



Regular Civil Suit No. 14/2019
(Chandrashekhar Gajanan Shinde
vs
Ravibhushan Dattaram Lad etc. 3)
(C.N.R. - MHRT08 - 000127 - 2019)

Order passed below application at Exh. No. 6

1. The plaintiff has moved the application (Exh. 6) for temporary injunction against defendants for not to alienate the suit property. Perused the application filed along with the affidavit. Perused the record and written say filed by defendant Nos. 1 vide Exh. 35. Heard the learned advocate Shri. S. Athalye for plaintiff and learned advocate Shri. C.M. Mangle for defendant no. 1.

2. At the outset I must mention here the description of suit property which is as follows;

Suit property at Mauje Sadawali, Tal- Sangameshwar

Sr no.	Survey no	Hissa no	Area in Hectre Are	Location
1.	85	0	0.16.20	Bhulbav
2.	86 A 1	16	0.75.00	Bhulbav
3.	86 a 1	17	0.96.00	Bhulbav

• Suit property at Mauje Deorukh, Tal- Sangameshwar

Sr no.	Survey no.	Hissa no.	Area	Location
1	30	2	0.11.00	Gharthan

The abovementioned suit property together is the subject matter of the suit. Plaintiff has filed the present suit for partition and separate possession of the suit property and ultimately for the relief of perpetual injunction.

3. It is the contention of the plaintiff that the suit property is ***ancestral and joint family property*** of plaintiff and defendants. Father of defendants and mother of plaintiff are real brother sisters of each other. While defendant no. 3 and plaintiff are real brothers of each other. As such, defendant no. 3 is made party only for the purpose of deciding shares. As the mother of plaintiff is having $\frac{1}{2}$ share in the suit property, plaintiff and defendant no. 3 being her sons, are having $\frac{1}{4}^{\text{th}}$ share each in the suit property. It is the contention of plaintiff that suit property mentioned above at Sr. no. 1 and 2 were purchased by grandfather of defendants and plaintiff vide ***registered sale deed dated 16/08/1944*** from one Vinayak Rajwade and Krishna Rajwade. Suit property at Sr no. 3 was purchased by grandfather of parties vide registered sale deed on 29/11/1946. Father of defendant no. 1 and 2, after existence of record of rights gave an application to enter their name on revenue record. Accordingly, name of only Dattatray i.e. father of defendants is on revenue record. The name of mother of plaintiff is not mutated intentionally as alleged by plaintiff.
4. Plaintiff has further contended that Suit property at Deorukh was originally owned and possessed by grandmother of parties. Thereafter, since 1955 name of father of defendant is there on revenue record. After the demise of maternal grandfather of plaintiff and defendants in **1949**, it was necessary to bring name of mother of

plaintiff and her brother as a legal heir on record. However, due to lack of information, name of wife and son of deceased is only mutated accordingly. The date of death of grandmother of plaintiff is **06/09/1991**, while date of death of mother of plaintiff is **05/01/2007**. Plaintiff is hence contending that, plaintiff being legal heir of the deceased grandfather, after his mother his share is existing there.

5. Plaintiff has further contended that, father of defendants died on **14/02/2018**. However, since then defendants have failed to take heir-search in that regard. Plaintiff has approached defendants time to time, for effective partition of the suit property. The notice was also published in newspaper dated **24/12/2018** thereby restraining everyone from entering any contract in respect of suit property. The plaintiff has $\frac{1}{4}$ share in the suit property. Plaintiff is apprehending that Defendants may try to alienate the suit property. Therefore, the plaintiff has filed the present suit for partition and possession and the application seeking the temporary injunction vide Exh.5.

6. Defendants are appeared before the Court after service of summons on him. Defendant Nos. 3 has failed to file say hence **no say order** was passed against him. Defendant no. 2 failed to appear despite of due service of summons, hence suit proceeded **ex parte** against him. Defendant no. 1 filed their written-statement-cum-counter claim at Exh.35 in which he has denied all the contentions made by plaintiff in the temporary injunction application (Exh. 6).

