

ORDER BELOW Exh.5

Plaintiffs made this application for temporary injunction for restraining defendants from creating third party interest in the suit properties and interfering and obstructing possession of plaintiffs over suit properties. Heard advocate of plaintiffs and advocate of defendants.

2. According to plaintiffs all that piece and parcel of land bearing Gut No. 2321 admeasuring 2.67 Hectar, Gut no. 2244 admeasuring 16 Are, Gut no. 2264 admeasuring 20 Are, Gut no. 2261 admeasuring 4.21 Hectar, Gut no. 2249 admeasuring 1.8 Are, Gut no. 2246 admeasuring 91 Are, Gut no. 2250 admeasuring 2.33 Hectar, Gut no.2251 admeasuring 84.2 Are, Gut no. 2252 admeasuring 47 Are, Gut no.2253 admeasuring 2.12 Hectar, Gut no. 2257 admeasuring 92.5 Are, Gut no. 2258 admeasuring 2.34.5 Are situated at village Vanoushi Tarfe Panchnadi and Survey no. 171A/18 admeasuring 0.05.82 Are alongwith house no. 39/2 constructed thereon situated at Dapoli and as specifically described in para no.1 of the application (hereinafter in short 'suit properties') are ancestral joint family properties of plaintiffs and defendant nos. 1 and 2. Plaintiff nos. 1 to 4 and Defendant no.2 are sons of defendant no.1. Hence, each of the plaintiffs is entitled for $1/6^{\text{th}}$ share in suit properties.

3. According to plaintiffs, suit properties were originally owned by Mahadev Bhikaji Depolkar and he was having two sons viz. defendant no.1 and Vasant. On 30-12-1966, Mahadev Depolkar executed one

Vyavasthapatrak (व्यवस्थापत्रक—family arrangement) mentioning his intention of bequeathing suit properties after his death. As per this document, he intended that suit properties be kept as joint family and ancestral properties. After his death in the year 1980, effect was given to *Vyavasthapatrak*. However, as defendant no.1 was eldest member in the family, his name was mutated on 7/12 extract of suit properties.

3. According to plaintiffs, they came to know that defendant no.1 and 2 were interested in alienating suit properties. Hence, plaintiffs filed one suit for perpetual injunction bearing R.C.S. No. 96/2012 on 18-05-2012. In the said suit, the Court had rejected the application for temporary injunction vide order dated 26-03-2013. Plaintiffs challenged the said order vide Civil Misc. Appeal no. 21/2013. The said appeal is still pending. On 08-06-2012, plaintiffs also registered *lis-pendens* notice in the sub-registrar office. Accordingly, plaintiffs gave notice in TARUN BHARAT news-paper about pendency of litigation in respect of suit properties. Thereafter, it was revealed that, on 17-11-2014, defendant no.2 by holding power of attorney of defendant no.1, alienated suit properties to defendant nos. 3 and 4. On asking to defendant no.1 and 2, they said that they will sale all suit properties. As each of plaintiff is having $1/6^{\text{th}}$ share in suit properties and there is no partition till date, plaintiffs filed this suit for partition and declaration that the sale deed dated 17-11-2014 executed between defendant no.1 and defendant nos. 3 and 4 is not binding on share of these plaintiffs.

However, it will take time to decide the suit on merit. Hence, this application.

4. Defendant no.1 and 2 objected this application vide their say (Exh. 37). According to them, defendant no.1 got suit properties situated at village Vanoushi Tarfe Panchnadi by partition and since then defendant 1 and 2 are in possession. Plaintiffs are not having any right in these suit properties. Defendant no.1 and 2 developed these properties by taking efforts. Defendant no.1 was doing business of dairy. He purchased a plot of land bearing Survey No. 179A/18 at Dapoli alongwith house no.39/2 and 39(1)/2 constructed thereon out of income received from dairy and by taking hand loan from relatives. Hence, this property is his self-acquired property. Hence, he has a right to sell suit properties as per his pleasure. He carried out work of repairs of the said properties from time to time. He gave proper education to plaintiffs. After their marriage, they started living separately and also started separate business. His wife died prior to 2 years. Defendant no.2 is taking care and looking after of defendant no.1. Due to old age, defendant no.1 has not been doing any work since many years. He is totally depended upon defendant no.2. Defendant no.2 is taking his proper care, though he is not financially sound. Defendant no.2 resided at his native as defendant no.1 told him to do so and he did not engage in any other business. He is totally depending on earning out of these lands. As defendant no.1 is having natural love and affection towards defendant no.2, he executed one registered will dated 10-05-2012 in

