

Order Below Exh.5 in Regular Civil Suit No.131/2016.

1. The plaintiff has filed the present application under Order 39 Rule I of the Code of Civil Procedure praying the relief of the temporary injunction against the defendants.

2. **The plaintiff's contention in the present application is as under :-**

The plaintiff has filed this present suit praying the relief of partition, declaration and perpetual injunction against the defendants. A] at village Linganur Dumala, Tal. Kagal, Dist. Kolhapur house and barren land property having City Survey No. 294, its Grampanchayat Assessment No.402, having total area 418.6 square meter in which plaintiff and defendant No.1 to 6's owned 209.3 square meter's barren land and 9.49 square meter's house property with its four boundaries specifically mentioned into the application, B] at Kagal, Taluka- Kagal whole farm land property Gat No.485/1/E C] at village Linganur Dumala, Tal. Kagal, Gat No.364 having total area 61 Are out of it 10 Are, with their four boundaries specifically mentioned into the application are the subject matter of the dispute. Hereinafter, called as a suit properties.

Suit properties are plaintiff and defendant No.1 to 6's ancestral Hindu joint family, jointly owned and possessed properties. Plaintiff and defendant No.4 to 6 are real sisters of each other, whereas defendant No.2 and 3 are the brothers of the

plaintiff and defendant No.1 is their father. Dadu Krushna Todkar was the original owner and possessor of the suit properties. He demised on 03/09/1979. His wife Krushnabai demised in the year 1991. After demise of Dadu through the mutation No.5489 present defendant No.1's name got mutated on the property extract of the suit properties as the Manager of joint family property. Suit property B is an plaintiff and defendant No.1 to 6's ancestral tenanted (कूळ हक्काची) property. The same is purchased from the income of joint family property. Present plaintiff is having joint ownership and possession into the suit properties. Plaintiff is jointly cultivating into the suit properties along with defendant No. 1 to 6. Plaintiff has right, share and possession over the suit properties. There is no partition of suit properties between plaintiff and defendant No.1 to 6 by metes and bound. Having such a position, present defendant No.1 in order to disregard the plaintiff's share into the suit properties and without any legal necessity, illegally sold suit property A through the registered sale deed to the defendant No.7. The said sale deed is not binding on the right of present plaintiff. Defendant No.1 to 3 denied to separate the plaintiff's share into the suit properties. Defendant No.1 to 3 are obstructing the plaintiff's joint possession and cultivation into the suit properties. Defendant No.7 on the basis of false sale deed in respect of suit property A, trying to make construction into the said property and also obstructing the plaintiff's possession into the suit property. Hence, on these ground plaintiff prayed that defendant No.7 be restrained by granting the temporary injunction against

him from making any construction, from creating any third party interest into the same and also from obstructing the plaintiff's possession. The plaintiff also prayed temporary injunction relief against the defendant No.1 to 3 restraining them from creating third party interest into the suit properties and also obstructing the plaintiff's possession.

The plaintiff in support of his pleading has filed the following documents :-

1. City Survey No.294's extract.
2. Copy of the sale deed dated 02/05/2016.
3. 8A extract of the properties owned by defendant No.1
4. 7x12 extract of Gat No.485/1/E, 364.
5. Mutation No.5489, 787's extracts.

3. On the other hand, the defendant No.1 to 3 have filed their say at Exh.19 whereas defendant No.7 has filed his say at Exh.20 denied contents into the application and objected the same. The defendants submission are as under :-

Present suit properties are not an ancestral joint family properties of plaintiff and defendant No.1 to 6. Suit property B cannot be an ancestral tenanted property and the same is not purchased from the income of joint family property. Plaintiff has no right and share into the suit properties. She is not an joint possessor and cultivator into the suit properties. Plaintiff is the married daughter of the present defendant No.1. She is been married on 07/05/1980. During the lifetime of defendant No.1

present plaintiff cannot ask for the partition. As present plaintiff and defendant No.4 to 6 are the married daughters of defendant No.1, therefore, they cannot become the co-parceners of the defendant No.1 to 3 and therefore, cannot get any right into the suit properties. Due to the family necessity defendant No.1 sold the suit property A in favour of defendant No.7 through the registered sale deed. Since the sale deed, defendant No.7 has become the owner and possessor of the suit property A. Present plaintiff has no right into the suit properties and therefore, the present suit and present application is not maintainable.

The defendants in support of their pleading have filed the following documents :-

1. Certificate given under section 32 M of Bombay Tenancy and Agricultural Lands Act, 1948.
2. Decree into RCS No.87/1976.

In support of their pleading the defendants have relied on following citations :-

- 1] **MLJ 2016 (1) S.C.**
- 2] **1988 Supreme Court 576.**
- 3] **AIR 2004 P & H 41.**
- 4] **2008 ALL SCR 784.**
- 5] **Supreme Court Civil Appeal No.2360/2016.**

4. After going through the material available on the Court record, following points arises for my consideration with its

findings and reasons given below.