Say of Defendant no. 1-

7. He submitted that; suit is bad for non-joinder of necessary parties as well as non-joinder of all the properties. The suit properties are not common ancestral properties of both the parties and the way in which properties came in hands of grandfather of plaintiff as mentioned by plaintiff is false. Defendant no. 1 further denied that the grandmother of defendants was possessor of properties as abovementioned. Defendant no. 1 has further denied that suit properties at Deorukh at S.No. 231 231 1A and 232, even though existing, their father has no any share in the same. Hence, now plaintiff has no share in the remaining suit properties. The temporary injunction application moved by plaintiff is false and bogus. The plaintiff has not come before the court with clean hands. The balance of convenience is not in favor of plaintiff. Therefore, they prayed that, the application of temporary injunction may kindly be rejected.

8. On the basis of pleadings of respective parties and documents on record following points arises for my determination and I have recorded my findings thereon for the reasons to follows

Sr. Nos.	Points	Findings
1.	Whether plaintiff has made-out the <i>prima facie</i> case in his favour ?	Yes.
2.	In whose favor balance of convenience lies?	In favor of the plaintiff.
3.	Whether plaintiff will suffer irreparable loss if the temporary injunction is not	Yes.

	granted in his favor?	
4.	Whether plaintiff is entitled for temporary injunction against defendants as prayed for?	Yes.
5.	What order ?	Application is Allowed.

Documents-

9. Plaintiff has relied upon **7/12 extracts of suit property** bearing S. No. 85, 86A Hissa no. 16 and 86A Hissa no. 17, 8A extracts of property at Sadawali bearing acc. No. 22, 7/12 and **8A extracts of property** situated at Deorukh, **photocopies of mutation entries at no. 1662, sale deed of suit property at Sr. no. 1, 2 and 3, original death certificate of father of defendants**, grandmother of them, and mother of plaintiff. He has further relied upon **paper notice for public at large published in Dainik Tarun Bharat and Dainik Pudhari dated 24/12/2018**, thereby restricting public at large from entering into an agreement with respect to suit property. On the other hand, defendants have not relied upon any documentary evidence.

It is common for plaintiffs in suits related to property to seek temporary injunction only to restrain defendant from alienating the property or creating third party interests, during the pendency of the suit.

Admitted facts-

- 1) Relationship between plaintiff and defendants**
- 2) Possession of suit property is with defendants.**
- 3) That 7/12 extract is in the name of defendants**
- 4) Suit property is not yet partitioned.**

Submissions-

10. The learned advocate for plaintiff submitted that, the suit property is ancestral and joint family property of plaintiff and defendants. The suit property is not yet partitioned. Though there is name of only father of defendants at 7/12 extract, it does not confer title on him. Ld. Adv. For the plaintiff submitted that revenue entries are merely for fiscal purpose. He drawn my attention to **Exh. 48/B** where **defendant no. 2** Swati has **admitted** that suit properties are ancestral properties of both the parties through her written statement. He also stressed upon the **affidavits** filed at **Exh. 42** by family members of plaintiff and defendant namely Ashok Surve and Alka Bhosale who are maternal brother and sisters of plaintiff.

11. Therefore, he submitted that plaintiffs have prima facie case. It will take considerable time to decide the suit meanwhile if defendants create third party interest in the suit property it will create multiplicity of the proceedings and thereby, they will suffer irreparable loss. The suit property is in possession of defendants nos. 1 and 2. Therefore, if the injunction is granted in favor of defendants they will not suffer any hardship. On the other hand plaintiffs will suffer competitive hardship and inconvenience then defendants therefore, balance of convenience is also in their favour. Hence plaintiff prayed to allow this application and thereby to restrain defendant no.1 and 2 from creating third party interest in the suit property during pendency of the suit.

