

**Order Below Exh.05 in R.C.S. No.234 of 2021**(Passed on this 22nd day of December, 2023)**Chandrakant -Vrs.- Suryakant & Ors**

CNR No.MHLA060009332021

The plaintiff has filed the present application under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure (hereinafter referred to as 'the C.P.C.') seeking temporary injunction –

- a) restraining defendants No.1 and 2 from causing obstruction and interference in the plaintiffs' peaceful possession over the suit property; and
- b) restraining defendants No.1 and 2 from alienating the suit property till the final disposal of the present suit.

Subject matter of the present suit :-

02. The subject-matter of the present suit is **open plot bearing G.P. House No.1145 adm 28 x 32 sq ft** situated at village Andhori, Tq.Ahmedpur, Dist. Latur. It has the following boundaries :

Towards East - Place of defendant No.1 out of the H.No.1155;

Towards West - Place of defendants No.3 to 5 out of the H.No.1155;

Towards South - Way adm 8' width which is located in H.No.1155;

Towards North - House of deceased Ram S/o Munjaji Shingde

(Hereinafter referred to as '**suit property**' for the sake of brevity).

Facts pleaded by the plaintiff :-

03. The plaintiff and defendant No.1 are real brothers interse and defendant No.2 is wife of defendant No.1. Defendant

No.3 is mother of defendants No.4 and 5 and legal heir of deceased brother of plaintiff and defendant No.1 namely Rajendra S/o Baburao Mamdge. The father of plaintiff and defendant No.1 namely Baburao Gyanoba Mamdge died on 24.04.2023 and brother Rajendra died on 13.10.2014. The parties in the present suit are governed by Mitakshara School of Hindu Law.

04. The plaintiff got the suit property in partition which is effected in between plaintiff, defendant No.1, their deceased brother Rajendra and deceased father Baburao at the time of Gudi Padwa in the year 1999. The said partition was effected in presence of relatives, family members and village panchas namely Subhash S/o Nivrati Bembade, Namdev S/o Gyanoba Mamdge, Sambhaji S/o Yelba Nalwad and Tukaram S/o Mahada Lakangire. The memorandum of partition deed was effected on 15.05.1999 before Notary at Sr.No.90/99. Since the said partition, the plaintiff is lawful owner and possessor of the suit property.

05. The open place adm East-West 80 ft and South-North 40 ft bearing G.P. House No.1155 is purchased property out of Sy.No.31/1 out of joint family funds of Hindu joint family of plaintiff, defendants and deceased Baburao Gyanoba Mamdge through registered sale deed bearing D.B. No.1579/96 dated 01.06.1996. The said sale deed was executed in the name of defendant No.1 who is elder brother of plaintiff and deceased Rajendra. The said property was purchased from Uttam S/o Santram Shingade for consideration of Rs.10,000/- (Rupees Ten

Thousand Only). Out of the said property, defendant No.1 got the suit property adm 28 x 32 sq ft which is adjacent to plaintiff's place from eastern side and the husband of defendant No.3 i.e. deceased Rajendra got property adm 24 x 40 sq ft adjacent from western side of the suit property in partition.

06. On the basis of aforesaid sale deed, the said purchased total property bearing G.P. H.No.1155 was mutated in the name of defendant No.1 at Gram Panchayat record. The plaintiff is residing at Mumbai for his service since 1979 and he got the suit property in the family partition which is effected in the year 1999. But, defendant No.1 (elder brother of plaintiff) did not effect mutation as per the said partition in the name of plaintiff in respect of suit property. The plaintiff was having good faith on defendant No.1, so he has not inquired about the said mutation. Taking disadvantage of this fact, defendant No.1 illegally and with malafide intention mutated the name of defendant No.2 to the H.No.1155 in place of plaintiff's name in order to grab the suit property behind the back of plaintiff. The application for mutation on the basis of memorandum of partition deed in respect of suit property in the name of plaintiff is pending before G.P. Office, Andhori.

07. The defendants have no any right or concern whatsoever in the suit property. Defendants No.1 and 2 denied the ownership of the plaintiff over the suit property. They are trying to cause obstruction and interference in the peaceful possession of

plaintiff over the suit property and it is still continuous. They are also trying to grab the suit property, trying to alienate it to other persons and also trying to dispossess the plaintiff therefrom by threatening to kill him. If the present application is not allowed, the plaintiff will suffer an irreparable loss which cannot be compensated in terms of money. Therefore, he prayed to allow the application.

