

Regular Civil Suit No.25/2017
(CNR No.MHNG14-000348-2017)
Suryakant & others/Madhav & others

ORDER BELOW EXH.5

(Passed on 17th day of August, 2018)

1. By way of this interlocutory application filed under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, the plaintiffs have sought two reliefs against the defendants i.e. first to restrain the defendants, their servants, agents or any person acting on their behalf from obstructing peaceful possession of plaintiff over the field bearing survey no.434, admeasuring 3.33 HR situated at mouza Parseoni, Tahsil-Parseoni, District-Nagpur (hereinafter referred as “suit property” for the sake of brevity) and second to restrain them from creating any third party interest in the suit property till the disposal of this suit.

2. According to the plaintiffs, defendants are their relatives. The father of plaintiffs namely Janrao Vyankatrao Tarar had got the entire suit property by way of oral partition that took place prior to 1949. The brothers of Janrao Tarar and Ramchandra Tarar have got the other agricultural field properties as per the said oral partition. Since the date of partition Janrao Tarar was in possession of suit property and after his death on 06.12.2015, the entire suit property came in cultivating possession of plaintiffs in confirmation with its

7/12 extract and other revenue records. However, in the month of April, 2017 the plaintiffs have got information that the defendant nos.11 to 16 have applied for mutating their names in the revenue record of suit property, upon which they filed an objection before the Tahsildar, Parseoni. However, the plaintiffs were surprised when they came to know that the names of defendants have been mutated against the revenue record of suit property.

3. According to plaintiffs, on 18.06.1988 Ramchandra Sitaram Tarar and others have filed an application against Janrao Tarar for obtaining possession of suit property before the Naib Tahsildar, Parseoni which came to be rejected vide order dated 17.09.1990. On 10.08.2017, the defendant no.11 told the plaintiff no.1 that he will forcefully take the possession of the suit property and also threatened and abused him in filthy language. The plaintiff no.1 reported the matter to Police Station, Parseoni by lodging oral complaint, but the police did not take any action. According to plaintiffs, the name of defendant nos.1 to 10 and father of defendant nos.11 to 16 are wrongfully recorded in the revenue record of suit property and now the defendant nos.11 to 16 have also applied for mutating their names in the revenue record of suit property without any right, title or interest. The plaintiffs are under apprehension that on the basis of revenue records, the defendants might dispossess them from the suit property and might alienate it. Hence, the plaintiffs have

been constrained to file this suit and during its pendency has filed instant application for grant of temporary injunction against defendants and prayed to restrain the defendants from disturbing their peaceful possession over the suit property and to restrain them from alienating the suit property, till the disposal of this suit.

4. The defendants have resisted the claim of plaintiffs by filing their written statement-cum-reply vide Exh.40. They have denied the alleged story of oral partition put forth by plaintiffs and also denied that plaintiffs are in possession of suit property in confirmation with its revenue record. They have specifically submitted that the plaintiffs have filed this vexatious suit just to grab the ancestral suit property by depriving the defendants from their share in it.

5. According to defendants, as per Adhikar Abhilekh Panji there were four properties bearing survey nos.85, 89/1, 116 and 128/1(suit property). Out of the aforesaid properties, property bearing khasra no.89/1 was disposed of and remaining properties were distributed amongst Ramchandra Tarar, Ramrao Tarar, Shamrao Tarar and Janrao Tarar. Ramchandra Tarar got $2/3^{\text{rd}}$ share and Ramrao Tarar, Shamrao Tarar and Janrao Tarar got $1/9^{\text{th}}$ share each in the field bearing survey no.116 admeasuring about 5 acres.

6. According to defendants, after the demise of Venkatrao Tarar a written partition dated 22.05.1949 was executed between all his five sons and his wife i.e. Shamrao Tarar, Ramrao Tarar, Janrao Tarar, Raosaheb @ Vasanta Tarar, Arvind Tarar and Annapurna Venkatrao Tarar, by which each of the sons has got 1/5th share and Annapurna Tarar got land admeasuring 8 acres. After the death of Shamrao Tarar on 04.12.1982, fer far in the names of his legal heirs was effected on 08.10.1984 with respect to the suit property having survey no.228 and survey no.206/2. The above legal heirs inherited 1/9th share of both the farm lands which includes the suit property also. Names of defendant nos.9 and 10 and names of daughters of Shamrao Tarar namely Pushpa Dhanraj Chikhale and Prabha Naresh Bonde and name of wife of Shamrao Tarar namely Indirabai Tarar were mutated in 1984 which remained unchallenged till date and hence the aforesaid mutation has attained finality. Ramrao Tarar and Ramchandra Tarar expired in the year 1996 and 2000 respectively leaving behind their legal heirs who are parties to the present suit. According to defendants, taking into consideration the factual history of case, the instant suit filed by plaintiffs is hopelessly barred by limitation. It is crystal clear that the plaintiffs were having knowledge about the mutation entry and the ownership of defendants way back in 1954, but they have not agitated their claim of ownership over the suit property before the competent court. Lastly, they prayed to reject the application.

