

ORDER BELOW EXH. 5 IN R. C. S. No.65 of 2021
(Shamrao Khandekar & ors. Vs. Shankar Khandekar & Ors.)
[CNR-MHSN08-000485-2021]
(Delivered on 6th October, 2021)

This is an application by the plaintiffs against the defendant No. 9 under Order XXXIX Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 for issuing temporary injunction restraining him from alienating the suit properties in any manner in favour of any third parties and also for restraining him from causing obstruction to peaceful possession of the plaintiffs over the suit properties, till final disposal of the suit.

2) Brief summary of the case of the plaintiffs is as under :-

Description of suit properties:-

A) The property situated at village Birnal, Taluka - Jath, District – Sangli bearing Gat No. 103 having area 1 H 20 R assessed at Rs. 0=76 Pai which is bounded by towards

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| East | – | The joint property of the plaintiffs and the defendants in Gat NO. 105 |
| West | - | The property of Suresh Pandurang Waghmode |
| South | - | The property of Shivaji Lokhande |
| North | - | The property of Sanjay Bandgar bearing Gat No. 102 |

The property as described above with all its contents and easementary rights.

B) The property situated at village Birnal, Taluka - Jath, District – Sangli bearing Gat No. 105 having area 12 R assessed at Rs. 0=07 Pai with all its contents, joint property for agricultural road and easementary rights.

3) That, the plaintiffs and the defendants No. 1 to 8 are members of Hindu undivided joint family and the suit properties are ancestral joint family properties. No partition in respect of ancestral joint family properties has been taken place in the undivided family of the plaintiffs and the defendants No. 1 to 8. They are all in joint cultivation and possession of the suit properties. After demise of the common ancestor i.e. Mayappa, the names of the plaintiffs and the defendants No. 1 to 8 came to be mutated to the records of the rights of the suit properties by virtue of Mutation Entry No. 358. Though, the suit properties are not partitioned yet by metes and bounds, the defendants No. 3 to 5 and grandmother of the plaintiffs namely Kasabai sold out their undivided interest in the joint family in favour of the plaintiffs by virtue of registered sale deed bearing No. 3561 dated 22.11.2001 for consideration of Rs. 60,000/-. On the basis of above said sale deed, Mutation Entry No. 705 came to be confirmed and the names of plaintiffs have been mutated to the suit properties.

4) That, though the suit properties are not partitioned yet by metes and bounds the defendant No. 1 intended to sell out his undivided interest in the joint family and started negotiations with defendant No. 9 for the said purpose. The plaintiffs came to know about the same from villagers. Hence, the plaintiffs approached the defendant No. 1 and requested for not alienating the suit properties in favour of

strangers than to the members of joint family. The plaintiffs also offered to purchase undivided interest of the defendant No. 1 for the consideration of fair market value. However the defendant No. 1 flatly refused to the fair offer proposed by the plaintiffs. The plaintiffs also approached defendant No. 9 and requested him not to purchase the undivided interest of defendant No. 1 as there was no partition by metes and bounds in respect of suit properties. However, he also do not paid any heed to the requests of the plaintiffs. So the plaintiffs issued legal notice to the defendants No. 1 and 9 through their advocate Mr. S. B. Soudagar on 13.01.2020. The defendant No. 1 and 9 did not answered the said notice. Thereafter due to outbreak of Corona pandemic, lock-down was imposed in entire state of Maharashtra. So the plaintiffs could not travel anywhere. All the government offices were also closed. Hence, the plaintiffs could not initiate any action immediately against the defendants No. 1 and 9.

5) That, immediately after receiving the notice of the plaintiffs, the defendant No. 1 executed and registered false, bogus and void gift deed in respect of suit properties in favour of the defendant No. 2 on 17.08.2020 having registration No. 1691 only with intention to deprive the rights of the plaintiffs. They also got mutated the name of defendant No. 2 by virtue of Mutation Entry No. 1549 without issuing any notices to the parties concerned. Thereafter, defendants No. 1, 2 and 9, in collusion with each other, by having advantage of lock-down imposed in the State of Maharashtra and simpleton nature of the plaintiffs, got executed sale deed in respect of the suit properties in favour of the defendant No. 9 from the defendant No. 2 bearing

registration No. 3327/2020 for the consideration of Rs. 1,00,000/-.

