

**R.C.S.No. 168/2022**

Deepak Patil Vs. Mahesh Patil etc.

CNR - MHKO130014192022**ORDER PASSED BELOW EXH.05****(Dt. 04/03/2024)**

1. This application is filed by the plaintiff against defendant no. 1 and 2, under Order 39 Rule 1 and 2 of the Code of Civil Procedure (in short 'CPC').

2. According to the plaintiff, there are following agricultural properties situated at Mouje Yamage, Tal Kagal, Dist. Kolhapur.

A)

Sr. No.	Gat No.	Area H. R.	Out of it H. R.
1)	1126	0-57	0-19
2)	1140	2-17	0-16.08
3)	232	1-18.30	0-20
4)	844	0-55	0-18.33
5)	519	0-64.70	0-21.60
6)	478	1-70	0-27

B) Grampanchayat Property no. 681/1 & Grampanchayat Property No. 681/2 both constructed with stone, brick, sand consisting R.C.C. house situated at Mouje Yamage, Tal. Kagal, Dist. Kolhapur.

Above both suit properties are well referred in the plaint is subject matter of suit. (hereinafter referred as "suit properties"). The gist of application is not to oust the plaintiff from suit property till disposal of suit.

3. Defendant no. 1 & 2 filed their say to this application at Exh.13 and specifically denied the contents of Exh. 5.

4. Heard Shri. S.S.Kestikar learned advocate appearing on behalf of plaintiff and learned advocate Shri. O.S.Diwan appearing on behalf of defendants. From the pleading of learned Advocates of parties with documents on record, following points arise for determination, and this Court, recorded the reasons with finding as stated below :-

	<u>POINTS</u>		<u>FINDINGS</u>
1.	Whether prima facie case lies in favour of plaintiff ?	:-Partly Yes.
2.	Whether balance of convenience lies in favour of plaintiff ?	:-Partly Yes.
3.	Whether plaintiff would suffer irreparable loss if injunction is refused ?	:-Partly Yes.
4.	What order?	:-	Injunction is Partly Allowed.

:- DOCUMENTS OF PLAINTIFF :-

5. The plaintiff relied on following documents filed at Exh.3, 17, 20 & 22 which includes 7/12 extracts, assessment extracts, death certificate of Parashram Bala Patil, N.C. report, consolidation extract of Gat no. 232, 7/12 extracts etc. Learned advocate for the plaintiff has filed affidavit of witness Mahesh Namdev Misal at Exh. 15.

6. Further, learned advocate of plaintiff has relied on following case laws at Exh. 30.

1.	Article 233 of Hindu Law By Mulla
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:- DOCUMENTS OF DEFENDANTS :-

7. The defendant no. 1 & 2 relied on following documents filed at Exh. 14 & 28 which includes 7/12 extracts, assessment extracts, tax receipt, receipt of water department, death certificate of Parashram Bala Patil, sale deed, saving pass book of SBI Bank, mutation extract of diary no. 240, construction expenses record, photos of suit property, death certificate, certificate given by Balbhim Vikas Seva Society to Parashram Patil, copy of Exh. 1 of R.C.S.No. 116/2023, copy of Exh. 1 of RTS Appeal etc. Learned advocate for the defendant no. 1 & 2 have filed affidavit of witnesses namely Balkrushna Balu Powar, Bajrang Bapu Patil, Sukumar Shankar Sutar, Bajirao Ananda Patil & Ashok Laxman Patil respectively at Exh.23, 24, 25, 26 & 29

8. Further, learned advocate of defendants relied on following case law at Exh. 31.

1.	Shri. Partap Singh & Ors. Vs. Shiv Ram, 2020(11) SCC 242.
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Facts and Arguments of the Plaintiff:-

9. Learned advocate for the plaintiff relying on the documents filed below Exh. 3, 17, 20 and 22 submitted that, defendants are real brother of plaintiff. The father of parties died on 01/10/2022 and their mother died during year-1997. It is averred that, suit properties are Hindu joint family of parties and after death of father of parties, the parties are in possession of suit property jointly as coparcener. According to plaintiff, Grampanchayat Property No.681/1 is in joint possession of plaintiff and defendant no. 2 and in Property No. 681/2, defendant no. 1 is residing with his family. It is averred that, yet the suit properties are not partitioned and being coparceners, the suit property is in joint possession having 1/3rd share of each.

10. It is contended that, plaintiff was serving at Nashik and during pandemic period, he lost his job and arrived at Mouje Yamage and residing in Grampanchayat Property No. 681/1 and cultivating the suit property jointly by receiving income. Meanwhile, defendants asked the plaintiff to leave the village and to vacate the suit house property. That time the plaintiff requested the eminent person from village as well as to the members of Tantamukti Samiti for partition. However, the defendants have not listened the request and on 29/10/2022 at morning 10:00 a.m. refused to give the share of plaintiff, as well as threatened to oust the plaintiff from suit property. Thus, as the defendants are not ready to accept the request, the plaintiff does not want to keep his share joint with the defendants. Hence, filed this interim application against defendant with relief not to oust the plaintiff from the suit property till decision of suit.