7. In the backdrop of the rival pleadings and the documents placed on record, I heard the learned advocates for both the sides at length.

8. Having perused the application and the relevant documents placed on record, following points arise for my determination and I have recorded my findings against the same for the reasons mentioned as under :-

SN	Points	Findings
1	Do the plaintiffs prove that they have prima facie case ?	No
2	Do the plaintiffs further prove that balance of convenience lies in their favour ?	No
3	Do the plaintiffs prove that they would suffer irreparable loss if temporary injunction is not granted in their favour ?	No
4	What order ?	Application is rejected.

REASONS

AS TO POINT NO.1:

9. It is the case of plaintiffs that the suit property came to the share of their father Janrao Vyankatrao Tarar by way of oral partition that took place prior to 1949. Since the date of partition Janrao Tarar

was in possession of suit property and after his death on 06.12.2015, the entire suit property came in cultivating possession of plaintiffs in confirmation with its 7/12 extract and other revenue records. It can be gathered from the contentions of plaintiffs on record that the very basis of the case of plaintiffs is the alleged oral partition that took place long back in 1949 whereby the father of plaintiffs has acquired the suit property. But in order to boost their contentions as regards oral partition, they have not filed a single document on record which would prima facie probablise their claim of alleged oral partition. Though they have filed on record the affidavits of one Bhaurao Sitaram Kelwade and Ramaji Daulat Wankhede to the effect that Janarao Tarar was in cultivating possession of suit property and after his death, his sons (plaintiffs) are in cultivating possession of same. But in my opinion, no reliance can be placed on alleged affidavits especially for the reason that the plaintiffs have failed to prima facie probablise their case as regards their absolute ownership over the suit property by filing any documents. Apart from it, the wordings of alleged affidavits are identical which prima facie goes to infer that the same are filed by the plaintiffs just to suit their case. Apart from it, the 7/12 extracts of the suit property filed by the plaintiffs on record makes it evident that the plaintiffs alongwith defendants are coparceners in it. Thus the 7/12 extracts of the suit property are rather useful to the case of defendants then the case of plaintiffs.

10. Contrary to this, according to defendants the suit property is an ancestral property and they alongwith plaintiffs have share in it. According to them, there were four fields bearing survey nos.85, 89/1, 116 and 128/1(suit property), out of which khasra no.89/1 was disposed of and remaining properties were distributed amongst Ramchandra Tarar, Ramrao Tarar, Shamrao Tarar and Janrao Tarar. Ramchandra Tarar got $\frac{2}{3}$ rd share and Ramrao Tarar, Shamrao Tarar and Janrao Tarar got $\frac{1}{9}$ th share each in the field bearing survey no.116 admeasuring about 5 acres. In order to support their contentions, they have filed on record copy of Adhikar Abhilekh Panji. Its perusal supports the contentions of defendants that initially there were four field properties including suit property. Further, it is the case of defendants that after the death of Shamrao Tarar on 04.12.1982, fer far in the names of his legal heirs was effected on 08.10.1984 with respect to the suit property, but despite knowledge about this fer far the plaintiffs did not challenge it. The defendants have filed on record the copy of alleged fer far of the year 1984 on record. Its bare perusal prima facie probablises the case of defendants as regards mutation of names of legal heirs of Shamrao Tarar as against his share in the suit property. If it is the case of plaintiffs that the names of defendants are wrongly recorded in the revenue record of suit property, then they ought to have brought their bonafides on record by filing any document which could have shown that being aggrieved by aforesaid mutation they have preferred any revenue

appeal. But no any document is filed by the plaintiffs on record to show that they have challenged the aforesaid mutation entry of 1984.

11. Adv.Shri.Mardikar, the learned counsel appearing for the defendants has placed his reliance in the case of **Digambar Adhar Patil ..vs.. Devram Girdhar Patil & another** reported in **AIR 1995 Supreme Court 1728** wherein it has been held that “The entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence in support of the oral evidence given by the respondent and his brother to prove the factum of partition”. So also, he has placed his reliance in the case of **Sangramsingh Premsingh Thakur ..vs.. Smt.Sarlabaji Chhotelal Thakur** reported in **2015(6) ALL MR 528** which is again on the point of proof of mutation entries in support of factum of partition. I have gone through the ratio laid down in the cases cited supra and the same are applicable to the facts of instant case also, facts being same. In the instant case also, the long standing and unchallenged mutation entries of 1984 prima facie probablises the story of partition of put forth by the defendants.

Thus in view of the discussion noted above, the plaintiffs have prima facie failed to established on record that the suit property is their absolute property, as they failed to substantiate their claim by filing any documentary evidence. On the other hand, the documents filed by defendants on record prima facie inspires confidence in my

mind that the suit property is a coparcenary property with share of plaintiffs and defendants in it. As discussed above, the jointness of suit property is prima facie established on record, therefore it cannot be said that the plaintiffs are absolute owners of property. I, therefore, record my findings as against point no.1 in the negative.