They also got mutated name of the defendant No. 9 by virtue of Mutation Entry No. 1577. The said sale deed and mutation entries are entirely illegal, baseless, void-ab-initio and bogus. The gift deed executed by defendant No. 1 in favour of defendant No. 2 is also illegal, baseless, void-ab-initio and bogus. All these transactions are not binding upon the rights of the plaintiffs involved in ancestral joint family properties.

6) That, the defendant No. 9 is trying to obstruct joint and peaceful possession of plaintiffs along with the defendants over the suit properties on the virtue of false and illegal sale deed in his favour. He is threatening the plaintiffs that he will alienate the suit properties in favour of third parties. Due to the illegal activities of the defendants No. 1, 2 and 9 the plaintiffs are constrained to file present suit for partition, separate possession, declaration and for perpetual injunction. However, considerable time will be required to decide the suit on merit. Meantime, if the defendant No. 9 alienates the suit properties in favour of any third parties in any manner or causes disturbance to the joint and peaceful possession of the plaintiffs over the suit properties, then it will cause heavy and irreparable loss to the plaintiffs. It will also result in multiplicity of the proceedings. There is prima-facie case in favour of the plaintiffs, balance of convenience also lies in their favour and they will suffer irreparable loss if the temporary injunction is not granted in their favour. Therefore, they prayed for allowing the application and granting temporary injunction against defendant No. 9 as prayed.

The brief summary of the say of the Defendants No. 9 :-

7) That, the defendant No.9 appeared in the matter and filed his written statement and say to present application vide Exh.27. The defendant No. 9 admitted the contentions of the plaintiffs regarding genealogy mentioned by them and the contentions in respect of sale deed by defendants No. 3 to 5 in favour of them. However, the said defendant denied all other contentions raised by the plaintiffs and in order to counter strike the same, he contended that, the plaintiffs have rights whatsoever in the property of Gat No. 103 to the extent of 19 R only. They have not described the said suit property by providing detailed boundaries of the same. Hence, the suit is not tenable for want of better description of the suit properties.

8) That, the plaintiffs have not claimed by relief in respect of sale deed by defendants No. 3 to 5 in their favour. Moreover, from the said sale deed, it vividly reveals that there is partition between the plaintiffs and defendants No. 1 to 8 and there separate Anewari is recorded to the revenue record. They are also exclusively in separate possession of their separate shares.

9) That, the plaintiffs never had any right of preemption over the suit properties. Hence, the defendant No. 9 did not replied to the false and bogus notice issued by the plaintiffs. That, as the properties of Gat No. 103 and 105 were separately in possession of the defendant No. 1 and 2 and their names were separately mutated to the record of rights by virtue of distinct Anewari, the defendant No. 9 purchased the property from the defendant No. 2 after inquiry regarding his title to the

same. The defendant No. 9 also perused and verified all the revenue record in respect of suit properties and only thereafter, he purchased it from the defendant No. 2. On the strength of the sale deed in his favour, he was actually put in possession of the property purchased by him on the date of the sale deed itself. Name of the defendant No. 9 is also mutated to the 7/12 extract of the suit property. No cause of action never arisen as contended by the plaintiffs. As all the holders were in separate possession of their respective shares as per their respective Anewari, the plaintiffs could not claim any reliefs against their co-sharers. As the defendant No. 9 has purchased the property from one of the co-sharer of the plaintiffs they could not claim any relief against him as he also becomes co-sharer of the plaintiffs. If the relief of injunction is granted in favor of the plaintiffs they will dispossess the defendant No. 9 by having undue advantage of such relief and will establish their rights in the suit property without any legal base. Hence, the suit filed by the plaintiffs deserves to be dismissed. The present application is also liable to be rejected with costs.

10) Heard Learned Advocates Mr. A. A. Nitave for the plaintiffs and Mr. A. B. Dudhal for the defendant No. 9. Perused the plaint, written statement and documents on record.