11. Relied on documents filed below Exh. 3, 17, 20 & 22, it is argued that, the defence taken by defendants as to Will can not be looked into at this stage. Further, there is presumption to joint family properties. It is argued that, there are contention of defendants that, suit properties is yet not partitioned, therefore, these facts strengthen the case of plaintiff. It is added that, whether certain suit properties are self acquired suit property of father of plaintiff is matter required to be deal during trial. Therefore, parties being co-parceners one party can not oust other co-parceners, thus, the plaintiff is entitled to remain in joint possession. It is argued that, the documents filed on record along with plaint of R.C.S.No. 116/2023 indicates prima facie case of plaintiff and if the defendants succeeded to oust the plaintiff, the plaintiff may suffer irreparable loss. Accordingly, by relying on documents filed below Exh. 3, 17, 20 and 22 with Article 233 of Hindu Law, argued to allow the application.

Facts and Argument on behalf of Defendant No. 1 & 2 :-

12. The defendant no. 1 & 2 have filed their written statement below Exh.13 with denial. It is contended that, the father of party died on 01/10/2022 and soon thereafter disclosing false cause of action, this false suit is filed. It is contended that, since last 15 to 20 years, the plaintiff resided at various places for his service purpose. Further, he also raised the several disputes and demanded and extracted money from father. Further, he never provided financial aid to the father of party from his service income. Further, he has also not provided the basic needs to the father and just after death of father tried to create rights. It is submitted that, the plaintiff is not approach with clean hand.

13. According to defendants, Gat no. 556, 468, 306, 204/B, 301, 542, 636, 676, 930 are other joint family properties of defendants and their grand father and uncles and that suit property is yet not partitioned by metes and bounds. Further, share of Anusaya, Shakuntala and Indumati are not separated, nor they relinquish their rights. Moreover, entire suit property is not included in the suit with joinder of necessary parties. It is averred that, Gat no. 1140 is joint family property, wherein only fodder is cultivated and said is not partition-able property. Further, certain portion from Gat no. 844 is in possession of Baburao Powar, certain portion from Gat no. 519 is in possession of LR's of Yashwant and Shivaji and certain portion is in possession of Bajirao Patil. Further, Gat no. 468 is also not partition-able. It is contended that, in the above property there is joint possession of Parashram, Yashwant and Shivaji since long time. It is submitted that, Gat no. 232 is purchased by their father and Uncles on 26/12/1996. Further, 20 R. portion from Gat no. 232 is purchased by father of parties by his hard earn money. It is submitted that, in Gat

no.232, the father of party constructed the house. Further, defendant no. 1 had served in arm forces and time to time he has provided financial aid to his father since year-1996 in the joint account of SBI standing in the name of defendant No.1 and father. The said amount is received by the father, time to time and from that amount their father constructed the house in Gat no. 232 during year-1999 to year-2001. Further, the said construction is completed in the year-2002, and construction is carried out from the amount provided by defendant no. 1 to his father. According to defendant No. 1, from his savings account, he disbursed the substantial amount to the father of party and these facts are suppressed by the plaintiff.

14. It is submitted that, Gat no. 232, consists house property No. 681/1 and 682/1. Those are also belonging to their father and even the defendant no. 2 and the plaintiff have no concern with the said construction. Apart from that, prior to death, their father had executed the Will of Gat No. 232. Further, the defendant no. 1 during year-2012 from his savings from salary and funds received, constructed the RCC house and the said house is having property no. 681/2. Since then, the defendant no. 1 is residing in property no. 681/2. It is averred that, at present the defendant no. 2 is owner of Grampanchayat Property No. 681/1 and defendant no. 1 is owner of Grampanchayat Property No. 681/2. According to the defendants, the plaintiff has no rights in the house property and Gat no. 232 is not joint family properties of parties, whereas Gat no. 232 is self acquired property of their father.

15. It is further contended by the defendants that, fact of Will is acknowledged by them recently. It is averred that, as per that Will the defendants are in possession of Gat No. 232 and these facts are

suppressed by the plaintiff. According to these defendants, there is no cause of action, therefore, plaintiff is not entitled for injunction.

16. The learned advocate of defendants relying on several facts as to payment made by defendant no. 1 to his father during year-1999 to year-2001, as well as Will executed by their father in favour of defendants as well as sale executed during year-1996 argued that, the property Gat no. 232 is self acquired property of father of parties. Therefore, their father had exclusive right to make valid Will. Further, the witness who was present at the time of execution of Will filed his affidavit corroborating the contents of Will. These, facts substantiate the facts referred in the W.S. It is argued that, soon after death of father, this suit is filed without cause of action by suppressing material facts. Therefore, the plaintiff is not entitled for equitable relief. It is argued that, there is no prima facie case in favour of plaintiff in respect to Gat no. 232. Further, this plaintiff has not clubbed all the suit property in this suit as well as necessary parties are also not added in this suit. Moreover, the certain suit property is in possession of various persons on lease basis and certain property is not partition-able. Thus, relying on document filed below Exh. 14 & 28 along with ratio laid down in case law, argued to reject the application.