Facts pleaded by defendants No.1 and 2 :-

08. Defendants No.1 and 2 appeared and filed their written statement at **Exh.23**. They filed pursis below **Exh.24** and submitted that, their written statement below Exh.23 be treated as say of present application. They contended that, the plaintiff's suit is false, imaginary and against facts and law. They contended that, the boundaries of suit property shown by the plaintiff are false and also the sketch map annexed with the plaint is false.

09. They further contended that, the plaintiff got the share in the suit property in the said partition, but after fifteen days of the said partition, the dispute in respect of G.P.H.No.1155 adm 80 x 40 sq ft started in between plaintiff, defendant No.1, their deceased brother Rajendra and deceased father Baburao. So, the village panchas has settled their dispute amicably and in that re-settlement the whole G.P.H.No.1155 adm 80 x 40 sq ft came to the share of defendant No.1 and since then defendant No.1 was / is exclusive owner and possessor of the said house. They further contended that, the family disputes arose in between defendants

No.1 and 2, therefore, defendant No.1 has given his aforesaid house to the share as well as for the residence purpose of defendant No.2 in the year 2015 and since then defendant No.2 is exclusive owner and possessor of the said house. The plaintiff has no concern whatsoever in the said house of defendant No.2.

10. Defendant No.1 was in service as S.T. Driver and he purchased the disputed G.P. H.No.1155 from his own income / salary. However, he has suo-moto merged the said house in the joint family. They denied all other contentions of the plaintiff. Therefore, they prayed to reject the application with cost.

11. Heard Ld Advocate Shri B.B. Kshirsagar for the plaintiff and Ld Advocate Shri D.L. Ghogre for defendants No.1 and 2.

12. Following are the points for my determination along with my findings and reasons thereon.

SR NO.	POINTS FOR DETERMINATION	FINDINGS
1.	Whether plaintiff has a <i>prima facie</i> case ?	NO
2.	Whether balance of <i>convenience</i> lies in favour of plaintiff ?	NO
3.	Whether plaintiff will suffer an <i>irreparable loss</i> , in case temporary injunction is not granted ?	NO
4.	What order ?	Application is rejected.

Undisputed facts :-

- a) The relation between the parties to the suit and death of Baburao and Rajendra are not in dispute.
- b) The partition of landed and house property effected in between plaintiff, defendant No.1, their deceased brother Rajendra and deceased father Baburao at the time of Gudi Padwa in the year 1999 is not in dispute.
- c) The memorandum of partition deed executed on 15.05.1999 is not in dispute.

13. To substantiate his claim, the plaintiff has filed several documents on record along with list vide **Exh.04** and **27**. On the other side, defendant No.1 and 2 have not filed any documents on record to support their contention. The said documents will be referred at relevant time in the discussion. Pleading of parties are supported by their respective affidavits and present application is also supported by affidavit of plaintiff.

Arguments advanced by Ld Counsels for both the parties :-

14. Ld Advocates for both sides conducted argument at length. Ld Counsel for the plaintiff argued that, the partition was effected on the occasion of Gudipadwa in the year 1999 and in this regard memorandum of partition deed was executed. He invited the attention of the Court towards certain documents at Exh.04 such as notarized memorandum of partition deed, Namuna No.8-A etc. and argued that original owner of suit property is Uttam Shingade but in his place the name of her wife of defendant No.1

is written – how her name came on record is not specified. Further, he argued that, open plot adm 80 x 40 sq ft is purchased out of joint family funds from Uttam. He invited the attention of Court towards Para No.4 of written statement (Exh.23) and submitted that the fact of partition is admitted by defendants No.1 and 2. Again, he invited the attention of the Court towards Para No.9 (i) of written statement of defendant No.1 in R.C.S. No.4/2011 (Exh.4/5) which provides that oral partition effected in between plaintiff, defendants No.1, 4 and 7 and their father on the occasion of Gudipadwa. He further argued that, defendants No.1 and 2 have not filed their written statement with clean hands. On perusal of documents, it appears that, the plaintiff is the owner and possessor of the suit property vide memorandum of partition deed. The plaintiff has a prima facie case and also balance of convenience lies in his favour. If the present application is not allowed, the plaintiff will suffer an irreparable loss which cannot be compensated in terms of money. Hence, he prayed to allow the application.