11) The points for determination along-with my findings thereon are as under :-

Sr. No.	POINTS	FINDINGS
1.	Whether the plaintiffs have made out prima-facie case in their favour ?	Affirmative

2.	Whether the balance of convenience lies in favour of the plaintiffs?	Affirmative
3.	Whether the plaintiffs would suffer irreparable loss, if relief of temporary injunction is refused ?	Affirmative
4.	What order ?	As per final order.

:- REASONS :-

As to Point No. 1 to 4 :-

12) In order to substantiate the case, the plaintiffs produced on record following documents along with lists below Exh. 3.

Sr. No.	Particulars	Date
1	The copy of 7/12 extracts bearing Gat Nos. 103 & 105 situated at village Birnal, Taluka- Jath, District – Sangli	02.03.2021 and 19.03.2021
2	The copy of 8-A extract bearing Khate No. 209 in the name of the plaintiffs	19/03/2021
3	The copies of Mutation Entry No. 358, 1577 and 1549 respectively confirmed on 01.09.1992, 08/02/2021 and 12/09/2020	15/07/2019, 18/02/2021 and 02/03/2021
4	The copies of sale deeds bearing registration No. 3561 & 3327	22/11/2001 and 15/12/2020
5	The copy of gift deed bearing registration No. 1699	24/08/2020
6	The death extracts of Kasabai Mayappa Khandekar and Sakhubai Shivappa Khandekar	03/03/2021

7	The copy of legal notice issued by plaintiffs to the defendants No. 1 and 9	13/01/2020
8	The postal receipt in respect of legal notice issued by plaintiffs	13/01/2020

13) In order to counter the contentions of the plaintiffs, the defendant No. 9 does not produced any document on record.

Arguments on behalf of the plaintiffs:-

14) The learned advocate on behalf of plaintiffs argued that, the plaintiffs have filed the suit for partition, separate possession, declaration of right of preemption, declaration to the effect that the gift deed and sale deed executed by defendants No. 1 and 2 are not binding upon them and for perpetual injunction. Mutation Entry No. 358 clearly reveals that after demise of common ancestor i.e. Mayappa, the names of all the plaintiffs and the defendants No. 1 to 8 came to be mutated to the suit properties. Hence, it is clear that the suit properties are ancestral joint family properties.

15) That, perusal of sale deed by defendants No. 3 to 5 in favour of plaintiffs clearly reveals that they have sold out their undivided interest in the suit properties. The said aspect strengthens the contentions of the plaintiffs that the suit properties are not partitioned yet. No partition by metes and bounds ever took place in respect of the suit properties. Even though, the defendant No. 1, 2 and 9 have fraudulently executed gift deed and sale deed only with intention to deprive the rights of the plaintiffs. Prior to the execution of gift deed the plaintiffs issued legal notice to the defendants No. 1 and 9. Even though, they have performed illegal transactions in collusion with each

other. Though the suit properties are undivided ancestral joint family properties, the alleged gift deed and sale deeds have been executed by mentioning false and bogus boundaries by the defendants No. 1, 2 and 9. They have no legal right to do so by any stretch of imagination.

16) That, the defendant No. 9 got mutated his name without issuing notices to the plaintiffs. On the strength of his name mutated to the suit properties, the defendant No. 9 is trying to disturb the possession of plaintiffs over suit properties and he is trying to alienate the same in favour of third parties. The defendant No. 9 is stranger to the joint family of plaintiffs and defendants No. 1 to 8.

17) That, though the defendants contend and argue about separate Anewari, it could not be construed as partition by metes and bounds. In the absence of actual and effective partition by metes and bounds, no one could claim that actual partition is there only on the basis of separate Anewari. The defendant No. 9 being stranger person and foreign to the joint family of the plaintiffs and defendants No. 1 to 8, he could not put into exclusive possession of undivided interest purchased by him. He could not claim so without suing the members of undivided family for general partition.

