

**ORDER BELOW EXH.5 IN R.C.S.No.70/2015**

**(Passed on 20.06.2017)**

The plaintiffs have filed this application for the relief of temporary injunction.

2. The contention of the plaintiffs, in short, is as under:-

Land admeasuring 65-R of block no.568 situated at village Barshingave, Tal. Igatpuri, more particularly described in plaint para no. 1 is the '**suit property**'.

3. The suit property is ancestral joint family property of the plaintiffs and defendant no.1, 4 to 6. Dada Bapu Targe is their common ancestor. He had three sons namely Damu, Ramaji and defendant no.1. Plaintiff no.5 to 8 are legal heirs of Damu. Defendant no.4 to 6 are legal heirs of Ramji. Plaintiff no.1 to 3 are sons of defendant no. 1 and plaintiff no. 4 is his wife.

4. The suit property has been devolved to defendant no.1 and his two brothers, after demise of Damu vide mutation entry no.489. The plaintiffs being cosharer, coparcener have undivided legitimate right, interest in the suit property. In spite of that, defendant no.1 had sold the suit property to defendant no.2 and 3 without any legal necessity and consent of the coparceners. He was and is not Karta of their family.

5. Plaintiff no.1 to 4 have 1/3rd share and plaintiff no.5 to 8 also have 1/3rd share in the suit property, which was not partitioned by meets and bounds. Defendant no.2 and 3 by taking disadvantage of sale deed in their favour, trying to alienate the suit property as well as tried to dispossess the plaintiffs. Therefore, the plaintiffs have constrained to institute the present suit and moved this application for

relief of temporary injunction. They prayed that defendant no.2 and 3 be temporarily restrained from alienating or creating third party interest in the suit property as well as not to disturb their possession.

6. Per contra, defendant no.2 and 3 resisted the application by filing say at Exh.26. According to them, defendant no.1 was agreed to sell the suit property for the consideration of Rs.2,25,000/-. He executed agreement to sell on 15.01.2011 in their favour. Thereafter, he executed sale deed dated 06.06.2013 of the suit property. They became absolute owner, possessor of the suit property on the basis of registered sale deed. Defendant no.1 had sold the suit property with the consent of other cosharers. Therefore, defendant no.2 and 3 became bonafide purchaser for value without notice. Hence, they prayed for rejection of the application.

7. The points for determination along with my findings thereon are as under:

<b><u>POINTS</u></b>	<b><u>FINDINGS</u></b>
1) Whether the plaintiffs prove their prima facie case ?	Yes.
2) Whether balance of convenience lies in favour of the plaintiffs ?	Yes.
3) Whether irreparable loss will be caused to the plaintiffs, if the application is rejected ?	Yes.

4) What order ?

Application is partly allowed.

## **REASONS**

### **AS TO POINT NO.1 :-**

8. Heard both the parties. At the outset, I would like to mention the undisputed facts of the case. It is undisputed that, Dada Bapu Targe is common ancestor of the plaintiffs and defendant no.1, 4 to 6. He had three sons. Out of which, Damu and Ramji are no more. Plaintiff no. 5 to 8 are legal heirs of Damu. Defendant no. 4 to 6 are legal heirs of Ramji.

9. I perused mutation entry no.479 and it appears that, after demise of Dada Bapu Targe, the land block no.568 was devolved to defendant no.1, Damu and defendant no.4 to 6. The said entry prima facie reveals that the suit property was owned and possessed by Dada Bapu Targe. After his demise, the plaintiffs as well as defendant no.1, 4 to 6 have acquired undivided legitimate right, interest and share in the land block no.568. Therefore, prima facie, it appears that, the said land is ancestral joint family property of them.

10. It is not the case of defendant no. 2 and 3 that, the suit property after partitioned and separate possession of it was allotted to defendant no.1. There is no iota of evidence to show that, land block no.568 was partitioned and divided amongst the parties. Rather, it appears that, the land block

no.568 is joint family property of them.