No.	Points	Findings
1.	Whether there is <i>prima facie</i> case in favour of the plaintiff ?	Yes.
2.	Whether the plaintiff proves that, the balance of convenience lies in her favour ?	No.
3.	Whether the plaintiffs proves that, the irreparable loss will cause to her, if the temporary injunction is not granted in her favour and against the defendants ?	No.
4.	Whether the plaintiff is entitled to relief of the temporary injunction as prayed ?	No.
5.	What order ?	As per final order.

Reasons :-

5. Heard the learned Advocate for the plaintiff and the defendants at length.

As to the Points No.1 to 5 :-

6. Prior to dealing with this application, I will like to prefer the relevant provision relating to the temporary injunction contained in the Order 39, Rule I of the Civil Procedure Code.

“Order 39 Rule I of Civil Procedure Code :- Cases in which temporary injunction may be granted :— Where in any suit it is proved by affidavit or otherwise

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in a execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,

[(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]

the Court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.”

7. In the present application what needs to be seen is that
1. Whether plaintiff has *prima facie* shown that she has right and share into the suit properties ? 2. Whether triable issue is made out by the plaintiff into the suit ? 3. Whether plaintiff has joint possession and cultivation into the suit properties ? 4. Whether defendants are trying to create third party interest into the suit properties and also trying to obstruct the plaintiff's possession ?

8. Firstly, it needs to be seen whether plaintiff has *prima facie* shown that she has right and share into the suit properties.

The relationship between the parties i.e. plaintiff, defendant No.2 to 6 are the children of defendant No.1 is admitted. It is also admitted that suit properties are the ancestral properties of Dadu Todkar.

9. The learned Advocate for the plaintiff argued that present suit properties are the ancestral joint family properties of the plaintiff and defendant No.1 to 6. Present plaintiff being the daughter of defendant No.1 has right and share into the suit properties. Suit property B is an ancestral tenanted property and the same is purchased from the income of joint family property. On the other hand, the learned Advocate for the defendant No.1 to 3 and 7 submitted that suit properties are not the ancestral properties, but the same are separate/self properties of present defendant No.1. After the demise of common ancestor Dadu present suit properties became the separate properties of present defendant No.1. In the separate properties of defendant No.1, present plaintiff has no right and she cannot ask partition into it.

10. In respect of suit property B, plaintiff's submission is that the same is an ancestral tenanted property and the same is purchased from the joint family income. First of all, there is no concept of ancestral tenanted property. Perused the 32 M certificate given under Bombay Tenancy and Agricultural Lands Act in favour of present defendant No.1. The said certificate shows that the present defendant No.1 by paying the amount and in

the proceeding before the Tenancy Court purchased the suit property B land under the provision of 32M of the said Act. The said certificate nowhere shows that the property is purchased into the joint. The said certificate appears to be exclusively given to the present defendant No.1. Nothing is produced on the Court record by the plaintiff in order to show that through the joint family income the said property is purchased on the name of defendant No.1. More also, into the compromise decree of RCS No.87/76 the defendant No.1's exclusive purchase and ownership over the suit property B mentioned. Thus, considering the 32 M certificate, and the decree into RCS No.87/76, it *prima facie* appears that the suit property B is the defendant No.1's exclusive and separate property. In respect of suit property A and suit property C plaintiff's contention is that these are the ancestral properties and the present plaintiff has right and share into it. On the other hand, the defendants contention in that respect is that these are the self/separate properties of defendant No.1. As per the amendment of 2005 of section 6 of Hindu Succession Act, daughter is been recognized as co-parcener and given equal rights as that of son. In the case of Prakash and others Vs. Phulavati and others, the Hon'ble Supreme Court held that :- the devolution of interest in co-parcenary property – the rights under amendment are applicable to the living daughters of living co-parceners as on 9th September 2005 irrespective of when such daughters are born.” This judgment of the Hon'ble Apex Court makes it crystal clear that as per the amendment of 2005, every daughter gets right and

share into the ancestral properties irrespective of when such daughter was born. In the present matter, even though the present plaintiff is born prior to 2005, still she becomes co-parcener and gets the right into the ancestral property of father. The defendant's defence is that after the demise of common ancestor Dadu, being the only legal heir suit properties became the self/separate properties of defendant No.1. Even though it is accepted that on the demise of Dadu, as only legal heir suit properties became present defendant No.1's self acquired properties, still on the birth of present plaintiff, the said properties again become the ancestral properties. As per the amendment on the birth of present plaintiff itself she becomes the co-parcener of the defendant No.'1 family. As a co-parcener she gets right and share into the suit properties. Defendant's defence that during the lifetime of father, daughter cannot ask for the partition cannot be gone into at this primary stage. What needs to be seen is only whether right is made out by the plaintiff or not. If considered the amendment, right is made out in favour of the daughter i.e. in favour of the present plaintiff. Therefore, considering the above discussion, I come to the conclusion that the plaintiff has *prima facie* able to show that she has right and share into the suit property A and C.