18) That, the plaintiffs claims 5/8th share in the suit properties. Perusal of sale deed in favour of defendant No. 9 prima facie reveals that the alleged area sold to him by defendant No. 2 is in excess to the alleged portion which could fall to the share of branch of defendant No. 1. As the sale deeds and gift deed have been executed in respect of the undivided joint family properties, those are at all void, baseless and

illegal. Those are not binding in any sense upon the rights of the plaintiffs. Hence, strong prima facie case is in favour of plaintiffs. Finally he submitted that, temporary injunction needs to be granted as prayed by the plaintiffs in their favour. In support of his arguments, he placed his reliance on the decision of Hon'ble Supreme Court given in the case of Gajara Gosavi Vs. Prakash Kamble & Ors. reported in 2017 (3) Mh. L. J. 135., the decision of Hon'ble Supreme Court given in the case of Ramdas Vs. Sitabai & Ors. reported in 2017 (3) Mh. L. J. 135. and decision given by Hon'ble Calcutta High Court in the case of Ashim Das Vs. Sm. Bimla Ghosh and Others, AIR 1992 Cal 44.

Arguments on behalf of the defendant No. 9:-

19) On the other hand, learned advocate on behalf of the defendants No. 9 argued that, the sale deed in favor of the plaintiffs by the defendants No. 3 to 5 and Kasabai clearly mentions about the separate Anewari of each member in the joint family of the plaintiffs and the defendants No. 1 to 8. Hence, it clearly reveals that the theory of oral partition is admitted to the plaintiffs. The so called notice issued by the plaintiffs was only in respect of right of preemption.

20) That, as per section 54 of transfer of property Act, the possession of immovable property would directly be transferred and handed over by the vendee by the transaction of out and out sale. Accordingly the defendant No. 2 has transferred the possession of property purchased by the defendant No. 9 by virtue of the sale deed. The defendant No. 9 has become exclusive owner and possessor of the said property on the strength of the sale deed in his favor. His name is also mutated to the 7/12 extract of the suit property. The relief of

temporary injunction sought by the plaintiffs is in the nature of final relief to be granted only after conducting trial in the suit. It could not be granted at this stage as it will result in deciding the suit finally. If the injunction as prayed for is granted then the defendant No. 9 only will suffer irreparable loss as he has purchased the property by paying valuable consideration.

21) That, the defendant No. 9 purchased the property from the defendant No. 2. Hence he steps into the shoes of the defendant No. 2 and consequently becomes co-parcener of the plaintiffs and the defendants No. 1 to 8. Moreover, the status of alleged joint possession is disrupted as the defendant No. 2 executed sale deed in favor of the defendant No. 9 by mentioning specific boundaries. Considering this aspects it clearly reveals that no prima facie case lies in favor of the plaintiffs. The balance of convenience lies in favor of defendant No. 9 as he is owner and possessor of the suit property purchased by him. Finally he prayed for rejection of application. In support of his arguments, he placed reliance upon the decision of Hon'ble High Court of Bombay given in the case of Laxminarayan Jaiswal Vs. Pruthviraj Jaiswal, Civil Revision Application No. 95/2017 decided on 27.07.2017 and the decision of Hon'ble Supreme Court of India given in the case of Narendra Kante Vs. Anuradha Kante and Others, Civil Appeal No. 8290/2009 decided on 15.12.2009.

22) In light of above rival pleadings, documents produced on record, arguments advanced and authorities relied upon, it is necessary to scrutinize first of all that, whether the plaintiffs have shown prima facie case in their favour or not. As the present suit is for partition,

separate possession, declaration, exercising right of preemption and perpetual injunction, it is necessary to scrutinize whether the plaintiffs have prima facie shown that, the suit properties are ancestral joint family properties and they have undivided interest therein by birth as co-parcener or not. For the said purpose, the documents produced on record by the plaintiffs are to be scrutinized carefully. First of all, perusal of mutation entry No. 358 reveals that the properties of Gat No. 103 and 105 i.e. the suit properties were standing in the name of the common ancestor of the plaintiffs and the defendants No. 1 to 8 namely Mayappa. As he died on 06/07/1988, the names of the plaintiffs and the defendants No. 1 to 8 came to be mutated to the suit properties as his legal heirs. Considering the said mutation entry, it clearly reveals that the suit properties are mutated in the names of the plaintiffs and the defendants No. 1 to 8 after the demise of their common ancestor. Hence, the said mutation entry prima facie substantiate the contentions of the plaintiffs that the suit properties are ancestral joint family properties. So also, perusal of the 7/12 extracts of the suit properties produced on record reveals that, the names of the plaintiffs and the defendants No. 1 to 8 have been mutated according to the mutation entry No. 358.