11. 7 X 12 extract stands in the name of plaintiff no.5 to 8, defendant no. 4 to 6 as well as defendant no. 2 and 3 and Jijabai Pandurang Khade. Names of defendant no.4 to 6 and plaintiff no.5 to 8 have entered in common. Their share have not been separated from the other co-sharer. It appears that, they are joint in possession of the suit property.

12. Sale deed dated 06.06.2013 also warrants that, the suit property is ancestral property of defendant no.1. The land is not described by four boundaries. It itself shows that, undivided portion of land block no.568 was purchased by defendant no. 2 and 3.

13. The plaintiffs being cosharers and coparceners have every right on every inch of the suit property. Their undivided right, interest and share have not been partitioned till today. Therefore, they have equal legitimate right, interest and share in the suit property.

14. As per section 44 of the Transfer of Property Act, any co-owner of immovable property is legally competent to transfer his share of such property or any interest therein, The transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferee right to joint possession or other common or part enjoyment of the property. He must have to enforce partition of the land. It has been held by the Hon'ble Apex Court in **Ramdas Vs. Sitabai 2009(AIR)(SC) 2735 in para no.17** that, *there could be no dispute with regard to the fact that an undivided share of*

*coshares may be a subject matter of sale, but possession cannot handed over to the vendee unless property is partitioned by mets and bound amicable and through mutual settlement or by a decree of Court.*

15. As per the ratio of the above case, by the transfer of immovable property, the vendee cannot get exclusive possession of the land. The same principle is applied here then it prima facie reveals that, the suit property being coparcenary property which was not partitioned before the sale, then defendant no.2 and 3 did not get absolute possession over the particular portion of the land. Rather, they have acquired joint interest along with other co-sharer. On the contrary, the plaintiffs being co-owner, coparcener have undivided legitimate right, interest and share as well as common possession over the suit property. Therefore, they have prima facie case. Hence, I answer point no.1 in the affirmative.

**AS TO POINT NO.2 AND 3 :-**

16. The plaintiffs have prima facie proved their lawful undivided share, right in the suit property. They have every right on every inch of the suit property until partitioned is effected. They have not given consent to the sale deed. On the contrary, the sale deed is of the portion of the undivided property. Therefore, balance of convenience definitely lies in favour of a person who has prima facie undivided legitimate right, interest and share in the suit property. The plaintiffs have such right in their favour. Hence, balance of convenience lies in their favour.

17. If defendant no.2 and 3 succeeded in alienating the suit property, then

definitely the plaintiffs will suffer irreparable loss. On the contrary, if the injunction for not to alienate or create third party interest is granted against defendant no. 2 and 3, then they will not suffer any hardship.

18. Defendant no.2 and 3 have purchased share of defendant no.1 of land block no.568. Therefore, they have joint interest along with plaintiffs. Then as per settled the principle law injunction for not to obstruct the possession against co-owner is not liable to be granted. If the co-owner trying to alienate the suit property, then definitely temporary injunction will have to be granted against him. Therefore, balance of convenience and irreparable loss lies in favour of the plaintiffs. Hence, I answer point no.2 and 3 in affirmative.

**AS TO POINT NO.4 :-**

19. The plaintiffs have proved all the ingredients of relief of the temporary injunction. They prayed two reliefs;

1. Not to alienate the suit property,
2. Not to dispossess their possession;

20. Defendant no.2 and 3 have purchased share of defendant no.1. Therefore, They became the co-owner along with the plaintiffs. In such circumstances, injunction not to dispossess the possession against coowner is not liable to be granted. Hence, the application will have to be partly allowed. In the result, in answer point no. 4, I pass the following order.

**: O R D E R :**

1. Application (Exh.5.) is partly allowed.

2. Defendant no. 2 and 3 or anybody claiming through them are hereby temporarily restrained from alienating or creating third party interest the suit property till the disposal of the suit.
3. No order as to costs.

Place – Igatpuri.

(Shridhar K. Dhekale)

Date : 20.06.2017

Civil Judge Junior Division, Igatpuri.