Court has taken into consideration the provisions of Section 14 of H. S. Act, and held that for establishing the full ownership in the undivided family estate, the female Hindu must not only be possessed of property, but, she must have acquired the property by way of some inheritance or by device or by partition or lieu of maintenance or by gift or by her own skill or exertion or by purchase or by prescription. Because, it means there should be an pre-existing right which is **sine qua non** for conferment of full ownership. Therefore, considering case in hand,

prima-facie it appears that deceased Laxmibai has not become the full owner on the basis of resolution passed by defendant no. 5.

29. The next submission made by the Ld. advocate for defendant no. 1 that co-sharer cannot seek injunction against another co-sharer. In this case, the plaintiff has not sought the relief that defendants be perpetually restrained from disturbing his peaceful possession, rather, the plaintiff has sought the relief that the defendant no.1 be restrained from alienating the suit property or from creating third party interest. Therefore, with respect to the ratio laid down in cases of **Ram Pasaricha and Dnyanu Rau Dalavi** is not helpful for the defendant no. 1.

30. Here, it would be apt to take into consideration the submission made by the Ld. advocate by defendant no. 1 that the suit is hit by the provisions of Section 164 of M.C.S. Act, and there is no jurisdiction in view of Section 163 of said Act to decide the Suit on merit. The plaintiff has sought the relief against the society (i.e. defendant no. 5) that they should be restrained from making the entry in favour of defendant no. 1 over the share certificate of suit property.

31. As per Section 9 of C.P.C., the Civil Court is having jurisdiction to decide the Suit of Civil nature except, the Suit of which cognizance is either expressly or impliedly barred. It is very well settled principle that Civil Court is having jurisdiction to decide the factum of ownership. The Co-Op. Court is not the appropriate forum in that regard. Reference to the essential to the case of **Alok Agrawal and ors. Vs. Punam Co-operative Housing Society 2012 SCC online Bom 1530** Wherein the Hon'ble Bombay High Court has taken into consideration the provisions of Section 91 of M.C.S. Act alongwith

Section 9 of C.P.C. and further held that when the Co-operative Society sues on the basis of encroachment made in respect of common amenity which does not form the subject matter of lawful allotment in favour of any member such a dispute cannot be said as if falling within purview of Section 91 of M.C.S Act. Therefore, as per Section 9 of C.P.C. civil Court has the jurisdiction to decide suit of removal of encroachment. Considering the case in hand, issue of title is involved, therefore, as per Section 9 of C.P.C. this Court is having jurisdiction to decide the issue of ownership and prayer of injunction made regarding non-alienation at the hands of defendant no. 1.

32. The another aspect which is involved in this case is that whether the housing society can be restrained from exercising their legal right. The Section 164 of M.C.S. Act, says that when any Suit is going to be instituted against the society or it's officers in respect of any act touching the business of society, then, prior two months notice is required to be served along with particulars such as cause of action, name, description of property and relief sought by the plaintiff. The Section further says that there should be an averment to be made in the plaint stating that such type of notice has been delivered to the society or not. The Section 163 of M.C.S. Act says that Civil Court or Revenue Court will not have jurisdiction in respect of disputes involved registration of society, it's bylaws or it's dissolution or any dispute which is required to be referred to Co-Operative Court for decision. The Section 91 of M.C.S. Act, says that if any dispute arises touching the constitution, election of committee or the conduct of general meetings, management or business of society shall be referred by the parties to Co- Operative Court.

33. It is not in a dispute that defendant no. 5 being the housing society is governed by the provisions of M.C.S. Act and it is a

legal entity. The society is having the right to take general meeting, to pass the resolution, to do the business. Therefore, prior two months notice was required to be served against the defendant no. 5 stating the cause of action and proposed relief which is going to be sought against the society. But, plaintiff has not done the same. Therefore, prima-facie suit is hit by the provision of Section 164 of M.C.S. Act.

34. Considering the fact of the case, prima-facie for failure of non serving the notice to defendant no. 5 within the meaning of Section 164 of M.C.S. Act, it cannot be said that suit is not maintainable against defendant no. 1. However, for want of serving the prior two months notice to defendant no. 5 and as well as considering the fact that to pass the resolution or not is business of society and as per provision of Section 91 of M.C.S. Act, the Co- Op. Court is having jurisdiction to decide the said aspect. Hence, the equally efficacious remedy is available to the plaintiff to sought appropriate relief regarding the application made by defendant no. 5 to enter his name over the share certificate of suit property. If the injunction is granted against defendant no. 5 then it will amount to curtail the rights of society and it will be hit by provision of Section 91 of M.C.S. Act. Therefore, it would not be just and proper to gran relief of injunction against defendant no. 5. But, as mentioned earlier civil Court is having jurisdiction to decide the ownership rights of parties. Therefore, suit is maintainable against defendant no.1.

35. The plaintiff has successfully shown prima-facie case to the extent of defendant no. 1. The balance of convenience lies of favour of plaintiff. If the relief of injunction is not granted against defendant no. 1 then it will create multiplicity of proceeding and it will certainly cause irreparable loss of plaintiff. As mentioned earlier, there is no prima-facie case made out to the extent of defendant no.

5. The relief of injunction cannot be granted against defendant no.5 in view of provision of Section 91 of M.C.S. Act, because to adjudicate the claim of resolution is the dispute touching the business of society and therefore, application deserves to be partly allowed. Hence, I answer point no. 1 to 3 as affirmative to the extent of defendant no. 1. Accordingly I pass the following order.

<u>ORDER</u>	
1.	Application is partly allowed.
2.	The defendant no. 1 or his agents or any person claiming on his behalf are hereby temporarily restrained from alienating the suit property in any manner or from creating any kind of third party interest in the suit property as described para 1A of the plaint till disposal of the suit.
<i>(Dictated and pronounced in open court)</i>	

Gargoti.
Date- 31/07/2025.

(N. D. Rudrabhate)
Civil Judge Jr. Dn.,
Gargoti.