:- REASONS :-

As to Points No. 1 to 3 :-

17. Points no. 1 to 3 are interrelated with each other, thus, to skip repetition they are discussed together.

18. From the documents and affidavits filed on record of parties, it is admitted that, one another R.C.S.No. 116/2023 is filed by Suvarna Sopan Desai against these parties for partition with the theme of joint possession. Further, in that suit Gat No. 232 is not

included as suit property. So far as contention of defendants are concern with Gat No. 232 it is self acquired property of father of parties. Further, there are averments as to construction of house property No. 681/1 and 681/2 is carried out by the father of parties from his hard earn money and money disbursed by defendant no. 1. According to plaintiff, he is residing along with defendant no. 2 in Grampanchayat property no.681/1, whereas defendants have denied this fact without disclosing actual residence of the plaintiff.

19. The Will executed by the father of parties is disputed by the plaintiff. There are also averment on behalf of plaintiff that, Will is not registered one and it is executed under influence and to prove the contents of Will the burden is upon defendants. Whereas, the defendant submitted the affidavit of person who is witness to that Will and separate suit for declaration on the basis of Will also instituted by the defendant No. 1 for that respect. The plaintiff has not disclosed that, Gat no. 232 consists house properties. Now, having regard to sale executed during year-1996, pleading as to joint possession in respect to rest of the property, excluding Gat No. 232 in R.C.S.No. 116/2023, several affidavits of witnesses filed on behalf of defendants, prima facie proof of bank details of joint account of defendant no. 1 and his father, earlier residence of the plaintiff at remote place for job purpose, with single prayer of plaintiff not to oust from the suit property if considered with Article 233 of Hindu Law, the plaintiff has partial prima facie case in respect to his joint possession in respect to properties referred in the suit except in entire Gat No.232. So far as sale in the name of father of parties of Gat No.232, prima facie Will executed by the father and affidavit of witness supporting the Will that cannot be neglected at this stage. Mere failure to registered the Will is also not prima facie go to the

root of the matter.

20. The next contention of the defendants grampanchayat property no. 681/1 & 681/2 is situated in Gat no. 232 is suppressed by the plaintiff. Whereas there are averment on behalf of plaintiff in respect to his residence in village property No. 681/1. These averments are only denied by the defendants. However, defendants has not firmly contended that, where the plaintiff is residing at this juncture. Case law of **Shri. Partap Singh & Ors. Vs. Shiv Ram, 2020(11) SCC 242** is filed on behalf of defendant no.1 is based upon fraud in records of rights and presumption attached to it. Further, the facts in that case suggest that, case referred above is decided on full fledged trial. Hence, with due respect that ratio may help to the plaintiff at the conclusion of trial. Now, having regard to these rival submissions and unspecified status of residence of plaintiff on behalf of defendants, along with certain documents filed on record on behalf of plaintiff, it reflects that, prima facie the plaintiff is residing in village property no. 681/1 with defendant no. 2 and defendant no.1 is residing in village property no. 681/2. There are averment on behalf of defendants that, certain persons are cultivating Gat No. 844, 519. However, those are not party in the R.C.S.No. 116/2023. Now, considering Article 233 of Uncodified Hindu Law relied by learned advocate of plaintiff, there appears joint possession of plaintiff in the suit property except in entire Gat No. 232. As the house property no. 681/1 is situated in Gat No. 232 with no specific averments as to whereabouts of residence of plaintiff, the plaintiff has partial prima facie case and his ousting from village property no. 681/1 may cause irreparable loss to the plaintiff. Therefore, he is entitled for partial relief though that house property is situated in some portion of Gat No. 232. Nevertheless, if the injunction in entire Gat No. 232

granted, it may be misuse by either party. Thus, point no. 1 to 3 are answered partly in the affirmative and for point no. 4 following order is passed.

ORDER

1. The application (Exh.5) is partly allowed.
2. Defendants are temporarily restrained from ousting the plaintiff from Gat No. 1126, 1140, 844, 519 and 478, till decision of suit.
3. Prayer of plaintiff to temporarily restrained the defendants from ousting from entire Gat No. 232 including village property no. 681/2 is rejected. However, prayer of plaintiff from temporarily restraining the defendants ousting the plaintiff from village property No.681/1 is allowed.
4. No order as to costs.

Sd/-

Kagal.
Date:- 04/03/2024

(B. D. Gore)
Civil Judge Junior Division,
Kagal.