respect of self-acquired property being house no. 39/2, 39(1)/2 and land beneath to these houses and landed properties situated at village Vanoushi in favour of defendant no.2. Defendant no.2 is looking after these houses by carrying repair works from time to time. Defendant no.1 gratuitously gave portion of the house to Plaintiff no.3 for residing for temporary period.

5. Defendant no.1 and 2 stated that Defendant no.1 is old man and suffering from illness due to old age. He is having full right to sell any of the suit property to satisfy his needs and for medical purpose.

6. According to defendant nos. 1 and 2, plaintiff filed the suit for perpetual injunction bearing R.C.S. no. 96/2012. In the said suit, he moved application for temporary injunction against defendant no.1 and 2 for restraining them from creating third party interest in suit properties and for restraining them from obstructing and interfering their possession over the suit properties. The said application was rejected by the Court considering all documents on record. The said order is not set aside till date. However, defendant no.1 sold one of the suit properties bearing Gut no. 2321 to defendant nos. 3 and 4, to satisfy his legal necessities. The said sale deed dated 17-11-2014 is legal and valid. He gave possession of this property to defendant no.3 and 4 on the same day. Since then defendant nos. 3 and 4 are having possession over Gut no. 2321. Plaintiffs are not having possession over suit properties. They can not pray for relief of declaration unless they make prayer for recovery of possession from defendant nos. 3 and 4. This Court has no

pecuniary jurisdiction to decide the suit. The suit is hit by non-joinder of necessary parties as other persons, whose names are on 7/12 extract, are not made as party to this suit.

7. According to defendant nos. 1 and 2, defendant no.1 is father of plaintiffs. This suit is for partition. Defendant no.1 sold only one suit property to defendant no.3 and 4 for legal necessity and handed its possession to defendant nos. 3 and 4. Hence, alternatively he prays that if this Court comes to conclusion that the suit properties are liable for partition, then instead of such declaration, the sold property be put in share of defendant no.1. Plaintiffs filed this suit for harassing defendants, hence, defendant nos. 1 and 2 prayed for rejection of this application.

8. Defendant nos. 3 and 4 also opposed this application vide say at Exh.40. In their say they reiterated contentions of defendant nos. 1 and 2, and prayed for rejecting this application.

9. Upon hearing advocates and considering abovesaid pleadings of parties, following points arise for my determination and my findings on these points alongwith reasons are as under.

No.	POINTS FOR DETERMINATION	FINDINGS
1.	Whether plaintiffs have made out prima facie case ?	Partly Yes.
2.	Whether the balance of convenience lies in favour of plaintiffs ?	Partly Yes.

3.	Whether plaintiffs would suffer from irreparable loss if the relief as prayed is not granted ?	Partly Yes.
4.	What order ?	As per final order

REASONS

As to point no.1 to 4

10. As all points are interconnected, these points are discussed together.

11. Admittedly, defendant no. 1 is father of defendant no.2 and plaintiffs. Mahadev Depolkar is their predecessor. Suit properties were owned by him. He was having two sons namely Vasant and Ganesh (Defendant no.1). He executed *Vyavasthapatrak* dated 30-12-1966 in respect of suit properties. After his death, name of defendant no.1 was mutated on 7/12 extract of landed properties. Defendant no.1 sold one of the suit property bearing Gut no. 2321 to defendant no.3 and 4 vide sale deed dated 17-11-2014.