23) Moreover, the said contentions of the plaintiffs are further substantiated prima-facie by the recitals in the sale in favour the plaintiffs by the defendants No. 3 to 5 and Kasabai. Perusal of the said sale deed reveals that the defendants No. 3 to 5 and Kasabai have sold out their undivided interest to the plaintiffs. It is specifically mentioned in the said sale deed that, the said defendants No. 3 to 5 and Kasabai are selling out their undivided interest having 10 Ana 8 Pai share . It is also specifically mentioned in said sale deed that, as there is no partition

by metes and bounds in respect of the suit properties, they have only alienated their undivided interest and for the said reason specific boundaries have not been mentioned therein. Considering said recitals, prima facie, it reveals that the suit properties are joint family properties of the plaintiffs and the defendants No. 1 to 8 and there is no partition by metes and bounds amongst the member of joint family.

24) To counter the said contentions the defendant No. 9 has contended that, there is partition between the plaintiffs and defendants No. 1 to 8. It becomes clear from recitals in sale deed by the defendants No. 3 to 5 in favour of plaintiffs as they have mentioned their separate anewari. However, I do not found any substance in said contentions and arguments advanced in that regard as sale deed clearly mentions about the property transferred thereby is nothing but only undivided share of the defendant No. 2. It is specifically mentioned in sale deed in favour of the defendant No. 9 that the defendant No. 2 has sold out only H 0=19 R are of his share out of total H 1=20 R area of the property of Gat No. 103. So also, the defendant No. 1 has mentioned in alleged gift deed executed by him in favour of the defendant No. 2 that, he has transferred only H 0=19 R are of his share by way of the gift deed.

25) The defendant No. 9 has also contended that there is partition between the plaintiff and the defendants No. 1 to 8. Said aspect becomes clear from specific names and anewari entered to the revenue record separately. However, I do not find any substance in the said contentions and arguments advanced in that regard only for the reason that, anewari entered to the revenue record simply indicates the extent of undivided interest in joint family. It could not be presumed or construed that, there is actual and effective partition between joint

family member unless any such evidence is brought on record. Though the defendant No. 9 has contended in that context, he has not brought on record any documentary evidence to prima facie substantiate his contentions regarding partition between the plaintiffs and the defendants No. 1 to 8 except than relying upon separate anewari entries. Moreover, said aspect is to be deal with at the time of the trial and both the parties will have opportunity to substantiate their claim.

26) Considering above discussion I am of the opinion that the plaintiffs have prima facie substantiated their contentions that, the suit properties are joint family properties and there is no partition in respect of them amongst themselves.

27) The plaintiffs have challenged the alienations made by the defendant No. 1 in favour of the defendant No. 2 by way of gift deed and subsequently by the defendant No. 2 in favour of the defendant No. 9 by way of sale deed. Now it is necessary to scrutinize the aspect that, whether the plaintiffs have shown prima facie case in that regard or not.

28) So far as these transactions are concerned, it is pertinent to note that the said transaction have been effected by the defendants No. 1 and 9 after receipt of legal notice by the plaintiffs claiming that the suit properties are ancestral joint family properties, there is no partition by metes and bounds in respect of them, they have right of preemption regarding them and for the said reason the defendant No. 9 should refrain from purchasing the same. Perusal of say of defendant No. 9 reveals that he has contended that the plaintiffs have no preemption right in respect of the suit property and hence he avoided to reply said false and bogus notice.

29) So far as this set of pleadings and counter pleadings is concerned, it is necessary to mention that whether the plaintiffs have right of preemption or not is the part of trial and both the parties will have every right to substantiate and counter their respective stand. However, at this stage prima facie I am of the opinion that the plaintiffs being the co-parceners and members of joint family and the defendant No. 9 being foreign to the joint family of the plaintiffs and the defendants No. 1 to 8, the right of preemption has to be construed from the proximity of the relations. Be that as it may, from the perusal of notice issued by the plaintiffs to the defendant No. 1 and 9, it reveals clearly that they have raised their claim regarding the suit properties being undivided joint family properties. Hence, it becomes clear that the defendant No. 9 was aware about said claim. The defendant No.9 contends that he has purchased the suit properties after inquiring about the same and after verifying all the revenue record. However, I do not find any substance prima facie in said contentions as the defendant No. 9 is relying only upon separate entries made on the basis of anewari and the theory of oral partition merely. He has not produced any counter documentary evidence to substantiate his said claim prima facie. Hence, I am of the opinion that the plaintiffs have made out prima facie case regarding the validity to be examined and checked in respect of the alienations made by the defendants No. 1 and 2 in favour of the defendant No. 9.

