

	Order Below Exh.05 in Reg. C.S. No. 592 of 2021 (Passed on this 12 th day of October, 2023) Preeti & Anr. Vrs... Hariram and Anr. CNR NO.MHLA060025402021
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01] The plaintiffs/applicants have filed present suit for Partition, Separate Possession and Perpetual Injunction, coupled with an application is under Order XXXIX Rule 1 and 2 and under Section 151 of the Code of Civil Procedure (Hereinafter referred as 'CPC' for short) for temporary injunction against defendant No.01 for not to alienate the suit property, which is described in Para 01 of plaint, during the pendency of suit. (The applicants and non-applicants are hereinafter referred to as per their nomenclature in the suit i.e. plaintiffs and defendants.)

Plaintiffs Version:-

02] The property comprised in land bearing Gut No. 333 Adm. 03 Hector 21 Are, situated at Takalgaon (Kamkhed), Tq. Ahmedpur Dist. Latur. (Hereinafter referred as **'The Suit Property'** for sake of brevity) is subject matter of this suit and instant application.

03] To show the relations between the parties, the plaintiffs have described their relationship in the plaint. The plaintiff No.02 is legally wedded wife of defendant No. 01. The plaintiff No.01 is legitimate daughter of plaintiff No.02 and defendant No.01. Defendant No. 02 has made formal part to the suit. No relief has been claimed against him.

04] According to plaintiffs, the suit property is ancestral and joint family undivided property of plaintiffs and defendant No.01. They are members of Hindu Joint Family. There is no partition between them in respect of suit property. Defendant No.01 is 'Karta' of their joint family. They are co-parcener of their family. Parties are belongs from Hindu community and governed under the provision of Mitakshara school of Hindu Law. Plaintiff No.01 is claiming partition of ancestral property, therefore, the plaintiff No.02 is necessary party who has equal share in the suit property. Thus, she has incorporated as necessary party.

05] It is pleaded that, suit property and other properties has allotted to the share of defendant No.01 by oral partition took place in between their brothers *interse*. However, the share of defendant No.01 has been confirmed by decree in R.C.S. No.267/2005 dated 04/09/2005. Plaintiffs have relinquished their share in the properties mentioned in the para No.4-C to 4-E in the plaint. Further, pleaded that the land bearing Gat No.313 Adm. 48 R situated at village Takalgaon (Km.) was allotted the defendant No.02 in resettlement in between the defendant Nos.01 and 02 after the partition. Though, the said land recorded in the name of defendant No.01. Actually, the defendant No.02 is the owner and possessor of the said land. Therefore, defendant No.02 has incorporated as a necessary party to the suit.

06] Defendant No.01 was not looking towards the

plaintiffs since long back. He has kept by name Shobhabai. Now, he is residing with her. They have three illegitimate children. Their names are Kirti, Trupti and Girish. The marriage between plaintiff No.02 and defendant No.01 is an existence. Therefore, the illegitimate children and second wife have no right, interest in the suit property.

07] However, in order to deprive the plaintiffs from getting their share in the suit property, defendant No.01 is in haste to alienate the suit property. Being member of joint family, plaintiffs are having legal share in the suit property. So, on 15.10.2021 plaintiffs requested the defendant No. 01 to effect partition of the suit property in presence of the respectable panchas. However, defendant No. 01 refused to effect partition. Therefore, plaintiffs have no alternate then to file present suit. According to plaintiffs, the prima-facie case, balance of convenience lies in their favour and the irreparable loss would be caused to them, if the defendant No.01 is not restrained from alienating the share of the plaintiffs from suit property till final disposal of the suit.

Defendants Version:-

08] Defendant No.01 appeared and has filed his Written Statement at (**Exh.24**) along with documents. He has filed pursis below (**Exh.27**), and submitted that, his Written Statement at (**Exh.24**) be treated as say of present application. He has

admitted the relations between the parties and denied the rest of adverse allegations made against him.

09] According to defendant No.01, it is absolutely false that, the suit property is ancestral and joint family property of plaintiffs and him. It is contended that, suit property is not joint family property of plaintiffs and himself. The plaintiff No.01 is married with Kishor, so that, she is member of her husband's family. The plaintiff No.02 has no right to ask for partition. Defendant No.02 is not necessary party. Therefore, suit is bad for mis-joinder of parties. The property bearing Gat No.04 Adm. 85 R situated at Gangapur, Dist. Aurangabad has been purchased by defendant No.01 from his salary. Therefore, it is the self acquired property of defendant No.01. Thus, question of seeking partition in respect of said property does not arise to the plaintiffs.

10] According to defendant No.01, plaintiffs have relinquished their share in the all properties alongwith suit property. The marriage of defendant No.01 with Shobhabai is valid performed as per their customs. Thus, the children born to Shobhabai from defendant No.01 are legitimate. So that, they have shares and interest in the suit property. Therefore, they are necessary party to the suit. However, illegitimate children are also entitled to the share of suit properties.

