

MHND100009602021

**ORDER BELOW EXH. 05 in RCS No. 103/2021****(Passed on 17th day of February - 2022)**

Needless to mention that, plaintiff come up with the suit for partition and separate possession, wherein he filed the present application under Order-XXXIX, Rule-1 and 2 of the Code of Civil Procedure (In short, it will refer as “CPC”).

2. As per plaintiff, defendants are his brother. His father Narharrao s/o Jayrampant Ganjre was in service of post office, who died on 10.11.2010. The mother of plaintiff and defendants was Nilawatibai, who died on 6.08.2016. As per plaintiff, the house property bearing property no. 105 (old property no. 108) was in the name of his father Narharrao s/o Jayrampant Ganjre. Other two properties i.e. property bearing no. 104 (old property no. 106), property no. 106 (old property no. 108-1) are in the name of his mother Nilawatibai. These properties are ancestral properties of plaintiff and defendants. (The said properties are more particularly described in the plaint clause, therefore it is referred as 'suit property' here-in-after.)

3. Deceased Narharrao Ganjre was bedridden prior to his death. Due to his old aged, he was not having perceptive as a general human being. As per plaintiff, defendant no. 4 Manoj Ganjre in

collusion with concerned official registered the property no. 105 (old property no. 108) in his name, without the knowledge and consent of plaintiff, his brother and mother. Recently plaintiff came to know about the said act of defendant no. 4, therefore, he along-with other defendants approach to the Nagar Parishad Office, Kandhar wherein he get confirmed the said fact. Therefore, on 14.07.2019 plaintiff ask defendants for his share in the suit properties. However, defendant no. 4 refuse the share of plaintiff in the property no. 105 (old property no. 108). As per plaintiff, defendant no. 4 would lease or gift or sell the said property during trial, and same will cause great loss to him. Therefore, he prayed for temporary injunction.

4. Defendant no. 4 resisted the present application by filing say at Exh. 25. Thereby, he denied the adverse contention of plaintiff. However, he admitted the relationship between plaintiff and defendant as a brother. Moreover, he admitted that deceased Narharrao Ganjre and Nilawati was their father mother, respectively. He admitted that, property no. 105 (old property no. 108) in the Nagar Parishad of Kandhar was in the name of Narharrao Ganjre. So far as, other property i.e. property no. 104 (old property no. 106) and property no. 106 (old property no. 108-1) were in the name of his mother Nilawatibai. Though, it is so as per defendant no. 4, on 14.12.2009 deceased Narharrao Ganjare had partitioned property no. 105 (old property no. 108) in his favour, wherein, plaintiff, other defendants, their mother and sister have relinquished their share in his favour. Consequently, the said property is registered in his name in the office of Nagar Parishad, Kandhar by Narharrao Ganjare. As per defendant no. 4 Narharrao Ganjre with the consent of plaintiff, other defendants, Nilawatibai and his sister give the said property to

him by way of partition. Prior to registered the said property in his name all formalities thereof is duly complied. The said fact is not revealed by the plaintiff in his case, which shows that plaintiff does not come before the court with clean hand. Moreover, as per defendant no. 4, plaintiff has knowledge that, defendant no. 4 is in possession of property no. 105 (old property no. 108) since long. He acquiesces to the possession of defendant no. 4 on the said property. So far as, other two properties in the suit are concerned, defendant no. 4 admitted that, these properties are joint family properties of plaintiff and defendants. There is no partition in respect of these two properties till date. In addition, defendant no. 4 contended that, if, plaintiffs would have any grievance against defendant no. 4 in respect of property no. 105(old property no. 108), then he was supposed to come before the court within a limitation. It is therefore, on the said grounds, there is no right accrued to the plaintiff to ask partition in property no. 105 (Old property no. 108), therefore, defendant no. 4 sought for rejection of the present application.

5. So far as say of other defendants are concerned, they filed no such say to the present application. Therefore, the application is proceeded without their reply.

6. I heard learned advocate for the plaintiffs Shri. D.G.Kutte and learned advocate for defendant no. 4 Shri A.G. Puranik at considerable length. I have gone through the application, say and documents filed alongwith. Following points arise for my

determination, wherein I record findings against each of them for the reasons stated thereunder :

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
[1]	Whether the plaintiff prove prima facie case in his favour ?	Yes.
[2]	Whether balance of convenience lies in favour of the plaintiff ?	Yes.
[3]	Whether the plaintiff would suffer an irreparable injury, if his prayer for temporary injunction is disallowed ?	Yes.
[4]	What order?	<i>Application is allowed as per final order</i>

REASONS

7. Plaintiff in order to prove the aforesaid three essential factors or points filed on record the certified copies of Namuna no. 43 of property no. 106, 108, 108-A at Exh. 7 Sr.Nos. 1 to 3 respectively, the application of defendant no. 4 dated 16.12.2021 to Nagar Parishad, Kandhar to measure the property no. 105, the application of the plaintiff dated 17.12.2021 to Nagar Parishad, Kandhar, thereby objecting to issuance of such measurement certificate in favour of defendant no. 4, application to receive the copy of application of defendant no. 4 to measure property no. 105 at Exh. 35 Sr.Nos. 1 to 3, respectively.