30) Now so far as the question pertaining to scrutinizing prima facie case regarding restraining the defendant No. 9 from temporary alienating the suit property in favour of any third parties till decision of the suit and restraining him from causing obstruction to the possession

of the plaintiffs alongwith the defendants No. 1 to 8 is concerned, it is pertinent to note that prima facie the plaintiffs have shown that the suit properties are joint family properties and they have undivided interest therein. In such circumstances as they have instituted the suit for partition and separate possession claiming other necessary and ancillary reliefs, if the defendant No. 9 is not restrained from alienating the suit properties further then it will result in multiplicity of proceedings. Hence, I am of the opinion that the plaintiffs have shown prima facie case in that regard.

31) So far as question of restraining the defendant No. 9 from causing obstruction to the possession of the plaintiffs over the suit properties alongwith the defendants No. 1 to 8 concerned, the plaintiffs have contended that there is no partition between themselves and the defendants No. 1 to 8 by metes and bound. Hence, their possession in the suit properties is joint possession with the defendants No. 1 to 8. The defendants No. 1 and 2 were having no right to alienate the suit properties by mentioning specific boundaries.

32) On the other hand the defendant No. 9 is claiming that the defendant No. 2 has transferred the property in his favour by giving specific description and specific boundaries. Hence, alleged joint possession came to be disrupted from each other the defendant No. 9 has been put in separate and exclusive possession of the properties purchased by him.

33) Considering above said rival contentions it is necessary to mention here that the plaintiffs have prima facie shown that the suit properties are undivided joint family properties. It is prima facie revealed from the documents on record that the alleged alienations by

the defendants No. 1 and 2 are in respect of their share in the joint family property. In such circumstances it is necessary to scrutinize whether the said alienation alleged to be made by mentioning specific boundaries of the portion of joint property alienated and recital therein regarding putting the vendee in possession of the same are to be prima facie accepted or not. So far as these questions are concerned the plaintiffs have relied upon the authorities as mentioned above in order to fortify their said contentions. Out of them in the case of **Gajara Gosavi Vs. Prakash Kamble & ors. cited supra, Hon'ble Supreme Court of India** has held in para No. 11 as follows,

“11. Thus, in view of the above, the law emerges to the effect that in given case an undivided share of a co-parcener can be a subject matter of sale / transfer, but possession can not be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.”

34) In the above said matter the appellant Gajara Gosavi filed suit for declaration of ownership of Western half part of house property claiming that the said property was transferred in her favour by one Anjirabai Kamble. The said Anjirabai has purchased the property from Housabai Kamble, who was heir of Krishna Kamble. The defendants therein contested the claim contending that Krishna Kamble and his brother Maruti Kamble were brothers and there was no partition between them and the sale deed executed by Housabai in favour of Anjirabai was not valid. The Trial Court and first Appellate Court held that there was no effective partition between Maruti and Krishna.

Hence, Housabai could not claim any specific share in the property. She could be co-sharer in common and joint possession. As the partition had never been effected, the question of handing over of the possession either to the appellant therein or to her vendee could not arise. Considering the concurrent finding of facts of all the lower Courts, Hon'ble Supreme Court dismissed the appeals by laying down the ratio as discussed above.

35) In the present case also, it has been prima facie shown that, the defendants No. 1 and 2 have transferred their undivided share in favour of the defendant No. 9 though there is no partition regarding the suit properties by metes and bounds. Hence, I am of the humble opinion that the ratio in the authority relied upon is applicable to the present case.