11] Plaintiffs approached to defendant No.01 on

15.12.2009 and told that, they have no interest in the suit property and other properties. Plaintiffs ask to defendant No.01 to give one plot and out of Gat No.122 at village Mitmita and they told, they will not claim any share in the suit property and other properties. Thus, they have surrender their share before the panchas for the consideration of said plot.

12] Plaintiffs have suppressed material fact about the relinquished suit property and other properties to defendant No. 01. Therefore, they are not entitled to equatable relief as sought. It is contended by the defendant No.01 that, plaintiffs are not incorporated necessary parties to the present suit, so that suit is bar by law, due to non-joinder of necessary parties. They have further contended that suit is bad for non-inclusion of all the joint family property. On these and other grounds, defendants prayed for rejection of the application.

13] Perused the application and documents produced on record. Heard, Advocate Mr. S.N. Naikwade representing to the plaintiff No.01, Advocate Mr. S.B. Fad representing to the plaintiff No.02 and Advocate Mr. B.N.Poul representing to the defendant No.01. They have Advanced their arguments in consonance with their contention as plead.

14] In view of these rival contention of both parties and argument advanced on their behalf, following points arise for determination and I have recorded my findings against each of
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them for the reasons stated below :-

No.	Points For Determination	Findings
1.	Whether plaintiffs have <i>prima facie</i> case ?	... Affirmative.
2.	Whether balance of <i>convenience</i> are in favour of plaintiffs ?	... Affirmative.
3.	Whether plaintiffs will suffer <i>irreparable loss</i> , in case of refusal of injunction ?	... Affirmative.
4.	What order ?	...As per Final Order.

:- REASONS :-

15] To substantiate their respective contention both side have filed documents their reference can be discuss at relevant time. Pleading of parties are supported by their respective affidavits and present application is also supported by affidavit of plaintiff No. 01.

16] Before adverting to the controversial aspects, it is desirable to see the admitted position. Following facts are admitted ;

- a) They have admitted their relationship,
- b) The suit property was ancestral one,
- c) The marriage between plaintiff No. 02 and defendant No. 01 is not dissolved, but defendant No.01 pretended to marry with one Shobhabai. He is residing with said Shobhabai at the aforesaid mentioned address & have three children from her.

Since these facts are admitted, no need to be further discuss.

17] Needless to mention that for considering relief of temporary injunction Under Order XXXIX Rule 1 and 2 of the Code of C.P. the plaintiffs must prove existence of *prima facie* case in their favour and balance of convenience as well as question of irreparable loss is in their favour. Simultaneous burden of rebutting the case of plaintiff's is on the defendant No. 01. Hence, first of all, it must be seen as to in whose favour *prima facie* case is.

Point No. 01 :- (Prima facie case)

18] It is a substantial question raised bona fide, which needs investigation and decision on merits. The plaintiffs have come with case that, suit property is an ancestral property. They are having undivided shares in the suit property. The partition of suit property has not been taken place amongst plaintiffs and defendant No. 01 till today.

19] The defendant No. 01 is taking disadvantage of the fact that his name is appearing in the revenue record of the suit property. He intends to create third party interest in the suit property, in order to deprive the plaintiffs from getting their share. So, plaintiffs seek partition, separate possession and perpetual injunction of the suit property.

20] However, the defence is bold that the plaintiffs have relinquished their right in the suit property in favour of

defendant No.01. Plaintiffs are not incorporated to the legitimate children of defendant No.01. Thus, the suit is hit by the principles of *non-joinder* of necessary parties. Defendant No.01 being husband of plaintiff No.02 is alive as of today. Then plaintiff No.02 cannot ask for partition during his life. No doubt, tenability suit is core question and real controversy in this suit. In order to resolved it, there is need of more evidence. At this initial stage, the Court may not come into conclusion regarding the same.

21] First of all it would be need to see that, the plaintiffs have established the status of suit property as pleaded and second one is that, defendant No. 01 is trying to create third party interest in the suit property. Let us, consider whether above two facts are prima-facie proved by the plaintiff.

22] According to plaintiffs, suit property is ancestral property. There was no partition took place regarding suit property. The defendant No. 01 denied that, suit property is ancestral. Defendant No. 01 is contented that plaintiffs have orally relinquished their shares, so that they have no whatsoever any right to claim partition. It may be emphasized here that there is no registered document to as relinquished share.

23] Ld. Adv. of plaintiff No. 02 has placed his reliance on the ratio laid down by the Hon'ble Apex Court in **Yellapu Uma**

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wherein the Hon'ble Apex Court has held that, "as per Section 17 (1)(b) of Registration Act, 1908 mandate that, relinquished deed or any other documents which has the effect of creating and taking away the rights in respect of an immovable property must be registered and Section 49 of the Act imposes bar on the admissibility of an unregistered document and deal with the document that are required to be registered under section of the Act".

