

CNR : MHKO19-000537-2018

Reg. Civil Suit No. 123 /2018



**ORDER BELOW EXH. 5**

This is an application by plaintiff for interim relief of injunction restraining the defendants from disturbing plaintiff's joint possession over the suit property.

2. As per plaintiff suit property is jointly held by plaintiff and defendants. Plaintiff is entitled for  $\frac{1}{2}$  share and all defendants are entitled for the remaining  $\frac{1}{2}$  share in suit property. Plaintiff and defendants are close relatives of each other. Thus, they had not partitioned their shares in the suit property. As per their convenience defendants have construed their house in southren portion of suit property and plaintiff have constructed their house in northern portion of suit property. There is an open space between these two house properties. Said open space is hereinafter is referred as “**Open portion**”.

3. As the suit property is yet to be partitioned, plaintiff and defendants are jointly holding the open portion. When plaintiff asked for partition, defendants declined to do so. Defendants also threatened that they will deal with the open portion as per their desire. There is a possibility of construction in the open portion at the hands of defendants. As the plaintiff and defendants are jointly holding the suit property, great and irreparable loss would cause to plaintiff's rights in the suit property if defendants succeed to change the nature of suit

property by making construction or transferring the open portion. Hence, present application.

4. Vide their say and written statement at Exh. 20 defendants have strongly combated the application contending its content as false and frivolous. Defendants admitted plaintiff's entitlement for  $\frac{1}{2}$  share in the suit property. However, they contend that the suit property is already partitioned and both parties are accordingly enjoying their respective shares in the same. Defendants further contend that pursuant to the application dated 16/05/2012 by plaintiff the concerned survey officer has measured the suit property and marked the boundaries and occupation by plaintiff and defendants. Vide his statement before the concerned survey officer plaintiff has admitted the measurement and boundaries fixed. Since year 1982 defendants are independently enjoying their  $\frac{1}{2}$  share in suit property. However, with intent to harass the defendants, plaintiff has preferred this suit and application claiming the open portion as jointly held by him. Ultimately, they have prayed for rejection of the application.

5. Heard both sides. Perused record. The points crop-up for determination and reasoned findings thereon are as under :-

<b>Sr.No.</b>	<b>Point for determination</b>	<b>finding</b>
1	Whether plaintiff proves that prima facie case is in his favour?	No.
2	Whether plaintiff proves that balance of convenience lies in his favour?	No.
3	Whether plaintiff proves that he would suffer irreparable loss or damage if the interim relief as prayed is not granted in his favour ?	No.
4	What Order ?	As per final order

### **REASONS**

6. In support of his case Plaintiff has placed reliance upon following documents :-

<b>Sr.No.</b>	<b>Particular</b>
1	Certified copy of 7/12 extract of Gat No. 15 for the year 2015-2016 to 2017-2018 at Exh. 3/1
2	Three photographs of suit property at Exh. 16/1 to 16/3
3	Invoice/bill of photographs at Exh. 16/4
4	Original sale deed No. 536/1986 dated 20/05/1986 at exh. 24/1
5	The notice dated 31/05/2014 issued by T.I.L.R. Radhanagari at Exh. 24/2
6	Map issued by T.I.L.R.Radhanagari at Exh. 24/3
7	Two photographs of suit property at Exh. 24/4
8	Invoice/bill of photographs at Exh. 24/5

Plaintiff has filed his affidavit at Exh. 28.

7. In support of their case defendants have placed reliance upon following documents :-

<b>Sr.No.</b>	<b>Particular</b>
1	Copy of Sale deed No. 1436/1982 at exh.27/1
2	The copy of statement by Yashwant Ganpati Patil dated 16/05/2014 at Exh. 27/2
3	Certified copy of mutation entry No. 58 at Exh. 27/3
4	Copy of Map of Gat No. 15 to 19 at Exh.27/4
5	One Photograph of property at Exh. 27/5

### **AS TO POINT NOS. 1 AND 2 :-**

8. As points No. 1 and 2 are interlinked they are discussed together with a view to avoid unnecessary repetitions.

9. As the outset it is pertinent to note here that the parties admit their respective  $\frac{1}{2}$  share in the suit property. Further, the position of the open portion in suit property appears as same from the photographs produced on record by both sides. Thus, it is also not in dispute that there is an open space as averred by plaintiff.

10. This is a suit for partition and permanent injunction. As per plaintiff, he is entitled for undivided  $\frac{1}{2}$  share in suit property. Defendants admit plaintiff's  $\frac{1}{2}$  share in the suit property. However, they have come with the theory of previous partition. As per defendants the suit property is previously partitioned by meets and bounds and plaintiff's  $\frac{1}{2}$  share is already separated. Thus, on the date of filing of suit, suit property is not jointly held by plaintiff and defendants.

11. In view of this scenario if the documents produced on record are perused carefully it transpires that the 7/12 extract of suit property records the name of plaintiff for  $\frac{1}{2}$  share and the name of defendant 1 for remaining  $\frac{1}{2}$  share. The crop cultivation column of 7/12 extract also records the existences of house and open plot. As per plaintiff with the mutual understanding plaintiff has constructed his house in northern side and defendants have constructed their house in southern side of the suit property.

12. Though defendants have come with the theory of previous partition they have not brought on record sufficient material to show that the  $\frac{1}{2}$  share of plaintiff is previously partitioned and separated.

13. Pointing out the copy of statement by plaintiff at Exh. 27 at serial No. 2 the Ld. Advocate for defendants argued that vide said statement plaintiff has admitted the partition and separation of his  $\frac{1}{2}$  share in suit property at the time of measurement.