12. The learned advocate for defendant Nos. 1 Adv. C.M. Mangale

submitted that suit properties are not ancestral. The way in which property came in hands of original owner Sadashiv who is grandfather of both the parties, i.e. registered sale deed, is not produced on record. Hence, merely based on contentions in the plaint, affidavits by few family members, it cannot be said that the suit property is common ancestral property. He further went on to submit that in the paper publication published by the plaintiff, there is no such contention that Sadashiv was the owner of properties.

13. Ld. Adv. For the defendant no. 1 Adv. C.M. Mangle further argued that suit itself is bad for non-joinder of necessary parties. According to him, Gajanan Shinde who is father of plaintiff being a husband of mother of plaintiff, is necessary party to the suit for partition. However, he has not been added so. He argued that as per **section 15 of Hindu Succession Act**, if a female Hindu dies intestate, her share shall devolve according to the rules set out in section 16 i.e. firstly upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband.

14. He further argued that, as per **Order II rule 2 of CPC**, since the suit is for partition of property, it should include whole claim. However, as itself mentioned para no. 7 in the plaint (Exh. 1), in the suit property, there is a house of grandfather of defendant bearing no. 231, 231 A and 232. Still the same has not been added to the property description. Hence, suit is also bad for non-joinder of necessary properties. Hence, prima facie, as plaintiff has failed to prove ancestral nature of suit property, this application deserves to be rejected. The very ground on which T.I. can be granted i.e. reasonable apprehension of alienation of property is also not proved by plaintiff by any oral or

documentary evidence. Hence, he prayed that application be rejected.

Reasons

As to Point No. 1 (*Prima facie* case)-

15. A term “*prima facie* case” means a case, which involves a fair and substantial question to be tried. If there is no defect in the plaintiffs' case, leading to its failure at this stage, it is in the ambit of the expression *prima facie* case. A *prima facie* case does not mean a case proved in its entirety. But, a case, which can be said to establish if the evidence, which is led in support of the same were believed. A triable issue is a crux of the expression *prima facie* case.

16. It is a settled preposition of law that while deciding an application under Order 39, Rule 1 & 2 of the Code of Civil Procedure, 1908, for the grant of temporary injunction, the Court must be satisfied that the applicant has a ***prima facie*** case in support of the right claimed by him, the ***balance of convenience*** lies in favour of the applicant and the applicant (the plaintiff) must show that he will suffer ***irreparable loss*** if the injunction has prayed is not granted. All the three aspects should go exists.

17. A *prima facie* case is a substantial question raised bonafide, are needs investigation and a decision on merits. It is a settled law for the purposes of forming a *prima facie* view, a Court is required to see the evidence available on the record and mere pleading does not make a strong *prima facie* case. The case must be established by sufficient material or proved by affidavit.

18. Instant suit has been filed for partition. Hence, it would be necessary to prove that the suit properties are joint family properties and plaintiff is the member of such joint family. If the plaintiff successfully proves both these things, he would be entitled to partition and share in it which will, in turn, make her entitle to the relief sought. Admittedly, mother of plaintiff is daughter of Sadashiv. Hence, it would be sufficient if the plaintiff proves that the suit properties are joint family and ancestral properties of defendants and plaintiffs. However, 7/12 extracts filed by plaintiff with the list of documents at Exh. 5 shows that name of father defendant only is there on revenue record.

19. The main question which needs to be discussed while deciding an application for temporary injunction is ***whether daughter of Sadashiv (Grandfather of plaintiff), Mandakini (mother of plaintiff) did inherit suit properties, along with her brother Dattatraya (Father of defendants)***. It is admitted position of the suit that, since 1955, name of father of defendants only is mutated at revenue entries. It is also admitted that death of date of mother of plaintiff is 05/01/2007, father of defendant no. 1 died on 14/02/2018 and his mother died on 03/08/2018. It is pertinent to note that, plaintiff has not uttered single word about his father, only fact of death of his mother is mentioned in the plaint.