AS TO POINT NOS.2 & 3:

12. As regards possession over the suit property is concerned, it is the case of plaintiffs that their father was in its exclusive and cultivating possession since the date of alleged oral partition and after his death, they are in its continuous possession. Therefore, they have prayed that the defendants or any other person acting on their behalf be restraining from interfering with their possession over the suit property. But the defendants have denied that plaintiffs are in possession of suit property. In order to boost the contentions, the plaintiffs have filed on record the copy of application preferred by Ramchandra Tarar before the Tahsildar, Parseoni and claimed that the aforesaid application makes clear the fact of possession of plaintiffs over the suit property. Its bare perusal goes to show that Ramchandra Tarar has prayed for possession of his 2/3rd share in the suit property wherein he has averred that the suit property is a lake, but as the water in it is about to vanish, he intends to cultivate his share. Thus the suit property being a lake, the possession of plaintiffs cannot be ascertained from the aforesaid application, hence it is not

helpful to the plaintiffs to prove their possession over the entire suit property.

13. The other documents filed by the plaintiffs to prima facie prove their exclusive possession over the suit property are the 7/12 extracts of the suit property. Its bare perusal goes to show that though Janarao Tarar (father of plaintiffs) is in cultivating possession of the suit property, the cultivating area is less than the total area of suit property, as most of the area of suit property is a lake. It shows that the plaintiffs are cultivating 0.40 HR of suit property out of total area 3.33 HR. Thus it cannot be said that the plaintiffs are in possession of entire suit property. Hence, the 7/12 extracts of suit property filed by the plaintiffs on record are not useful to them to gather their possession over the entire suit property. So also, as discussed in preceding paragraphs the affidavits of Bhaurao Sitaram Kelwade and Ramaji Daulat Wankhede filed on record by the plaintiffs to support their contentions as regards their cultivating possession over the suit property are concerned, I have already discarded the aforesaid affidavits for the reason that the wordings of alleged affidavits are identical which prima facie goes to infer that the same are filed by the plaintiffs just to suit their case.

14. Apart from it, while recording my findings as against point no.1, I have already held that the plaintiffs have failed to prove that

they have prima facie case in their favour. They have prima facie failed to prove that the suit property is their absolute property. In other words, the suit property appears to be an ancestral property, hence defendants cannot be restrained from either entering into the suit property or from alienating it. Because it is well settled principle that injunction cannot be granted against co-owner.

15. Adv.Shri.Paliwal, the learned counsel for the plaintiffs has placed his reliance in the case of M/s.Shakti Impex Ahmedgarh ..vs.. Amar Singh wherein the Hon'ble Punjab and Haryana High Court has held that-

“(i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession”.

(ii) Mere making of construction or improvement in the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest”.

16. So also, he has placed his reliance in the case of **Nagesh Kumar ..vs.. Kewal Krishan** wherein the Hon'ble Himachal Pradesh High Court has held that "A co-sharer is entitled to claim injunction when another co-sharer threatens to exclusively appropriate joint land to himself to the detriment of other co-sharers by constructing a structure thereon". I have gone through the ratio laid down in the case cited supra, but with due respect the same is not applicable to the facts of the instant case, facts being different. In the instant case, besides mere apprehension that the defendants might obstruct their possession over the suit property, the plaintiffs have not brought a single incident on record which would suggest that the defendants have committed any act which is detrimental to the right and interest of plaintiffs in the suit property and that too when the plaintiffs have prima facie failed to prove their possession over the entire suit property.

Thus the discussion noted above coupled with the ratio laid down in the cases cited supra and relied upon by the learned counsel for the plaintiffs leads me to hold that the plaintiffs have failed to prove their possession over the entire suit property. Hence, it cannot be said that the balance of convenience lies in their favour. If the defendants are restrained from entering into the suit property which is a coparcenary property as well, they would suffer irreparable loss rather than the plaintiffs, which cannot be compensated in terms

of money. Thus in view of the discussion noted above, I am of considered view that the plaintiffs have failed to prove that they have prima facie case in their favour, that balance of convenience lies in their favour and that they would suffer irreparable loss if injunction is not granted in their favour. In such circumstances, I am of the considered view that the interlocutory application filed by the plaintiffs deserves to be rejected. I, therefore, record my findings as against point nos.2 and 3 in the negative and proceed to pass the following order-

ORDER

1. The application Exh.5 is hereby rejected.
2. Costs in main cause.

Parseoni.
Date:-17.08.2018.

(S.D.Wankhede)
Civil Judge, Jr.Dn., Parseoni.

Argument heard on	04.08.2018
Order delivered on	17.08.2018
Transcription ready on	17.08.2018
Order checked and signed on	17.08.2018

CERTIFICATE

I affirm that the contents of this P.D.F. file of order are word to word, as per original order.

Name of Stenographer - Abhijit Yeshwant Kulkarni