14. I have gone through the said statement. Said statement records that the concerned measurement officer has measured the property at Gat No. 15 and fixed its boundaries. Vide said statement plaintiff admits the measurement and also the boundaries pertaining his occupation in column No. 15 shown by the measurement officer. However, the entire statement neither records the name of defendants nor it makes clear that vide said statement plaintiff has admitted the partition and separation of his share in Gat No. 15. Thus, though the statement is accepted at its face value, in that case also on the basis of said statement it can not be said that vide said statement plaintiff has admitted the partition and separation of his  $\frac{1}{2}$  portion in suit property.

15. Moreover, plaintiff's case itself is that the parties are holding and occupying the suit property and also have constructed their houses with mutual understandings. In this scenario based on the statement by plaintiff at list Exh 27 Sr. No. 2 it can not be said that the suit property has been previously partitioned.

16. Further it is an admitted position of fact that the suit property is originally owned by Mr. Dhondiba J. Patil and Mr. Dhondiba Patil has sold and transferred the  $\frac{1}{2}$  share in suit property to plaintiff vide sale deed No. 1536/1986, and the remaining  $\frac{1}{2}$  share is transferred in favour of defendant 1 vide sale deed bearing No. 1436 of 1982.

17. The plaintiff's sale deed is at Exh. 24 Sr. No. 1 and copy of defendants sale deed is at Exh. 27 at Serial No. 1. On careful perusal of these sale deeds it transpires that the four boundaries of the subject matter of the sale deeds are not specifically mentioned. On the contrary the sale deed of year 1986 executed in plaintiffs favour specifically records that vide said sale deed originally owner has transferred his undivided  $\frac{1}{2}$  share in plaintiff's favour.

18. The sale deed executed in favour of defendants is of year 1982 and the sale deed executed in favour of plaintiff is of year 1986. Thus, considering these aspects and specific content of sale deed executed in favour of plaintiffs it can be said that on the date of execution of said sale deed defendant 1 and the original owner were jointly holding the suit property. Thus, in absence of specific material on record on the point of partition, the suit property prima facie appears as jointly held by plaintiff and defendants. Thus, as far as prayer for partition of their respective share is concerned the prima facie case is in plaintiff's favour.

19. However, plaintiff has also sought the relief of permanent injunction restraining defendants from disturbing his joint possession over the suit property. He has specifically prayed for permanent injunction restraining defendants from causing any construction or changing nature of the vacant portion between the two houses in suit property and also from transferring the suit property.

20. On these points if the plaint is perused carefully it reveals that in paragraph No. 7 plaintiff has averred that he desires to

construct the compound around his house and for that purpose when he asked defendants for partition, they threatened that they will construct in open portion. However, defendants have denied the averments by plaintiff on the point of construction at their hands in open portion. Plaintiff has not brought on record enough material to show the immediate prospect of construction in open portion at the hands of defendants. On the contrary defendants contend that they use the open portion to keep their agricultural equipments.

21. As per plaintiff the open portion is jointly held by plaintiff and defendants. Consequently, at this junction it can be certainly said that defendants are also equally entitled for the open portion. Plaintiff has not made out any case of his ouster of possession or the case of destruction of suit property at the hands of defendants.

22. That apart admittedly defendants are co-owners holding  $\frac{1}{2}$  share in suit property. As per Sec. 44 of Transfer of Property Act," *Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as it is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer the share or interest so transferred.*

*Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in these section shall be deemed to entitle him to joint possession or other common*

*or part enjoyment of the house.”*

23. Thus, as per Sec. 44 of Transfer of Property Act, defendants can certainly transfer their share in the suit property. Because, admittedly they are holding  $\frac{1}{2}$  share in it. That apart plaintiffs have not made out any case of ouster of their possession. Further, it is not plaintiff's case that defendants are trying to sale or transfer their undivided share in dwelling house belonging to an undivided family.

24. It is pertinent to note that the relief of injunction can be sought by a co-sharer against other co-sharer when such co-sharer happens to be in exclusive possession of the land to the exclusion of other co-sharers, but when the possession of all co-sharers is joint, relief of injunction can not be granted. In instant case as discussed here-in-above as per plaintiff himself the open portion is held jointly by both parties. Thus, this is not a case of exclusion of possession of plaintiff. Consequently, an injunction as prayed can not be granted. Hence, this court is of view that plaintiff has no prima facie case for grant of interim relief as prayed. As the prima facie case is not in plaintiff's favour, balance of convenience also leaves their side. Hence, points No.1 and 2 are answered in negative.

**AS TO POINT NO. 3**

25. Vide their written statement defendants have denied the averments by plaintiff pertaining to construction at their hands in open portion. Further, though for the sake of moment if it is assumed that the defendants are in process to sale and transfer or dispose of any portion in suit property, in that case also no harm or prejudice would

cause to plaintiff's ½ share. Thus, in the case of assumption also it does not appear that plaintiff would suffer any immediate and irreparable loss of any kind if the application is rejected. Thus, point No. 3 is also answered in negative.

**AS TO POINT NO. 4**

26. From the aforesaid backdrop it is now clear that the application deserves to be rejected. Hence, in answer to point No. 4 following order is passed :-

**ORDER**

1. Application is rejected.
2. Cost in cause.

Radhanagari.

Date : 05-03-2019.

( M. H. Shitole )  
Civil Judge, Jr.Dn., Radhanagari.

CNR : MHKO19-000537-2018
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I Affirm that, the contents of this P.D.F. file Order are same, word to word, as per the original Order.

Name of the Stenographer	U.S.Telang
Name of Court	Civil Judge, Junior Division & Judicial Magistrate, First Class, Radhanagari.
Date of Dictation	05/03/2019
Order signed by the P.O. On	05/03/2019
Order uploaded on	06/03/2019