36) In the case of Ashimdas Vs. Shrimati Bimala Ghosh cited supra the plaintiffs therein had filed suit for injunction restraining the defendant, who was lessee of the undivided interest transferred by the co-parceners of the family of the plaintiff in his favour from disturbing his possession over the suit property on the strength of the lease deed.

37) Considering the evidence on record, Hon'ble Calcutta High Court, by interpreting the provision of section 44 of the Transfer of Property Act and relying upon the decision of Hon'ble Supreme Court of India has held as follows,

“That the co-shares of the of an undivided family dwelling house is entitled to a protection under Section 44 of The Transfer of Property Act can by no means be questioned. Second para of Section 44 of The transfer of Property Act reads as follows:-

Where the transferee of a share of dwelling house belonging to an undivided family is not a member of the family, nothing in

this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

In Paresh Nath Vs. Kamal Krishna, it was held that upon a transfer of an undivided share of a family dwelling house by a co-sharer, the other co-sharer may maintain a suit for injunction restraining the stranger transferee from exercising any act of joint possession in respect of the share transferred. A co-sharer is entitled to exercise his possession over every portion of his property. In Surendra Nath Vs. Ram Chandra (1971) 75 CWN 195, this High Court went to so far as to say that a stranger-purchaser is reduced to the position of a trespasser. His purchase vests in him title only and gives him right to sue for partition and nothing more. Section 44 of The Transfer of Property Act negatives his claim to possession before partition. Section 4 of Partition Act spells out his right to sue for partition. Former is the limit and the later is extent of what he had acquired by purchase. Supreme Court virtually gave a sanction to the legal proposition propounded in Surendra Nath's case (supra). In Dorab Cawasji Vs. Coomi Sorab, the Supreme Court approved the view of a High Court that once it is held that the plaintiff is entitled to protection under the second part of Section 44 of the Transfer of Property Act and the stranger-purchasers are liable to be restrained it would follow that even if the defendants have been put in possession or have come jointly to possess they can be kept out by injunction. The effect of that injunction would necessarily mean ejectment. The remedy of the stranger-purchaser is actually one of partition. Until then, he is obliged to keep out from asserting joint possession. It has further been observed in paragraphs 25 and 28 that denial of right of injunction under Section 44 of the Transfer of Property Act would cause irreparable injury to the other members of the family.”

38) In the present case, the plaintiffs have prima facie shown that the defendant No. 1 & 2 have alienated undivided share in favour of the defendant No. 9. In such circumstances, considering the ratio laid down in above referred authority, I am of the opinion that, the said alienation made in favour of the defendant No. 9 is subject to the undivided interest of the other co-shares in joint family of the plaintiffs and the defendants No. 1 to 8 and he could not claim his exclusive

possession over the undivided interest purchased by him and his only remedy is to sue for partition against the co-shares and until then he could be restrained from causing disturbance to the joint possession of the co-sharers in the joint family. Hence, I am of the humble opinion that, the ratio laid down in above said case law is also helpful to the plaintiffs in present case.

39) In the light of the ratio laid down in above said authority, I don't find any substance in the argument on behalf of the defendant No. 9 advanced in connection with the provisions of section 54 of The Transfer of Property Act as said provision is controlled by the general principle regarding transfer of property as laid down in section 44 of the said act.

40) In the case of Ramdas Vs. Sitabai & Ors. cited supra also Hon'ble Supreme Court of India has held in para No. 17 as follows :-

“17. In view of the aforesaid position there could be no dispute with regard to the fact that an 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 metes and bounds amicably and through mutual settlement or by a decree of the court.”

41) Hence taking into consideration the authorities relied on behalf of the plaintiffs also, I am of the humble opinion that, the plaintiffs have prima facie shown that the defendant No. 9 is not entitled to claim exclusive possession in the suit property and he has to sue for partition and until then he could be restrained from passing order of temporary injunction. Hence, considering above said legal and factual background, I don't find any substance in the contentions on behalf of the defendant No. 9 that he has been put in exclusive

possession of the suit property as it has been sold out to him by mentioning specific boundaries and thereby there is disruption of joint status of the suit properties.