20. Defendants have denied the date of death of their grandfather in 1949. However, mutation entry 1662 shows that after death of father, name of defendant has been brought on record. Obviously, at that time Hindu Succession Act, 1956 was

not in force. The said Act came in force on 17/06/1956. However, as per Judgement of Honorable Apex Court in the case of **VINEETA SHARMA v/s RAKESH SHARMA & OTHERS (2020) 9 SCC 1** now, the requirement that Father should be alive on 09/09/2005 is not necessary. It is sufficient that if Daughter is alive on 09/09/2005. Hence, as it is admitted that that death of date of mother of plaintiff is 05/01/2007, after her demise plaintiff being her class 1 heir is having share in the property of her father. Though revenue entries are in the name of defendants, they are merely for fiscal purpose. Hence, no title can be conferred on defendant based on those extracts.

21. Now, so far as contention of the defendant about the nature of suit property is concerned, it can be seen from record that **photocopy of registered sale deed** produced on record shows that from one Vinayak Keshav Rajwade and Krishnaji Keshav Rajwade, properties were purchased by grandfather of parties by registered sale deed.

22. There is a presumption every Hindu Family is joint in food, worship and estate. There is a presumption that a joint family continues joint. There is no presumption that the joint family possessed joint family property. The party who claims partition must prove that it is a joint family property. Coparceners have community of interest and unity of possession. No coparcener is entitled to exclusive possession of any part of the property. These rules and incidents of coparcenary or joint family properties are enumerated in the case of **STATE BANK OF INDIA VS GHAMANDI RAM AIR 1969 SC 1330**. It was held the said case

by Honorable Apex Court that,

“ the incidents of coparcenrship under the Mithakshara law are ; first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition, thirdly; that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of property is possible unless it is for necessity, without the concurrence of the coparceners and sixthly; that the interest of deceased member lapses on his death to the survivors.”

23. Considering above mentioned authority, it is crystal clear that coparcener, who can be a daughter, after death of her father, can transfer entire portion of ancestral property without any partition, only for legal necessity. Same in the case of son. Unless and until, she has consented, he cannot transfer property in any way. Hence, she being a coparcener in property, after her death, as per section 15 of the Hindu Succession Act, her sons being class one heirs are the successors of her property.

24. As discussed above a Hindu Coparcener acquire ownership in an ancestral property **by birth**. Such descendants of that coparcener can very well at any time work out their rights by asking for partition. Till the partition is effected by metes and bounds, each member has got ownership extending

over the entire property conjointly with others. Hence, as a result of such co-ownership, the possession and enjoyment of the properties is common. Hence, prima facie it appears that plaintiff's mother was having an undivided interest in the suit property mentioned. And after her demise, being class 1 heir, plaintiff is having share in the suit property. As mentioned by defendants, they are in possession of suit property since many years. The mutation entries are in the name of defendants. However, as partition is not yet effected, share of plaintiff is intact.

25. It was held by Hon'ble Supreme Court in the case of **M/S. GUJARAT BOTTLING CO. LTD. VS. COCA COLA COMPANY LTD. AIR 1967 SC 1098** has held that "*while deciding an application under Order 39, Rule 1 & 2 of the Code of Civil Procedure, 1908, for the grant of temporary injunction, while exercising discretion the Court has to apply following test.(1) that the applicant has a prima facie case in support of the right claimed by him, (2) the balance of convenience lies in favour of the applicant and (3) the applicant (the plaintiff) would suffer an irreparable loss or injury if the prayer for interlocutory or temporary injunction is disallowed*".

26. Further in case of **DALPAT KUMAR VS. PRALHAD SINGH, AIR 1993 SC 276** Hon'ble Apex Court explained three factors to be considered while deciding application for temporary injunction as follows: *(1) a serious*

disputed question to be tried. (2) The Court's interference is necessary to protect from injury and (3) That the comparative hardship or inconvenience is likely to occur from withholding the injunction will be greater than acted from granting it.

