

**ORDER BELOW EXH.5 IN R.C.S NO.97/2022****Biru Vs. Dharepaa.**
CNRNO.MHSN070003412022

This application is filed by plaintiff under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 for temporary injunction restraining the defendant No.1 from obstructing to peaceful possession of plaintiff over the Gat No.293 ad-measuring to the extent of 4 H, 4 Are situated at village Lonarwadi, Tal.Kavathe-Mahankal, Dist. Sangli, more particularly described in plaint para No.1.

02. According to plaintiff, suit property is ancestral property of plaintiff and defendant Nos. 2 to 7/3. In partition, suit property had come to share of his father. The father of plaintiff namely, Tatoba Dadu Mote died intestate. Plaintiff is the son of deceased Tatoba. Defendant Nos. 2 to 7 are sisters of plaintiff. After the death of Tatoba, plaintiff and defendant Nos. 2 to 7 have inherited the suit property. It is further averred that, co-sharers of this property cannot sold the share of property to third person. Other co-sharers have preferential right to purchase this property. Plaintiff and defendant Nos. 2 to 7 are Class-I heirs of deceased Tatoba.

03. It is further averred that, partition of suit property has not taken place. Defendant No.2 sold 1/6th share in suit property to the defendant No.1 by way of registered sale-deed dated 24-02-2022. She has no right to sale her undivided share. In fact, there are seven legal heirs of deceased Tatoba. Therefore, defendant No.2 cannot

sold 1/6th share when there are seven co-sharers in the suit property. In nutshell, she has sold undivided share more than his right. It is further contended that, plaintiff is the brother of defendant No.2, therefore, he has right of preference to purchase share of defendant No.2. Plaintiff had shown his interest to purchase the suit property. Therefore, sale-deed in favour of defendant No.1 is null and void, and is not binding of share of plaintiff. It is further submitted that, defendant No.1 is stranger purchaser. He is trying to take illegal possession of the suit property. He has no right to take possession of suit property unless there is partition by meets and bounds or by Decree of the Court. Defendant No.1 is trying to take possession of the suit property on the basis of sale-deed. Suit property is ancestral property. Therefore, possession of plaintiff would be disturbed by unlawful act of defendant No.1.

04. It is further submitted that plaintiff has a prima facie case. Furthermore, balance of convenience lies in his favour. Plaintiff is the possessor of suit property, therefore, no hardship would be caused to defendant No.1 if injunction is granted. Accordingly, prayed that defendant No.1 be restrained temporarily from interfering in peaceful possession of plaintiff over the suit property.

05. Defendant No.1 filed his reply to this application vide Exh. 27 and thereby, resisted the application. Defendant No.1 has denied all averment of the application. According to him, defendant No. 2 has sold suit property to him vide sale-deed No. 387/2022, dated 24-02-2022. This sale-deed is legally valid. It is alleged that, partition has not taken place between Grandfather of plaintiff and legal heirs of Grandfather of plaintiff. Therefore, this suit is not

maintainable for premature partition. He denied right of pre-emption of plaintiff. He contended that plaintiff was aware that defendant No.2 is going to sale his share. Plaintiff did not take objection for registration of sale-deed. Therefore, sale-deed of defendant No.1 is legal valid. The defendant No.1 has purchased the suit property by verifying all concerned title documents. According to defendant No.1, he is in possession over the suit property on the basis of sale-deed executed by defendant No.2. It is further contended that other sale-deeds also had taken place of the lands of plaintiff and defendant No.2, but there is no objection to other sale-deeds. In view of above reason, he prayed for rejection of the application.

06. Heard argument of both parties. Considering pleadings, documents filed on record, and argument of both parties, following points arise for my determination. I have recorded my finding thereon for reasons given below.

SR.NO.	POINTS	FINDINGS
1	Whether plaintiff proves prima facie case is in his favour?	Proved.
2.	Whether plaintiff further proves that the balance of convenience lies in his favour ?	Proved.
3.	Whether irreparable loss and hardship would be caused to plaintiff if temporary injunction is refused ?	Yes.
4.	What order?	Application is allowed.

REASONS

07. It is well settled principle of law that in temporary injunction application three tests have to be applied. Prima facie case, balance of convenience and irreparable loss. Plaintiff is duty bound to prove that prima facie case is made out. Prima facie case means a case that there is serious question to be tried in the suit and that on the facts before the court, there is possibility of the plaintiff being entitled to the relief asked by him.

08. Perused the plaint, application, reply and documents filed by both parties. The learned Advocate for plaintiff argued that suit property is ancestral property of plaintiff and defendant Nos. 2 to 7. The defendant No.2 has sold her interest of ancestral property to the defendant No.1. That sale-deed also recites that suit property is ancestral property. Till today, partition has not taken place between plaintiff and defendants. Therefore, defendant No.1 cannot take possession of the suit property unless there is partition of suit property. Therefore, order of temporary injunction is necessary to restrain the defendant No.1 from taking forceful possession of the suit property. On the other hand, the Ld. Advocate for defendant No.1 argued that sale-deed is legally valid. Defendant No.2 has right to sale her undivided share of ancestral property and therefore, she has sold her share. He further argued that defendant No.1 is in possession over the suit property. He relied upon photographs submitted by defendant No.1 to show his possession over the suit property. For these above reasons, the Ld. Advocate for defendant No. 1 prayed for rejection of the application.