8. On the other hand, defendant no. 4 in support of his defence filed on record the xerox copies of partition deed dated

14.12.2009 (Exh.49/1), relinquish deed dated 14.12.209 (Exh. 49/2), application of defendant no. 4 to Nagar Parishad, Kandhar dated 12.01.2020 (Exh.49/3), the copy of proclamation issued by Nagar Parishad, Kandhar on 1.2.2010 (Exh. 49/4), the paper proclamation dated 15.12.2010 (Exh.49/5), the notice issued to defendant no. 4 by Nagar Parishad, Kandhar dated 8.4.2010(Exh.49/6), copies of Roznama dated 17.4.2010 before Nagar Parishad, Kandhar (Exh. 49/7), the order of Nagar Parishad, Kandhar dated 15.11.2010 (Exh.49/8), the copy of order given to defendant no. 4 by Nagar Parishad, Kandhar dated 15.11.2010 (Exh.49/9).

Point Nos.1 to 3 :

9. It is well settled that, for grant of temporary injunction three factors have to be satisfied, which are prima facie case, balance of convenience and an irreparable injury. Prima facie case does not mean that the plaintiff should have cent per cent case which in all probability succeed in trial. Prima facie case means contention which the plaintiff is raising, require consideration in merit and are not liable to be rejected summarily. It is well settled that, for grant of temporary injunction three factors have to be satisfied, which are prima facie case, balance of convenience and irreparable loss. The Hon'ble Apex Court in the case of **Dalpat Kumar vs. Pralhad Singh, AIR 1993 SC 276**, explained these three factors as follows :

- i) There is a serious disputed question to be tried in the court and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/ defendant.

- ii) The Court's interference is necessary to protect the party from the species of injury. In other words irreparable injury or danger would ensue before the legal right would be established at the trial and,
- iii) That the comparative hardship on mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to acted from granting it.

It is thus, in the light of said provision, the case of the plaintiff is required to be adjudged.

10. Thus, in order to show the prima facie case in favour of plaintiff, the learned advocate for plaintiff argued in consequence with the contention in the application. He argued that, suit properties are their ancestral properties. Out of suit properties, property no. 105 (old property no. 108) was in the name of his father Narharrao Gajre. Narharrao Ganjre died on 10.11.2010. Other two properties out of suit property i.e. property no. 106 (old property no. 108/1) and property no. 104 (old property no. 106) were in the name of his mother Nilawati, who died intestate. It is thus, the suit properties are ancestral properties of plaintiff and defendants being the heirs of deceased Narharrao and Nilwatibai.

11. As per plaintiff, defendant no. 4 in collusion with the concerned official of Nagar Parishad, Kandhar entered his name in respect of one of the suit property no. 105 (old property no. 108) in the Namuna no.-43 in the office of Nagar Parishad, Kandhar. Defendant no. 4 did so without the consent and knowledge of plaintiff

and other defendants. As per plaintiff, till date there is no partition taken place between them in respect of suit properties. When, plaintiff came to know about such illegal act of defendant no. 4, he alongwith defendant nos. 1 to 3 went to the office of Nagar Parishad, Kandhar and confirm the said fact. Thereafter, on 14.7.2019 the plaintiff ask for partition in the suit property to defendants in presence of witnesses. However, they refused for partition of suit property.

12. To negate the said fact, defendant no. 4 submits in consonance with his pleading. Thereby, he denied that, property no. 105 (Old property no. 108) is not partitioned. On the contrary, the learned advocate for defendant no. 4 argued that, property no. 105 (Old property no. 108) was in the name of deceased Narharrao Gajre. During his life time on 14.12.2009 with the consent of plaintiff, defendant nos. 1 to 3 and his mother Nilawatibai gave the said property to defendant no. 4 by executing partition deed, which is scribed on bond of Rs.100/-. Moreover, he argued that, as plaintiff, defendant nos. 1 to 3, his sister Savita Khadke and mother Nilawatibai consented to enter his name in respect of property no. 105 (old property no.108), Nagar Parishad, Kandhar having observing all formalities thereof, enter his name in Namuna No.43. In support of his submission, he relied upon the documentary evidences at Exhs. 49/1 to 49/3. After going through the said documents, it appears that, plaintiff, defendant nos. 1 to 3 and Savita Khadke and Nilawati Ganjre allegedly consented to give the property no. 105 (old property no. 108) to defendant no. 4 and, it is therefore, Narharrao Gajre gave such property. Though it is so, the very existence of such partition deed (Exh.49/1), consent deed (Exh.49/2) etc. are denied by

plaintiff. In such circumstances, it appears that, plaintiff is not agreed that, property no. 105 (old property no. 108) is given with his consent by his father Narharrao to defendant no. 4. Moreover, it is pertinent to mention that, defendant no. 4 nowhere in his pleading denied that suit properties are not ancestral one. On the contrary, when the court question the learned advocate for defendant as to state specifically about the nature of property no. 105 (old property no. 108) at that time he orally submits that, the said property was ancestral property but, it has given by deceased Narharrao Ganjre with the consent of plaintiff and other defendants, to defendant no.1 by way of partition.