15. On the other side, Ld Counsel for defendants No.1 and 2 argued that, for seeking claim of temporary injunction, it is necessary that plaintiff must show his possession on the suit property. He invited the attention of the Court towards Para No.2 of the plaint and Para No.3 of the present application (Exh.5) and argued that partition is admitted by defendants No.1 and 2. The whole suit property was given to defendants No.1 and 2

in partition. The whole suit property was purchased by defendants No.1 and 2 and it was included in the joint family property at the time of partition. He further argued that, suit property is in respect of G.P. H.No.1155 and invited the attention of this Court towards Para No.3 of the partition memo and other certain paragraphs and argued that, in partition memo there no where mentioned about G.P. H.No.1155. To this, Ld Counsel for the plaintiff replied it is clearly mentioned in plaint Para No.3 that the suit property is purchased from Uttam. He invited the attention of Court towards Namuna No.8 (Exh.4/1) and argued that from Column No.4 of the said Namuna No.8 it appears that defendant No.2 is in possession of the suit property. By taking undue advantage of T.I. order, the plaintiff will definitely dispossess defendants No.1 and 2.

16. Ld Counsel for defendants No.1 and 2 further argued that, the partition took place in the year 1999 and the suit is filed in the year 2021. Till the filing of the present suit, the plaintiff has neither tried to enter his name in revenue record nor challenged the ownership and possession of defendants No.1 and 2. The plaintiff has not come before Court with clean hands. The documents filed by plaintiff at Exh.4/4 and 4/5 are documents of another suit. Those documents cannot be referred in the present suit. So, defendants No.1 and 2 have a prima facie case and also balance of convenience lies in their favour. If the present

application is allowed, they will suffer an irreparable loss. Hence, he prayed to reject the application.

REASONS

AS TO POINTS NO.1 TO 3 :-

17. As Points No.1 to 3 are interlinked with each other, I prefer to discuss them together.

18. The Court while deciding the application of temporary injunction has to take a prima facie view from the material on record. *Prima facie* case does not mean that it must be shown in all probability that the plaintiff would succeed the suit. *Prima facie* case means that there must be a bonafide substantial question to be tried at the hearing and there is probability that the plaintiff will be entitled to the relief sought by him/her.

19. At this stage, it is necessary to see that, whether the plaintiff has a prima facie case or not. *Order XXXIX Rule 1 and 2 of the C.P.C. confers discretionary power on civil Court to grant temporary injunction where it is proved by affidavit or otherwise that, the suit property is in danger of being wasted, damaged or alienated by the party to the suit or where the defendant threatens to dispossess the plaintiff or to cause injury.* The purpose of granting temporary injunction is to protect the subject matter of suit during the pendency of the suit. But for getting the relief under this Rule, the plaintiff must prove that, he has a prima facie

case, the balance of convenience lies in his favour and more hardship will cause to him if injunction is not granted.

In view of aforesaid principle of law, now it is necessary to see, whether the plaintiff establish the requisite criterion for grant of equitable relief.

20. The suit is for perpetual injunction and declaration of ownership. It is the case of plaintiff that, he got the suit property in partition and accordingly he is lawful owner and possessor of the suit property. To support his claim, the plaintiff has filed on record the memorandum of partition deed (**Exh.4/3**) which reveals that, the said deed was executed between plaintiff, defendant No.1 Suryakant, their deceased brother Rajendra and deceased father Baburao and all the parties therein have consented to the said partition effected in the year 1999. In the said memorandum, it is stated they have two joint family houses bearing H.No.455 and 459 situated at Mouje Andhori. They also have two open plots. In regard to suit property, certain relevant lines from the memorandum of partition deed are reproduced below :

"१. आमची एकत्र कुटुंबाची दोन घरे असून त्याचे घर नं.४५५ व ४५९ मौजे अंधोरी येथे आहेत. तसेच दोन खुले प्लॉट आहेत.

२. तसेच खारीमध्ये उत्तम संतराम शिंगडे ४० x ८० फुट क्षेत्राचा प्लॉट नंबर दोन्ही सुर्यकांत बाबुराव मामडगेच्या नांवे खरेदी केला आहे. त्यामध्ये तिघांना नं.२ ते ४ यांना हिस्सा देण्यात आला आहे. त्यापैकी उत्तर-पश्चिम कोपऱ्यात राजेंद्र यास पुर्व-पश्चिम २४ फुट व दक्षिण-उत्तर ४० फुट जागा दिली आहे. त्याच्या पुर्वेस चंद्रकांत यास पुर्व-पश्चिम २८ फुट व दक्षिण-उत्तर

३२ फुट आहे..... चंद्रकांतच्या पुर्वेकडून लगत सुर्यकांत यास पुर्व-पश्चीम २८ फुट व दक्षिण-उत्तर ३२ फुट जागा आली आहे."

21. From the above paragraph / lines of the memorandum of partition deed, it appears that Rajendra got 24 x 40 sq ft share whereas both plaintiff and defendant No.1 got 28 x 32 sq ft each share in plots. But from this it is not clear whether the suit property was allotted to plaintiff or defendant No.1.

