

MHKO150003882020

R.C.S. No. 49/2020
Vithoba vs. Mhankali

ORDER PASSED BELOW EXH. 05

This is an application filed by plaintiff under order XXXIX rule 1 and 2 of C.P.C.

2. Suit property-

40 R. land from Gat No. 186 situated at village Mendholi, Tal. Ajara, Dist. Kolhapur.

(In short "suit property") mentioned in paragraph no. 1.

3. In short plaintiff's case is as under :

According to plaintiff, the suit property was purchased property of him. He has purchased suit property on 30.04.1979 from one Appa Chougale. He is owner and possessor of suit property since from date of sale deed. The suit property was purchased by him from his self acquired income. The suit property is self acquired property of him. The defendants are not concern with suit property. The suit property was purchased from the Appa who is father of defendant no. 1 and 2. Defendant no. 3 and 4 are not concern with suit property. The plaintiff has requested defendant no. 1 and 2 for fixation of boundaries in respect of suit property. But, the defendants have refused request of plaintiff. Therefore, he has filed present suit for fixation of boundaries. The defendant no. 3 and 4 are not concern with suit property. But, they have try to obstruct to the peaceful possession of plaintiff. Therefore, plaintiff filed present suit for perpetual injunction.

4. By way of present application, plaintiff prayed temporary injunction. That is restraining defendants from obstructing to his peaceful possession. He lastly prayed for allowing application.

5. The defendant no. 1, 3 and 4 have appeared and filed their written statement. The defendants have denied all allegation, pleading and prayer of plaintiff. They admitted that, the suit property is purchased in the name of plaintiff. But they have denied that, plaintiff is owner and possessor of suit property. They have denied that, plaintiff has purchased suit property from his self acquired income. They have denied that, the suit property is self acquired property of plaintiff. They denied that, the plaintiff is exclusive in possession of suit property.

6. According to defendant, the plaintiff having two brothers, namely Shivaji and Tukaram. The Tukaram was died. The defendant no. 3 and 4 are the legal heirs of Tukaram. They admitted that, the father of defendant no. 1 and 2 has sold out suit property. According to defendant, the suit property is Hindu joint family property of plaintiff, Shivaji and Tukaram. The partition of suit property between plaintiff, Shivaji and Tukaram was effected in the year 1995. Some portion of property from suit property was goes in the favour of Tukaram in partition. As per that partition, defendant no. 3 and 4 have possessed some portion from suit property. Some portion from suit property was owned by Shivaji as per partition. In this circumstances, plaintiff is not owner and possessor of suit property. Defendant no. 3 and 4 are also owner and possessor of some portion from suit property. Defendants have attached hand sketch map along with written statement. In this circumstances, defendants prayed for rejection of application.

7. Heard Learned advocate Shri A. S. Farakte for plaintiff and Shri. S. R. Powar for defendants.

8. Following points are arises for my determination to which I have given my findings thereon along with my reasons-

Sr.No.	POINTS	FINDINGS
1.	Whether the plaintiff is prima-facie case for grant of temporary injunction as prayed for?	No
2.	Whether balance of convenience lies in favour of plaintiff ?	No
3.	Whether the plaintiff would suffer irreparable loss, if temporary injunction is refused?	No
4.	What order ?	As per Final order.

REASONS

9. Prima-facie case, balance of convenience, and irreparable loss are the three ingredients for temporary injunction.

As to point No. 1 to 3 -

10. The plaintiff pleaded that, he is owned suit property and he is exclusively possessed suit property. Defendants have denied that, the exclusive ownership and possession of plaintiff over suit property. The plaintiff pleaded that, he has purchased suit property on 30.04.1979. Both the parties have admitted that, on 30.04.1979 the suit property was purchased in the name of plaintiff. The plaintiff pleaded that, the suit property was purchased by him from his self acquired income. And it is his self acquired property. The defendants denied that, the suit property is self acquired property of plaintiff. According to defendant, the partition in respect of suit property and other properties of Hindu joint family effected in the year 1995.

11. The defendant no. 3 and 4 have filed R.C.S.No. 35/2020 before this court for declaration and injunction as per partition effected in the year 1995. The present plaintiff of this case is defendant no. 1 in that case. The plaintiff of present case has filed written statement in R.C.S. No. 35/2020. On perusing the written statement of present plaintiff, filed in R.C.S. No. 35/2020 it appears that, at paragraph no. 20 he pleaded that, the suit property was self acquired property of him. The Hindu joint family of plaintiff, Shivaji and Tukaram was present till 1987. The partition between plaintiff, Shivaji and Tukaram was effected in the year 1987. Further, he pleaded that, the suit property is self acquired property of him. Therefore, the question of partition does not arise in the year 1987. Thus, from the pleading of plaintiff it comes on record that, the partition between plaintiff, Shivaji and Tukaram effected in the year 1987. The suit property was purchased on 30.04.1979. It means prior to partition between plaintiff, Shivaji and Tukaram, the suit property was purchased in the name of plaintiff. At this stage it is to the plaintiff to show that, the suit property was separately possessed by him and it was not possessed by Hindu joint family. Because the plaintiff himself pleaded that, the partition between him and other brothers effected in the year 1987. And prior to that partition, the suit property was purchased in his name in the year 1979.

12. The defendants pleaded that, the partition effected in respect of suit property in the year 1995. The defendants have produced one partition document on record. On perusing that partition paper, it appears that, the land from Mendholi was kept in the share of plaintiff, Shivaji and Tukaram. The witnesses namely Gopal Savaba Patil, Hari Sakharam Patil and Laxman Bhima Shende have signed that document as witnesses. The plaintiff, Shivaji and Tukaram also signed that document. Thus, from the partition document it comes on record that, the land from Mendholi was kept between plaintiff, Tukaram and Vithoba. The suit property is situated at Mendholi.