13. Admittedly, the submission of such fact by learned advocate for defendant no. 4, shows for the sake of present application that, property no. 105 was ancestral property of parties to the suit. If it is so, having regard to the nature of suit, it deems just and expedient to protect the said property from future alienation by any manner.

14. So far as, apprehension express by the plaintiff as to alienation of property no. 105 (Old property no.108) at the hands of defendant no. 4 is concerned, the learned advocate for plaintiff argued that, defendant no. 4 is going to sell out the said property to the third person. It is therefore, on 16.12.2021 defendant no. 4 had applied to Nagar Parishad, Kandhar to receive the measurement certificate of the property. In support of the said fact, the learned advocate for plaintiff filed on record the certified copy of such application at Exh. 35/ 1. After going through the Exh. 35/1 it appears that, what has been stated by the plaintiff as to the collection

of such measurement certificate by defendant no. 4 from Nagar Parishad, Kandhar, is true. So far as, the purpose to apply such certificate by defendant no. 4 is concerned no satisfactorily explanation advanced by defendant no. 4 during his submission. In such circumstances, in my view in the fact and circumstances involved in the case at hand the possibility expressed by the plaintiff as to the alienation of property no. 105 (old property no. 108) appears to be genuine and trustworthy.

15. To establish that, plaintiff does with not with clean hand, the learned advocate for defendant no. 4 argued that, plaintiff suppress the material fact as to the partition of property no. 105 in his favour by Narharrao Ganjre, and plaintiffs and defendants had one sister, therefore plaintiff is not entitled to the relief of temporary injunction. In this regard, it is pertinent to mention that, nowhere plaintiff asserted the existence of such partition deed executed by deceased Narharrao Ganjre in his favour. Moreover, the partition deed as filed by the defendant no. 4 is not sufficiently stamped and unregistered document. No doubt, unregistered document can be relied upon for collateral purpose but, insufficiently stamp document cannot be relied for the same. Admittedly, here in the case at hand it appears that, alleged partition deed and consent deed dated 14.12.2009 (Exhs.49/1 and 49/2) are not insufficiently stamped, therefore, it cannot be considered while deciding the present application, and same is not helpful to defendant no.4 at this stage. So far as hiding their sister in the suit is concerned, it can be considered during trial, in the light of substantive proof. Therefore,

the submission of learned advocate for defendant no. 4 as to hiding such facts by plaintiff is not considered at this stage.

16. It is thus, from the record, it appears that defendant no. 4 is in the possession of property no. 105 (old property no.108) as on today. Looking to the nature of suit and relief therein claims by the plaintiff, it is expedient to preserve the nature of suit, as it is on today. No doubt, if defendant no. 4 sell out property no. 105 to third person, then it will create complexity in the matter and will affect the interest of plaintiff adversely. On the contrary, if defendant no. 4 is restrained temporarily from alienation of property no. 105 (Old property no.108) no prejudice will cause to him. It is thus, in the fact and circumstances in the case at hand, it appears that, there will be great loss caused to plaintiff if temporarily injunction would not grant in his favour, as compared to defendant no. 4.

17. It is thus, from the aforesaid discussion, it appears that plaintiff sufficiently bring on record that, he has a concluded right which require adjudication from the court. Till then it is expedient to preserve the nature of property, which is in possession of defendant no. 4. If, it is not done, the great loss will cause to plaintiff nor to defendant no. 4. This is nothing but fact which shows a balance of convenience in favour of plaintiff and irreparable loss to him. It is thus, the plaintiff sufficiently bring on record, three basis material facts essential for granting temporary injunction, as provide in case of Dalpat Kumar cited *supra*; therefore, I answer point nos. 1 to 3 in the affirmative.

18. Considering the findings of Point Nos.1 to 3, it appears that in order to preserve the nature of property and to avoid complicity in the matter, it is just to prevent defendant no. 4 from future alienation of one of the suit property no. 105 (old property no. 108) situated at Nagar Parishad, Kandhar. Hence, plaintiff is deserved for temporary injunction against the defendant no. 4 till adjudication of the case at hand. Hence, in response of answer to Point No.4, I proceed to pass the following order :-

Order

- (i) Application (Exh.05) is allowed.
- (ii) Defendant no. 4 or anybody claiming on his behalf are hereby temporarily restrained from alienating one of the suit property i.e. property no. 105 (Old property no.108), situated at Nagar Parishad, Kandhar in any manner till final disposal of the suit.
- (iii) Cost will follow in main cause.

Date : 17.02.2022

(P. D.Azade)
2nd Jt. Civil Judge, (Jr.Dn.),
Kandhar.