27. Now, so far as the point of non-joinder of party who is necessary is concerned, it is alleged that her husband after her death should have been made a party. However, at the time of deciding T.I., Court is not expected to dwell into the fact. Share of mother of plaintiff can be decided in the main suit after evidence is laid on the said fact. Prima facie it appears that as mother of plaintiff is having share in the suit property and there is apprehension that Defendants whose name are already on record can very well transfer or destroy it without her successors consent.

As to point Nos. 2 & 3-

28. The expression balance of convenience means balancing the rights of both the parties. Prima facie, it appears that as the plaintiff is having share undivided in the suit property, his rights need to be safeguarded. Though it is submitted by the defendants that, they have never shown any intention to transfer the suit property in any way, but plaintiff by way of filling this application supported by an affidavit shown the apprehension of alienation of the suit properties. Hence, in the present matter there is an oath against oath. Thus, in the present suit, till the final adjudication of suit, the suit property needs to be preserved and protected as it is.

29. On the point of protection of section 51 of Transfer of property Act, I am guided on law point by an authority of Honorable Bombay High Court in the case of **Shri Prakash Gobindram Ahuja Vs Shri Ganesh Pandharinath Dhole 2016 SCC online Bom 8884**, wherein in an answer to reference made, Honorable Court observed that, in **para no. 177** that *section 52 of the Transfer of Property Act does not provide adequate protection to parties from transfers pendente lite. It may not be appropriate for the court to expect the plaintiff to show that the provisions of section 52 of Transfer of Property Act do not afford and adequate protection, it cannot be laid down as a blanket proposition of law that in each case, plaintiff is expected to show it as a condition precedent for grant of injunction order.* Hence, it cannot be said that remedy of protection under section 52 of T.P. Act is available to plaintiff.

30. Hence, the plaintiff has made out the prima facie case by showing the apprehension of alienation of the subject matter. In the present matter, till the final adjudication of the suit, the subject matter must be preserved and protected. Hence, in an answer to point no. 2 I answer that balance of convenience lies in the favour of plaintiff and recorded my findings accordingly.

As to point No. 4-

31. Irreparable loss or injury means the legal injuries to the parties. While, evaluating the legal injury likely to be caused, it is necessary that the parties should have legal rights. Furthermore, if the temporary injunction is not granted in favour of the plaintiff, then he will be deprived of his right of possession in the suit property. It will also create multiplicity of proceedings. The trial will take its own

course to get completed and till then an irreparable loss would cause to the plaintiff if the subject-matter is allegedly disturbed by defendants. No irreparable loss would be caused to defendants if the temporary injunction is granted in favour of the plaintiff. In this backdrop, I am convinced that the plaintiffs will suffer irreparable loss. Hence, the point No. 3 is also answered accordingly.

32. Admittedly, dispute is regarding having right in the suit property and restraining defendants from creating third party interest. The factum of attempt on the part of defendant to create third party interest and share of plaintiff in the suit property can be decided after the evidence led by both parties. This being a triable issue which can be decided after evidence on record. Till then, injunction needs to be issued against defendants thereby preventing him from creating third party interest till final decision of the suit. Hence, I pass following order

Order

1. The application at **Exh. No. 6** is allowed
2. Defendant no. 1 and 2 are temporarily restrained from alienating or creating any third party interest in the suit property in any manner till final determination of the suit.
3. Parties to take note that the observations in this order are purely based on prima facie assessment on available material on record.
4. Costs will abide the main cause.

Place- Deorukh

Date- 26/09/2022

Shruti H. Patil

Jt. CJJD, Deorukh.

CERTIFICATE

order in R.C.S. no. 30-2020

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

Name of the Stenographer : T. N. Khade (Jr. Clerk)

Court name : Jt. Civil Judge, J. D. and J.M.F.C., Deorukh.

Date : 26/09/2022

Order signed by the presiding officer on : 26/09/2022

Order uploaded on : 27/09/2022