12. Advocate of plaintiffs relied on *Vyavasthapatrak* dated 30-12-1966 and argued that the terms mentioned in the *Vyavasthapatrak* shows that Mahadev Depolkar intended to keep properties as joint family so that his grandson will also take benefit of it. Hence, intention of the

maker needs to be considered. As a result, each of the plaintiff is having 1/6th share in suit properties. For this purpose, he relied on judgment of **C.N. Arunachala Mudaliar V/s. C.A.Muruganatha Mudaliar and Anr. AIR 1953 SC 495**. In this case, the Hon'bel Apex Court held that,

“the Court would have to collect the intention of the donor from the language of the document taken alongwith surrounding circumstances in accordance with well-known canons of construction. Stress would certainly have to be laid on the substance of the disposition and not on its mere form. The material question which the Court have to decide in such cases is, whether taking the document and all the relevant facts into consideration, it could be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition and what was given to the son was really the share of the property which would normally be allotted to him and in his branch of the family on partition. In other words the question would be whether the grantor really wanted to make a gift of his properties or to partition the same. As it is open to the father to make a gift or partition of his properties as he himself chooses, there is strictly speaking, no presumption that he intended either the one or the other”

According to advocate of plaintiffs, this judgment is perfectly applicable in this case as the facts and circumstances in this case are similar as the *Vyavasthapatrak* was prepared with intenti to give benefit to sons of Mahadev and their heirs.

13. In this respect, on page no.17 of the said *Vyavasthapatrak* it is mentioned that,

“ गणेश व वसंत यांचे लग्न कार्य मी करून दिले आहे व गणेश यास सहा मुले आहेत व वसंत यास एक मुलगी आहे व त्यांचे कुटुंबाची सोय होवून त्यांचे आयुष्य सुखात चालविता यावे या हेतुने मी आपले इस्टेटीची व्यवस्था गणेश व वसंत यांचे संमतीने करून ठेवीत आहे. तरी त्याचा उपभोग त्यांनी पुत्रपौत्रादीवंशपरंपरेने घ्यावयाचा आहे. ”

The advocate of plaintiffs argued that these words show intention of Mahadev. He made this document for benefit of his sons and their family and they shall enjoy the same. However, advocate of defendants argued that there is practice of writing such words in the sale deeds also and it does not mean that the person who gets the property is not entitled to dispose the same as per his pleasure. She relied on other words mentioned in the document like,

“ याउपर दोन्ही मुलांना प्रत्यक्ष वेगळी वहिवाट करतांना काही अडचणी आल्यात तर त्याही त्यांनी आपापसात सलोख्याने सोडवून घ्याव्यात....वसंत यास जी मिळकत ठेवली आहे त्या मिळकतीशी गणेश याचा हक्कसंबंध नाही व गणेश यास जी मिळकत ठेवलेली आहे त्या मिळकतीशी वसंत याचा संबंध नाही”

Both advocates relied on several other contents of the said *Vyavasthapatrak*. However I think, as mentioned in *Mudaliar's* case, intention of the maker needs to be gathered from contents and

surrounding circumstances. For that purpose, opportunity needs to be given to parties to lead evidence and also their admissions, statement needs to be considered while gathering intention. Thus, the intention can be gathered after considering entire evidence on record and other circumstances. Hence, I think at this stage other aspects need to be considered for deciding this application.

14. Advocate of plaintiffs argued that defendant no.1 got suit properties situated at Vanoushi Tarfe Panchnadi by partition. This admission shows that the suit properties are joint family properties. In this respect advocate of defendants relied on Mulla's Hindu Law.