09. Plaintiff has filed on record certified copy of 7/12 extract of Gat No.296. This extract prima facie shows that suit land is joint property of plaintiff and defendant No.2. Plaintiff has filed on record copy of mutation entry No. 1302. This mutation entry reflects that after the death of Tatoba Dadu Mote, the name of plaintiff and defendant No.1 came to be recorded as legal heirs of deceased Tatoba. There is no dispute as to this fact. Further, sale-deed No.387/2022 also recites that defendant No.2 has sold her undivided share of suit property to the defendant No.1. Therefore, prima facie it is proved that suit property is ancestral property of plaintiff and defendant No.2. Admittedly, defendant No.1 is the stranger to the family of plaintiff. The reply of defendant No.1 also, shows that suit property is ancestral property and till today partition has not taken place. The defendant No. 1 in his reply contended that partition had not taken place between predecessor of Tatoba Mote and Baburaoji Mote. Therefore, plaintiff has no right to ask for partition. This statement also supports to the fact of jointness of family of plaintiff. Undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the Vendee unless the property is partitioned by meets and bounds amicably and through mutual settlement or by decree of the court.

10. Prima facie it is proved that suit property is ancestral property which is not partitioned till today. There is no partition between plaintiff and defendant No.2. Therefore, defendant No.1 cannot take possession of suit property unless the property is partitioned by meets and bounds amicably or through mutual settlement or by decree of the court. Further, prima facie it shows

that there are total 7 co-sharer including defendant No.2, but defendant No.2 has sold 1/6th share which is more than her share. The defendant No. 2 is entitled to alienate to the extent only of her own interest in the alienate property. Defendant No.1 has filed on record certain photographs to show that he is in possession over the suit property. As stated above, defendant No.1 is entitled to purchase the undivided interest of defendant No.2, but he is not entitled to take possession of co-parceners undivided interest in the joint family. His only right is to sue for partition of property and asked for allotment to him of that which, on partition might be found to fall to the share of the co-parcener whose share he had purchased. Therefore, even if it is assumed that defendant No.1 is in possession over the suit property, his possession is not sanctioned by Law. The possession of defendant No. 1 is illegal, and illegal possession cannot be protected.

11. The defendant No.1 relied upon the judgment of the **Hon'ble Haryana and Punjab High Court in the case of Ashok Kapoor Vs. Murtudevi reported in 2015 SCC on-line HP 1422.** In this judgment, the suit property was joint property. The plaintiff was co-sharer to the extent of 1/4th share. This judgment is not on the point of alienation of co-parcener undivided interest in the joint family property. Therefore, this judgment is on different facts and law, and hence is not applicable to the facts of present case.

12. Plaintiff has taken several grounds such as bar of fragment and his right of preference to purchase the suit property etc. These grounds are not relevant at this stage. At this stage, only the

question of possession is in question. The question of fragment and right of preference are matter of trial.

13. In view of above discussion, I come to conclusion that prima facie it is proved that suit property is ancestral property of plaintiff and defendant Nos. 2 to 7. The defendant No.1 is the stranger purchaser. He has purchased undivided interest of defendant No.2, but he is not entitled to take possession of co-parceners undivided interest in the joint family. Therefore, it is necessary to restrain the defendant No.1 from interfering in possession of the plaintiff over the suit property, which is joint family property of plaintiff and defendant Nos. 2 to 7. In view of above reasons, I come to conclusion that plaintiff has proved that, he has prima facie case. Prima facie suit property appears to be joint family property and defendant No.1 is the stranger to the family of plaintiff. As stated above, the possession of defendant No. 1 is not sanctioned by Law. Therefore, balance of convenience also lies in favour of plaintiff. Further, irreparable loss would be caused to plaintiff if injunction is refused. An order of temporary injunction is necessary to protect the right of plaintiff. All three ingredients of temporary injunction are satisfied by the plaintiff.

14. As discussed above, plaintiff has proved his prima facie case. Balance of convenience also tilt in his favour. Further, plaintiff would suffer an irreparable injury if, his prayer for temporary injunction is disallowed. Whereas, no irreparable loss would be caused to defendant No. 1 as he is not entitled to take the possession of suit property without resorting available legal remedies. Therefore, plaintiff is entitled for discretionary relief of temporary injunction

against the defendant No.1. Resultantly, application deserves to be allowed. In view of above discussion, I answer point nos. 1 to 3 in the affirmative and in answer to point No.4, I pass the following order-

ORDER

1. Application at Exh.5 is hereby allowed.
2. Defendant No. 1 is hereby temporarily restrained from obstructing to peaceful possession of plaintiff over the Gat No.293 ad-measuring to the extent of 4 H., 4 Are situated at village Lonarwadi, Tal.Kavathe-Mahankal, Dist. Sangli, more particularly described in plaint para No.1 till the disposal of suit.
3. Costs in cause.

Date: 01/09/2023
Kavathe-Mahankal.

(Arun R. Vyawahare)
Civil Judge, Junior Division,
Kavathe-Mahankal.

Certificate

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

Name of the Stenographer - H.P.Haridas

Court - CJJD and JMFC, Kavathe-mahankal.

Date - 1.9.2023

Order signed by the

Presiding Officer on -1.9.2023

Order uploaded on -2.9.2023