22. It is pertinent to note here that, the execution of the said memorandum of partition deed is not disputed. The only objection of the defendants No.1 and 2 is that, the suit property is given to the share of plaintiff in the partition, but thereafter some dispute in respect of G.P.H.No.1155 adm 80 x 40 sq ft arose and after settling the dispute, the whole G.P.H.No.1155 adm 80 x 40 sq ft came to the share of defendant No.1. But again, due to some dispute, defendant No.1 has given his aforesaid house to defendant No.2 and since then defendant No.2 is exclusive owner and possessor of the said house. On perusal of Namuna No.8 dated 26.11.2020 and 25.11.2020 (**Exh.4/1** and **4/2** respectively), there appears the name of defendant No.2 in ownership and Cultivation Column in respect of G.P. H.No.1155 adm 80 x 40 sq ft.

23. The written statement (**Exh.4/5**) filed by the plaintiff in R.C.S. No.11/2014 therein stated that, oral partition took place in between defendants No.1, 4 and 7 and their deceased father Baburao in respect of Gat No.28/1, 57/1 and 52/1 situated at village Narwatwadi, Tq. Ahmedpur, Dist.Latur. However, the suit

property in the present suit is open plot bearing G.P. H.No.1145 adm 28 x 32 sq ft situated at village Andhori, Tq. Ahmedpur. To this aspect, Para No.9 (vi) therein is of importance as it was stated therein that, defendants No.1, 4 and 7 has also partitioned the house property on the festival of Gudipadwa in the year 1999. As already discussed this fact is admitted by defendants No.1 and 2.

24. For the purpose of deciding the application for interim injunction, the Court has to see prima facie only, that too, on the aspect of possession only. Considering the aforesaid discussion, the plaintiff has failed to prove his possession over the suit property. Prima facie, this Namuna No.8 is more than sufficient to hold that the plaintiff has failed to prove his possession over the suit property. The documentary evidence, which is produced on record, definitely tilts the prima facie case in favour of defendants No.1 and 2.

25. The plaintiff alleged that defendants No.1 and 2 threatened to dispossess him from the suit property. As already discussed, the plaintiff failed to prove his possession over the suit property. In such circumstances, it is hardly to believe the fact of obstruction at the hands of defendants No.1 and 2. Further, the plaintiff alleged that, defendants No.1 and 3 are trying to alienate the suit property to any other person. As discussed above, prima facie the suit property is standing in the name of defendant No.2. It is to be noted that till date the defendants have neither created

third party interest nor attempted to create the same. Even during pendency of the suit for last more than three and half year, there is no effort from the side of the defendants No.1 and 2 to alienate the suit property. Mere apprehension is not substantial to prove the alienation. Merely because the defendants No.1 and 2 denied the theory of the plaintiff, one cannot jump to conclude that they might alienate the suit property, especially when there is no substance to substantiate the said apprehension.

26. The second important factor for consideration is that, whether balance of convenience lies in favour of the plaintiff. It is settled principle of law that, while determining the balance of convenience it is necessary to see that, who will cause more inconvenience or mischief. In the present matter, the plaintiff failed to prove prima facie case. Prima facie it appears that, defendant No.2 is in possession of the suit property. Whether the plaintiff is entitled for the relief of declaration of ownership and perpetual injunction or not is going to be decided in the suit. At this stage if the injunction is not granted, prejudice will not be caused to the plaintiff. Therefore, this Court is of the view that, if the injunction is not granted the plaintiff will not suffer hardship.

27. However, it is clarified that, refusal of grant of interim relief should not be construed to be a licence to create third party interest in respect of the suit properties. Needless to mention, any creation of right, title or interest in respect of the suit properties pending the suit shall be subject to the principle of lis pendence.

Accordingly, I answer Points No.1 to 3 in the Negative.

AS TO POINT NO.4 :-

28. In view of the above findings as to Points Nos.1 to 3, the application is liable to be rejected. As far as imposition of cost is concerned, it is not the proper stage to impose cost on any party. Therefore, it would be just and proper not to impose cost on any party at this stage and to include such cost in the final decision of the suit. Accordingly, I proceed to pass the following order.

O R D E R

1. Application (**Exh.05**) is rejected.
2. The costs of the application be included in final decision of the suit.

(Dictated and pronounced in open Court).

Place : Ahmedpur.

Date : 22.12.2023.

(Kanchankaur B. Gadiwale)

Jt. Civil Judge Junior Division,
(Court No.04) Ahmedpur,
Dist.Latur.