24] The mandate laid down by the Hon'ble, Apex Court in case of Yellapu Mahegswari's the relinquished deed or any other documents which has the effect of creating and taking away the rights in respect of an immovable property must be registered. But in the present there is no registered deed of relinquishment. The defendant No. 01 has not adduced any such document that, the plaintiffs have in fact relinquished their rights in suit property. Thus, the contention as regards to the relinquishment of shares, at this prima-facie stage at all not acceptable.

25] Another contention that, defendant No. 01 has three children from Shobhabai. Their names are Kirti, Trupti and Girish. Though, they are illegitimate children, they are necessary parties to the suit. Thus, the suit is hit by the principles of *non-joinder* of necessary parties. Mr. S.B. Fad representing to the plaintiff No. 02 submits that, illegitimate children have rights in the property parents in view of Section 16(3) of the Hindu

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Marriage Act. They are not coparcener, they can not ask partition. Thus, they are not necessary parties to the suit.

26] The Ld. Advocate for plaintiff No. 02 has sought reliance on the ratio laid down in **Revanasiddappa and others ..Vrs.. Mallikarjun and others, (Civil Appeal No. 2844) decided on 01.09.2023,** The Hon'ble Divisional Bench of the Hon'ble Apex Court made reference to Full Divisional Bench of the Hon'ble Apex Court, “wherein Three Divisional Bench of the Hon'ble Apex Court has held that illegitimate children are entitled to the shares in both self-acquired and ancestral property of their parents, but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property. During the life time of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents.”

27] In our case, the defendant No.1 and Shobhabai are parents of illegitimate children. As a matter of record, both are alive as of today. In view of observations of Hon'ble Apex Court in **Revanasiddappa's** case (*cited supra*), the illegitimate children – cannot ask for partition during life-time of their parents but they can exercise such right only after the death of their parents. In the circumstances, prima-facie appears that, illegitimate children are not necessary parties to the present suit.

28] Last contention is that, defendant No.01 being husband of plaintiff No. 02 is alive as of today. Then plaintiff No.2 can not ask for partition during his life. Admittedly, the claim of partition is opened by the daughter that is coparcenar. At this juncture, I would like to note here that, Article 315 page No. 487 Mulla's Hindu Law, '12th Edition', a wife can not herself demand a partition of Hindu Undivided Family Property; but if a partition does take place between her husband and her son, she is entitled to receive a share equal to that of sons. Therefore, it is clear that the plaintiff No.02 is necessary party along with other parties. Thus, the contention of mis-joinder of parties at this prima-facie stage at all not acceptable.

29] However, the tenability of suit is core question and real controversy in this suit. In order to resolved it, there is need of more evidence. At this initial stage, the court may not come into conclusion as regarding the tenability of suit. At this stage, there is no prima-facie material on the record to support the defence. The plaintiffs are adduced copy of 7/12 extract of suit property. It reveals that, the suit property is in name of the defendant No. 01. There is no prima-facie evidence on record, about their separation and defendant No. 01 absolute owner of suit property. As mentioned earlier, there is no dispute regarding the relationship between the parties. Therefore, the pleadings of plaintiffs regarding the status of property is acceptable at all even at prima-facie stage of the suit.

30] Now there is second point, defendant No. 01 trying to create third party interest. Mr. B.N.Poul representing to the defendant No. 01 submits that, the defendant No.01 is old age. He suffered from old age deceases. Therefore, he is need of money for his medical treatment. He is unable to do work. He is absolute owner of suit property. Thus, he has every right to dispose off the property as per their choice. Further, submits that, there is sufficient protection under Section 52 of the Transfer of Property Act provides to the plaintiffs, if the suit is registered in the sub registrar Office.

31] He has placed his reliance upon the observation of the Hon'ble High Courts in case **Mukhtar Khan Akram Khan .. Vrs.. Abdul Talib Abdul Wahed (Mh.L.J. 2015 (6) 931)** and **in case of Kachhi Properties.. Vrs.. Ganpatrao (Mh.L.J. 2010 (5) 905)** “Wherein the Hon'ble High Courts has held that, the Section 52 of the Transfer of Property Act is provides adequate protection to the parties from transfers pendente lite, since such transferees are not required to be, or entitled as of right to be.” Thus, it is clear that the protection under Section 52 of the T.P. Act is sufficient to the plaintiffs.