11. Plaintiff's subsequent submission is that without any legal necessity, and without any right present defendant No.1 made the sale of suit property A in favour of defendant No.7. The said sale deed is illegal and not binding on the right of plaintiff.

Whether the said sale deed is made for the legal necessity or not cannot be gone into at this primary stage. The legality of sale deed cannot be decided at this primary stage. The same can very well be decided on the evidence of both the side at the time of trial.

12. Plaintiff's submission is that she is having joint possession into the suit properties along with the defendants. She is jointly cultivating into the suit property farm lands and taking the various crops into it. She is also having joint possession into the suit property A house and barren land. Having such a position, now, the defendants are obstructing her joint possession into the suit properties. Except the bare pleading no any *prima facie* material evidence adduced by the plaintiff in order to show that she is having joint possession into the suit properties. The property extracts of the suit properties nowhere shows plaintiff's joint possession and cultivation into the suit properties. The cultivation column entries are made every year by the concerned Revenue Officer. The question arises why the plaintiff did not approached to the concerned Revenue Officer for mutating her name into the cultivation column of the suit property if at all she is having joint possession. Nothing on the Court record to show that the plaintiff did tried to mutate her name on the property extracts. Plaintiff had opportunity to file on the Court record the affidavits of the adjoining land holders in order to show her possession. The same is also not done by the plaintiff. The bare pleading of having joint possession is itself not sufficient enough in absence of *prima facie*

evidence in that respect. Thus, the plaintiff failed to *prima facie* show that she is having joint possession and cultivation into the suit properties. In such a situation, on the plaintiff's failure to prove her possession into the suit properties, it cannot be held that the defendants obstructed her possession.

13. The plaintiff's further submission is that defendant No. 1 to 3 and defendant No.7 are trying to create third party interest into the suit properties. She also pleaded that defendant No.7 is in the process of making construction into the suit property A. There is no specific pleading and there is no any *prima facie* evidence of the plaintiff in respect of defendants act of trying to create third party interest into the suit properties. How and from whom the plaintiff got knowledge about defendants act is nowhere specifically stated. Bare suspicion cannot be taken into consideration. Merely because defendants names are present into the ownership column of property extract of suit properties, they cannot be restricted from doing such act which they are not trying to do. In respect of defendant No.7's act of proceeding with the construction, the plaintiff had an opportunity to produce on the Court record the photographs of the suit property A in order to show the construction process. Plaintiff had also opportunity to file the affidavits of adjoining holders to show the construction. The same are not done by the plaintiff. Thus, the bare pleading without any *prima facie* evidence it cannot be held that the defendants are trying to create third party interest into the suit

property and also defendant No.7 making the construction into the suit property.

14. Thus, considering all above discussion, it comes out that plaintiff has made out *prima facie* case in her favour, but failed to show the balance of convenience and irreparable loss. The plaintiff has failed to *prima facie* show that she is having joint possession into the suit properties, defendants are obstructing her possession and also trying to create third party interest into the suit properties. Whatever, be the share of the plaintiff the same can very well be decided at the time of trial. Merely because, the plaintiff has *prima facie* shown of having right into the suit properties, is itself not sufficient enough to restrain the defendants from doing such acts where there is no *prima facie* evidence to show that they are doing the same. All the ingredients needs to be proved by the plaintiff in order to get the order of temporary injunction. In the present matter, the plaintiff has only able to satisfy first ingredient and failed to show the required other two ingredients. In such a situation, a discretionary relief of injunction cannot be granted in favour of plaintiff.

15. The plaintiff is failed to satisfy all the ingredients of Order 39 Rule I of the Civil Procedure Code. After considering all above discussion, I answer point No.1 in the affirmative and point No.2 to 4 in the negative. Hence, the plaintiff is not entitled to the relief of the temporary injunction as prayed. Hence, in order to

point No.5, I pass the following order :-

ORDER

- 1] The application is rejected.
- 2] No order as to the costs.

Sd/-

Date :-02/01/2017.
Place :- Kagal.

(Chetan Jagtap)
Joint C.J.J.D. Kagal.

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

Name of the Stenographer	Sandip Maruti Patil (L.G.)
Name of Court	Jt. Civil Court & J.M.F.C. Kagal.
Date of Dictation	02/01/2017.
Judgment signed by the P.O. on	03/01/2017.
Judgment uploaded on	04/01/2017.