15. Advocate of defendants argued that, Mahadev got the suit properties from his Uncle Moro Ganesh Depolkar, who executed will dated 28-11-1927 in his favour and the same aspect is mentioned in *Vyavasthapatrak*. This shows that suit properties are not ancestral properties as there was no four degree relationship in existence at that time. Further, joint family property consists of ancestral property and other is separate property of coparceners thrown in common stock. But there was no ancestral property in hands of Mahadev and hence no question arose for throwing it in common stock. The precondition for blending is not satisfied in this case. She further argued on obstructed and unobstructed heritage, property which devolves on parents, nephews, uncles, etc. upon death of the last owner, is obstructed heritage, these relations do not take a vested interest in the property by birth, their right to it arises for the first time on the death of the owner, until then

they have a mere *spes successionis*, or a bare chance of succession to the property, contingent upon surviving the owner. Thus in this case, plaintiffs do not get any rights by birth as defendant no.1 is alive and he can dispose of the property as per his wish. The property possessed by defendant no.1 is not ancestral property. It is settled law that a father who is joint with his sons may sell his self acquired property without concurrence of his sons and he may make gift of it to one son to the entire exclusion of the other sons. She relied on judgment of **Uttam v/s. Saubhag Singh and ors. Civil Appeal no. 2360 of 2016.**

16. I think the other important aspect needs to be considered in this case is about interim order passed by the Court. Plaintiffs have produced certified copy of order dated 26-03-2013 passed by this Court in R.C.S. No. 96/2012. The record reveals that plaintiffs filed this suit for temporary injunction against defendant nos. 1 and 2. In the said suit, they moved application for temporary injunction and prayed for restraining defendant nos. 1 and 2 from creating third party interest in suit properties and restraining them from interfering and obstructing possession of plaintiffs over suit properties. The said application was rejected by the Court holding that suit properties are joint family properties and being Karta defendant nos. 1 has right to alienate suit properties for legal necessities, such right can not be taken away by passing temporary injunction and plaintiffs have right to challenge the sale. In this application also plaintiffs prayed for similar relief under

same facts and circumstances. The Court has already decided similar application under similar facts and circumstances.

17. Advocate of plaintiffs argued that after rejection of the said application, defendant no.1 in sale deed dated 17-11-2014 mentioned about pendency of this R.C.S.No. 96/2012 and rejection of interim application and sold the property. This shows his intention to sell the property. Even in the abovesaid order the Ld. Judge ought to have considered entire Judgment **Sushilkumar v/s. Ramprakash 1988 AIR 576. In such cases**, interim injunction can be granted if there is ouster. I think, the aspect of interim injunction was decided by the Court on similar circumstances, hence, there is no need to make contrary opinion upto extent of granting temporary injunction against defendant no.1 and 2. However, the circumstances are changed in respect of Gut No. 2321. Admittedly, defendant no.1 sold this suit property bearing Gut no. 2321 vide Sale deed dated 11-02-2015. Prima facie, plaintiffs have right to challenge this sale deed as opined by my predecessor in order dated 26-03-2016. The purpose of granting the temporary injunction is to protect the subject of the suit and maintain status quo till disposal of the case. Hence, considering change in circumstances as to Gut No.2321, the application needs to be partly allowed by granting temporary injunction restraining defendant nos. 3 and 4 from creating third party interest in this Gut no.2321. Such type of injunction is necessary to avoid multiplicity of proceeding. It will not cause any harm to defendant no.3 and 4. However, if it is not granted, it will cause irreparable loss to

plaintiffs. Hence balance of convenience upto that extent lies in favour of plaintiffs. Hence, this application needs to be partly allowed. As a result I answer point no.1 to 3 in partly affirmative and for point no.4 I pass following order-

ORDER

1. The application is partly allowed.
2. Defendant nos. 3 and 4 shall not create third party interest in the suit property bearing Gut no.2321 till disposal of the suit.
3. Costs in cause.

Date- 10-11-2016.

(R. S. Dhadake)

Jt. Civil Judge Junior Division,

Dapoli

Case Number : R.C.S. 31 of 2015

I affirm that the contents of this pdf file order are same word for word as per original order.

Name of Stenographer	:	--
Court Name	:	Shri.Rahul S.Dhadake, Joint Civil Judge(J.D.) Dapoli
Date of Decision	:	10-11-2016
Judgment signed by P.O. on	:	10-11-2016
Judgment uploaded on	:	10-11-2016
Typed By	:	Self