32] On the otherwise, the Ld. Advocate Mr. S. B. Phad representing the plaintiff No. 1 submits that, the observation held by the above cited supra cases are Hon'ble High Court of single Judge Bench and old one, he has placed his observation of

the Hon'ble full Division Bench of the Hon'ble High Court in case of **Shri Prakash Ahuja.. Vrs.. Ganesh Pandhari Dhonde &**

Ors. (Civil Appeal No. 256 of 2013) decided on 04.10.2016.

The Hon'ble Single Judge of the Hon'ble High Court made reference to Full Divisional Bench of the Hon'ble High Court, “The Full Divisional Bench of the Hon'ble High Court has held that, registering notices of suits under Section 18 of the Indian Registration Act secures more protection for plaintiffs than an injunction. It is not inappropriate to expect a plaintiff seeking temporary injunction to show that Section 52 of the Transfer of Property Act does not afford adequate protection before an injunction to restrain transfer pendente lite is issued. Rule 1 of Order 39 of C.P.C demonstrates that there can be occasions for the grant of injunction restraining pendente lite transfers in a fit and proper case, notwithstanding the Rule of its pendens in Section 52 of the T.P. Act. Section 52 of T.P. Act does not provide adequate protection to the parties from transfer pendent lite. In case of conflict between the decisions of co-ordinate benches, the earlier decision in point of time should be followed and applied by the Subordinate Courts to the facts and circumstances of a case before it.

33] In view of later observation of the Full Divisional Bench of the Hon'ble High Court is fruitful to the present case. As regards to contention of the defendant No. 01 that, he has ever right to sale the suit property. It is undisputed fact that,

defendant No. 01 is cultivating the suit property. Likewise, he has another property, he is also pensioner. It means that, the economical condition of the defendant No. 01 is better than from the plaintiffs. As the suit property is standing in the name of defendants No. 01 and he has denied the status of property. It is apprehending to plaintiffs that, defendant No. 01 will create third party interest in the suit property is also acceptable one.

34] It is well settled principle of Law co-parceners i.e. plaintiff No. 01 can be claim share in the ancestral and joint family property. Likewise, the plaintiffs are the member of joint family and their joint family are intact. Therefore, I have no hesitation in holding that, the plaintiffs have succeeded to prima-facie proving that, the status of suit property. Hence, they are having prima-facie case. Thus, the prima-facie case is in favour of plaintiffs. In the result, **Point No. 01 is answer in the Affirmative.**

Point No.02 (As to Balance of convenience):-

35] This point pertain to the comparative inconvenience to the parties. The inconvenience to the plaintiffs, if temporary injunction is refused be balanced and compared with that to defendant No.01 if it is granted. In view of affirmative finding to Point No.01, the prima-facie case is in favour of plaintiffs. In the circumstances, inconvenience would cause to the plaintiffs, in case of refusal of temporary injunction. In the contrary,

defendant No.01 is cultivating and yield the income of the suit property. He has sufficient source for fulfill his needs. Therefore, if defendant No.01 retrained from creating third party interest in respect of suit property will not cause an inconvenience. Thus, the point of balance of convenience is in favour of the plaintiffs. In the result, **Point No. 02 is answer in the Affirmative.**

Point No.02 (As to Irreparable loss):-

36] Irreparable loss means injury, which can not be adequately remedied by damages. In view of above discussion and affirmative findings to the point Nos. 01 and 02. It is clear that, the prima-facie and balance of convenience is in favour of plaintiffs. On the contrary, if injunction is granted it will have an irreparable loss of the plaintiffs because, the plaintiffs have right in the suit property. If such relief is not granted then, they will never allow defendant No. 01 to initiate any recourse of law to claim the partition in suit property. Thereby, I found that the plaintiffs will suffer irreparable loss, if injunction is not granted. Thus, point of irreparable loss is also in favour of plaintiff. In the result, **Point No. 03 is answer in the Affirmative.**

Point No. 04 :- (What order)

37] In the backdrop of above discussions and in view of my findings on Point Nos.01 to 03, it is crystal clear that, the plaintiffs have succeeded to established the three essential ingredients in their favour. Therefore, they are entitled to get

temporary injunction only against the defendant No. 01 till the decision of suit as the suit property in his name. Hence, in the result and my finding to **Point No. 04, I proceed to pass following order:-**

:-ORDER:-

- 1.** Application below (**Exh.05**) is allowed.
- 2.** The defendant No. 01, and his agents, servants are hereby restrained temporarily not to alienating or creating third party interest in any manner over the suit property bearing **Gut No. 333** Adm. 03 Hector 21 Are, situated at Takalgaon (Kam.), Tq. Ahmedpur Dist. Latur, till the final decision of this suit.
- 3.** The costs of the application be included in final decision of the suit.

(Dictated and pronounced in open Court)

Place :- Ahmedpur,

Date :- 12.10.2023.

(Shyam S. Tondchire)

IIIrd Joint Civil Judge (Jr.Dn.)

Ahmedpur.