

ORDER BELOW EXH.05 IN R.C.S. No. 44/2021

01. The present suit has been filed by the plaintiff against the defendant for declaration and for permanent injunction.

02. The brief facts of the plaintiff's case are as follows:-

That, plaintiff and defendant are the real brothers, but living separately. That, there was a memorandum of partition executed between plaintiff and defendant on 24.11.2010 which was notarized bearing notary no.669/2010, and according to said memorandum, the plaintiff was given half the share to the tune of 02H.73R of the northern side in Gut no.14 having area of 05H.46R, on the other hand the southern part was given to defendant Dattaram. Similarly, 02H.60R out of 05H.21R in Gut no.44 on the northern side was given to plaintiffs and southern side area of 02H.61R was given to defendant Dattaram, and accordingly they are in possession and they are separately taking crops in it. However, now the defendant is obstructing and interfering and trying to eject out the plaintiff. Hence, the present suit and application at Exh .05.

03. The defendant has appeared on issuance of suit summons to him and resisted the claim of the plaintiff by filing his Written Statement vide Exh No.28 and adopted the said W.S. as say to Exh

No.05, by filing his pursis vide exh No.17.

04. It has been specifically pleaded by the defendant, that the plaintiff has no ownership and possession of the whole of the suit property. On other hand as per 7/12 extract defendant has ownership and possession of gut No.14 to the extent to of 05H.46R which was given to him from his grandmother Laxmibai and his name was mutated on 13.01.2007. On the other hand, the whole of 05H.21R of Gut no.44 is in the ownership and possession of plaintiff, received as share in ancestral property, and they respectively are cultivating the respective lands.

05. It is specifically further by defendant admitting the execution of the memo of partition (signing) on 24.11.2010, but claimed that it was not executed or acted upon as plaintiff refused to give maintenance amount to grandmother Laxmibai, as agreed upon by them. Hence, the said document is canceled by declaration in public. That, no mutation was done as per the said memorandum of partition. Hence, the suit be dismissed and application be rejected.

06. Following points arise for my determination and I have recorded the findings against each of them, with following reasons as under:

POINTS

FINDINGS

1. Whether plaintiffs proves a prima-facie case in his favour ? ...In the negative.
2. In whose favour balance of convenience lies ? ...In favour of defendants.
3. Whether plaintiff proves that he will suffer irreparable loss if the injunction is refused ? ...In the negative.
4. What order ? As per final order.

:: REASONS ::

07. The plaintiff has filed an affidavit vide Exh.06, on the other hand the defendant has filed an affidavit vide Exh.28/1 and exh No.16. So there is an oath against oath, hence the prima-facie case will have to be gauged from the documents filed on record.

AS TO POINT NO.01 :-

08. The plaintiff has filed list of document vide Exh.07, he has filed 06 documents, first one is the certified copy of 7/12 extract of the Gut No.14, second and third document is certified copy of form no.08-A of Gut no.14 and Gut no.44, respectively, fourth document is the certified copy of 7/12 extract of the Gut No.44, fifth document is notarized partition-deed, sixth document is Adhar card. Similarly, the plaintiff had filed other two documents vide exh No.22, and one document vide Exh no.27, the first one 22/1 is letter by Tahsildar, and the second is the latest 7/12 extract of the gut No.14, the certified copy of mutation entry no.161 was filed vide

exh no.27/1. On the other hand, the defendant has filed the 7/12 extract of Gut No.14 vide Exh no.20/1, form no.08-A vide Exh no.20/2, and bank account statement vide Exh No.20/3.

09. It is pertinent to note here, that this court had directed both the parties to give better particulars of how there were two separate 7/12 extracts, separately in their respective names prior to the admitted partition deed of 2010, and how they were mutated and on what basis/grounds. This order was passed on 09.06.2022, on exh no.01. Subsequently, the defendant has amended the W.S. by order dated 17.01.2023 and incorporated such pleadings, however, the plaintiff did not explain such dichotomy for reasons best known to him.

10. It is pertinent to note here that the plaintiff has filed the 7/12 extract of both the properties and there is name of plaintiff only on 7/12 extract of gut no.44, and defendant only on gut no.14. The reasons for the same appears to be the partition in favour of plaintiff by his father Kondiba Hullappa, which was mutated vide mutation entry no.161 which is at Exh no.27/1, and which shows that 06H.R area was given to plaintiff out of the whole property in the year 1987 or something. It was given effect to and due to which only name of plaintiff is there in gut no.44, whereas no such document is produced by the defendant to show that such property bearing gut

no.14 was given to him by his grandmother Laxmibai, as claimed by him. No mutation entry to that effect, however, the 7/12 extract has presumptive value and it shows the ownership and possession of defendant to 05H.46R land of gut no.14. This presumptive value has not been rebutted by the plaintiff.

11. Even if such is the case, there is an admission of subsequent partition deed between plaintiff and defendant executed on 24.11.2010, the copy of which is filed vide Exh no.07/5. However, defendant claims that it was canceled by declaring publically. In the opinion of this Court such partition deed can not be canceled by such mode. It is written document and a written contract which has to be canceled by written mode only, which is not done in this particular case by the defendant. Therefore, the cancellation can not be presumed, as claimed by defendant. However, the said partition deed was not executed upon or acted upon. There is no effect given to such partition deed in the revenue record and neither there is any proof that parties have acted upon it and partition took place, between the parties and separate possession or exchange of possession had also taken place. Therefore, even if the document is not canceled, it is not shown to have been acted upon by the plaintiff. Hence, the possession has remained as it is, and similarly no ownership accrued as the memorandum of partition was not acted upon. Therefore there is no

prima-facie case in favour of the plaintiff. Hence, the point no.01 is determined in the negative.

AS TO POINT NO. 02 and 03 :-

12. Since the points are inter-related, they are discussed together. Since point No.01 is determined in the negative, the plaintiff has failed to prove a prima-facie case in his favour. The ownership declaration, as sought by the plaintiff has not materlised as yet, as the partition memorandum has not been acted upon. The plaintiff is still the owner and possession of Gut no.44 only, and therefore, the basis of partition cannot be taken into consideration and the possession of Gut no.14 is also not proved by him, to be in his possession. Therefore, there is no cause that the plaintiff would suffer any substantial mischief if the injunction application is rejected, then compared to the mischief which might be caused to the defendant, if the injunction is allowed. Therefore the balance of convenience is in the favour of defendant and not the plaintiff. The plaintiff is not likely to suffer substantial mischief or irreparable injury and therefore the point no.02 and 03 are determined in the negative, as well.

AS TO POINT NO.4 :-

13. On equitable considerations and as the point Nos.01 to 03 are determined in the negative, and as the plaintiff has failed to

prove a prima-facie case in his favour, hence, considering the conduct of the plaintiff, the application is liable to be rejected with the following order as under;

ORDER

1. Application at Exh.05 is hereby rejected.
2. Costs in cause.

Sd/-

(Amitabh A.Panchbhai)

Civil Judge, Senior Division, Bhokar.

Dated: 04.12.2023

CERTIFICATE

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	:	S. S. Gholap (Jr. Clerk)
Court Name	:	Civil Judge, Sr. Division, Bhokar
Date	:	04.12.2023
Order signed by the Presiding officer on	:	08.12.2023
Order uploaded on	:	08.12.2023