42) Now it is most important to discuss the authorities relied on behalf of the defendant No. 9. The defendant No. 9 has placed his reliance on the decision given in the case of Laxminarayn Jaiswal Vs. Pravin Jaiswal & ors. cited supra to contend that, the injunction could not be granted in favour of one co-parcener against the other co-parcener by claiming that he has stepped into the shoes of the defendants No. 1 & 2 as he has purchased the suit property described with specific boundaries by registered sale deed described in specific boundaries. However, by any stretch of the imagination, it could not be construed that the purchaser of the undivided interest of the co-sharer ipso-facto becomes the co-sharer of the Hindu Undivided Family which is very peculiar and narrow legal entity. The purchaser of the undivided interest of one co-sharer always remains the foreign member to the joint family.

43) Moreover, I am of the humble opinion that, authority relied upon by the defendant No. 9 is also not applicable to the present case as the facts therein and the facts in present case are different from each other. In the authority relied upon on behalf of the defendant No. 9, the legality of the order passed rejecting the application praying for rejection of the plaint under order VII Rule 11 of The Code of Civil Procedure, 1908 was in question. It is my humble opinion that, Hon'ble Bombay High Court has opined that, for the purpose of deciding the application for rejection of the plaint, only pleadings in the plaint are to be considered. In the said decision, Hon'ble High Court has only

observed that no injunction can be granted to one co-sharer against the other co-sharer. However, merely because of said passing observation, it could not be concluded that, the said decision is authority on the said law point and it was the ratio laid down in the said authority. Hence, once again, most humbly I mention here that the authority relied upon by the defendant No. 9 is not helpful to him.

44) So far as the decision in the case of Narendra Kante Vs. Anuradha Kante cited supra is concerned, it is necessary to mention here that, the defendant No. 9 has relied upon the said decision to strengthen his contention that there was oral partition between the members of the family of the plaintiffs and the defendants No. 1 to 8. However, I most humbly mention here that, whether there was oral partition or not is the question to be decided during trial. The plaintiffs have prima facie shown that the suit properties are the properties of undivided joint family and there is no partition by metes and bound. The defendant No. 9 has not produced any documentary evidence to prima facie show that there was oral partition except his bare contentions. Hence, I am of humble opinion that authority relied upon by the defendant No. 9 is not helpful to him.

45) Considering all these aspects, I am of the opinion that, the plaintiffs have shown prima-facie case in their favour. In such circumstances, I am of the opinion that, if the defendant No. 9 is not restrained from alienating the property purchased by him in favour of any third parties and from causing disturbance to the joint possession of the plaintiffs over the suit properties alongwith the defendants No. 1 to 8, then definitely it will result in multiplicity of the proceedings.

Considering this aspect, I am also of the opinion that the balance of the convenience lies in favour of the plaintiffs. I am also of the opinion that, if the temporary injunction as prayed by the plaintiffs is not granted, then it will certainly result in causing heavy and irreparable loss to them. Considering all above discussion, I am of the opinion that, the application of the plaintiffs deserves to be allowed. Hence I have answered the points No.1 to 3 in the affirmative and in answer to the point No. 4, I pass following order.

1. The application is hereby allowed.
2. The defendant No. 9 or anybody claiming through him are hereby temporarily restrained from causing obstruction to the joint and peaceful possession of the plaintiffs alongwith the defendants No. 1 to 8 over the suit properties as mentioned in details in Para No.1 A) and B) of the plaint and present application in any manner, without adopting due procedure of law, till final decision of the present suit.
3. The defendant No. 9 or anybody claiming through him are hereby temporarily restrained from alienating or transferring the suit property purchased by him in favour of any third parties in any manner till final decision of the present suit.
4. The costs in main cause.

Place :- Jath
Date :- 06.10.2021.

Sd/-
(Shri. Ekanath K. Chougale)
(JO Code -MHSN2400)
Civil Judge Junior Division,
Jath.

CERTIFICATE

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

Name of Stenographer : Shri. S.A. Jamadar (Steno Grade-III)

Court : Shri. Ekanath K. Chougale.
Civil Judge Jr. Dn., & J.M.F.C.,
Jath, Dist – Sangli.

Date : 06/10/2021.

Signed by Presiding
officer on : 11/10/2021.

Uploaded on : 21/10/2021.