13. It is pertinent to note that, for cutting and sending the sugar cane from the suit property, the court commissioner appointed by my predecessor in this case. The court commissioner has completed his work and deposited amount of sugar cane in this court. The court commissioner has submitted his report at Exh. 42 along with panchnama. On perusing panchnama prepared by court commissioner, before witnesses dated 26.02.2021 it appears that, the plaintiff has possessed 0.14 R. land from suit property. The Shivaji also possessed 0.10 R. land from suit property and defendant no. 3 of present case has possessed 0.14 R. land from suit property. The panchnama signed by plaintiff, defendant no. 3 and other witnesses. Thus, from the panchnama it comes on record that, the plaintiff has not possessed 0.40 R. land that is suit property exclusively. The Shivaji and defendant no. 3 also possessed the suit property.

14. Considering all above discussion, prima-facie it appears that, the plaintiff has not possessed 0.40 R. land that is suit property exclusively. The Shivaji and defendant no. 3 also possessed some portion from suit property. The plaintiff has not produced any evidence which shows that, since from 1979 till 1987, he has exclusively possessed suit property as his separate property and it was not Hindu joint family property. Because the plaintiff himself pleaded that, the partition between him, Shivaji and Tukaram effected in the year 1987. Further, the partition document which is produced by defendant shows that, the land from Mendholi was kept between plaintiff, Shivaji and Tukaram. That document signed by plaintiff. The witness of partition document Gopal Savaba Patil has filed his affidavit in respect of partition, which was effected in the year 1995. On affidavit he stated that, he is present at the time of partition and the suit property was partitioned and some portion from suit property was given to the Shivaji and Tukaram. These all evidence prima-facie shows that, the plaintiff has not possessed suit property exclusively. Therefore, I conclude that, the plaintiff prima-facie fails to establish that, his possession over the suit property. Therefore, the

balance of convenience not lies in favour of plaintiff. If application rejected, then no irreparable loss will be caused to the plaintiff.

15. The advocate for plaintiff relied on ratio decided by **Hon'ble Mysore High Court decided in AIR 1968 Mysore 229 T Mahalaxmimma vs. N. S. Radhakrishna.** and submitted that, the jointness is not in respect of property. The jointness only presume the Hindu joint family and it can not presume jointness of Hindu joint family property. It is settled law that, the jointness can not be presumed in respect of property. In above discussion, I found that, the plaintiff has not exclusively possessed suit property. Therefore, the ratio of Hon'ble Mysore High Court is not helpful to the plaintiff.

16. The advocate for defendant relied on some ratio of **Hon'ble Supreme Court. In AIR 1995 SC 1728 Digambar Patil vs. Devram Patil,** the Hon'ble Supreme Court held that, the partition under Hindu law not necessary be effected by registered partition deed. In **AIR 1966 SC 292 Tek Bhujil vs. Debi Singh,** the Hon'ble Supreme Court held that, the memorandum of arrangement is not necessary to register. In case in hand, defendants have produced unregistered partition document. Therefore, the ratio's of Hon'ble Supreme Court applicable to this case.

17. In **AIR 1977 SC 1712 Sitaram Patil vs. Ramchandra Patil,** Hon'ble Supreme Court held that, whatever will appear in the record of rights will be presumed to be correct until shown by evidence that, the entries are not correct. In case in hand, the revenue entries are in the name of plaintiff. In above discussion, I found that, the plaintiff prima-facie failed to made out his possession over the suit property. In these circumstances, it is difficult to presume the entries of plaintiff are correct. Therefore, the ratio of Hon'ble Supreme Court is applicable to this case.

18. In **AIR 1972 SC 2531 Baikunth vs. Sashi,** the Hon'ble Supreme Court held that, when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions then a

presumption arises that the acquisitions standing in the names of persons who were in the management of the family properties are family acquisitions. In above discussion, I found that, some portion from suit property also possessed by Shivaji and Tukaram who are the brothers of plaintiff. Further, plaintiff fails to show that, since 1979 to 1987 he has possessed suit property as his separate property. In these circumstances, the ratio of Hon'ble Supreme Court is applicable to this case.

19. The advocate for defendant further relied on ratio of **Hon'ble Bombay High Court. In 2015 (1) Mh.L.J. 78 Shamkalabai vs. Bhikam Singh**, the Hon'ble Bombay High Court held that, mere evidence that the property was purchased in the name of one person does not render the property as his separate property. In case in hand, the suit property purchased in the name of plaintiff. Therefore, the ratio of Hon'ble Bombay High court is applicable to this case.

20. Considering all above discussion, I conclude that, the plaintiff fails to made out prima-facie case. The balance of convenience not lies in favour of plaintiff. There is no irreparable loss will be caused to plaintiff if, application rejected. In this circumstances, I answer point no. 1 to 3 in the negative. The application of plaintiff needs to be rejected. In answer to Point No. 4, I pass the following order,

ORDER

1. The application Exh. No. 5 is hereby rejected.
2. Considering peculiar circumstances, there is no order as to cost.

Date : 17.02.2022.

(S. P. Jadhav)
Civil Judge J.D., Ajara.

Certificate

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	Mrs. Y.S. Chavan
Name of Court	C.J.J.D. Ajara
Judgment / Order dictated on	17-02-2022
Judgment / Order typed on	17-02-2022
Judgment / Order signed by the P. O. on	17-02-2022
Judgment / Order uploaded on	22-02-2022