

ORDER BELOW EXH. 5 IN RCS NO. 124/2022
(CNR NO. MHSN08000837-2022)

Gangaram Bhimanna Mali (Irale)
Vs.
Baburao Allappa Irale and others

Suit is for partition and separate possession of their share and declaration that registered sale deed dated 24/12/2012 bearing No. 5557/2012 is cancelled vide cancellation deed bearing no. 1210/2013 dated 01/04/2013 and for declaration of right of pre-emption, for permanent injunction, not to alienate suit properties and not to construct over the suit properties by the defendant no.1.

2. This is an application filed by the plaintiff for temporary injunction against defendant no.1 not to obstruct the plaintiffs peaceful possession over the suit properties, not to construct over it, not to alienate or create any charge over the suit properties till decision of the suit.

3. **Description of the properties :-**

Landed properties situated at Village Shelkewadi, Taluka- Jath, District-Sangli are as follows :-

Sr.No.	Gat Nos.	Area Admeasuring	Assessment
1A.	30/1	6.45 P.K. 0.01	4.94
1B.	30/2	3.57 P.K. 0.01	1.19

1C.	33	5.14	2.56
1D.	35	3.09	1.31
1E	Out of Gat No.33	0.20 R	----

4. The above said properties are here-in-after referred as “Suit properties”.

The plaintiff’s case is summarized as under:-

5. Ld. Advocate Shri. P.S. Gavade for the plaintiff submitted that the suit properties are ancestral properties of the plaintiff and defendant nos. 2 to 8. The defendant no.1 is not concern with the suit properties. Suit properties are not partitioned yet and are in common possession of the plaintiff and defendant nos. 2 to 8. However, the defendant no.2 has sold out the land admeasuring of about 20 R from the suit property described in para no.1E of the plaint vide registered sale deed bearing registration No. 5557/2012 dated 24/12/2012 without plaintiffs consent. Therefore, the plaintiff has instituted suit bearing R.C.S. No. 34/2013 against defendant nos. 1 to 8. During pendency of that suit, the parties are arrived at amicable settlement and it was decided that the defendant nos. 1 and 2 to execute the cancellation deed and in lieu of that, the plaintiff to withdraw the suit. Accordingly, the cancellation deed bearing No. 1210/2013 dated 01/04/2013 is registered and registered sale deed bearing No. 5557/2012 dated 24/12/2012 got cancelled.

Accordingly, the plaintiff withdrawn the suit and the parties i.e. the plaintiff and defendant nos. 2 to 8 are started to cultivate the suit properties in common possession.

6. He further submitted that since 01/04/2013, the plaintiff again cultivating the suit properties in common. On 18/06/2020, the defendant no.1 has filed application for entering his name to the 7/12th extract of the suit property mentioned in para no. 1E by mutation entry no. 416. Despite making complaint against the said mutation entry, the same is confirmed on 23/11/2020. The defendant no.1 has started construction in the suit property No.1E, which was purchased by him as per sale deed dated 24/12/2012. He further submitted that the plaintiff and defendant nos. 2 to 8 are in common possession of all the suit properties and as the land admeasuring 0 H 20 R is sold out by the defendant no.2 to the defendant no.1, the road approached to Gat no. 33 is closed. He further submitted that despite executing cancellation deed by the defendant nos. 2 and the defendant no.1 in respect of the sale deed, the defendant no.1 illegally started construction over the suit properties. Therefore, the new cause of action is arose on 20/11/2020 also as the defendant no.1 has filed the another suit bearing R.C.S. No. 218/2020 and on 09/05/2022 when the defendant no.1 started construction over the suit properties. Therefore, he submitted that defendant nos. 1 and 2 in collusion pretended that the dispute is amicably settled by executing cancellation deed and therefore, the plaintiff

withdrawn the previous suit unconditionally. However, this suit for partition on the basis of new cause of action is maintainable and if the defendant no.1 is not restrained from constructing over the suit property then the plaintiff would suffer irreparable loss, which cannot be compensated in the terms of money. Therefore, he submitted to allow his application.

The defendants case is summarized as under:-

7. On the other hand, Ld.Advocate Shri. S.M. Shaikh for the defendant no.1 and Ld. Advocate Shri. I.S. Khatib for defendant nos. 2 to 8 opposed the application by filing their written-statements-cum-say vide Exh. 36 and 41. They submitted that the defendant no.1 has purchased the suit property as mentioned in para no. 1E of the plaint by registered sale deed and since then, he is in lawful possession. The plaintiff has withdrawn the previous suit unconditionally and therefore, the second suit in respect of the partition is not maintainable as the same is barred by the principle of Res-Judicata. The defendant no.1 has already started construction at the time of previous suit but it was kept pending and now the defendant no.1 has started his remaining construction. He further submitted that suit properties are already orally partitioned between the plaintiff and defendant nos. 2 to 8 before 25 to 30 years. He further submitted that the suit for cancellation of sale deed dated 24/12/2012 is not maintainable on the point of limitation as the present suit is

filed after 7 to 8 years. Suit for right of pre-emption is also not within time as sale deed is executed in the year 2012 and the same is not filed within limitation. The defendant no.1 is the lawful owner as per the sale deed, which is not cancelled by the competent court. Therefore, the defendant no.1 cannot be restrained from enjoying the fruits of his property, which was purchased by him from the defendant no.2 before 10 years.

8. I have considered following points for determination and recorded my findings thereon with reasons mentioned as follows.

Sr. No.	Points	Findings
1.	Whether the plaintiff has established prima facie case in his favour ?	Yes
2.	Whether balance of convenience lies in plaintiff's favour ?	Yes
3.	Whether plaintiff will suffer irreparable loss, if temporary injunction is not granted ?	Yes
4.	What order ?	As per final order.

REASONS

ADMITTED FACTS :-

9. The relationship between the parties and nature of

properties i.e. suit properties are ancestral properties are admitted by the defendants. Execution of sale deed dated 24/12/2012 and filing of previous suit bearing R.C.S. No. 34/2013 are admitted facts. Withdrawal of suit unconditionally by the plaintiff is also admitted. The defendant no.1 has applied for certifying mutation entry bearing no. 416 and revenue litigations in respect of the same is also admitted.

AS TO POINT NO. 1 :-

10. The plaintiff filed following documents on record.

Sr. No.	Description of document	Exh. No.
1.	Extract of Namuna No.8 of khata no.122	8
2.	7/12 th extracts of land bearing Gat Nos. 30/1, 30/2, 33, 35	9 to 12
3.	Extract of Mutation Entry No. 237	13
4.	Extract of Mutation Entry No. 416	14
5.	Certified copy of plaint in R.C.S.No.218/2020	15
6.	Office copy of notice dated 17/05/2022	3/9
7.	Office copy of complaint dated 09/05/2022 made to P.I. of Jath Police Station.	3/11
8.	Certified copy of sale deed dated 24/12/2012.	3/12
9.	Certified copy of Cancellation deed dated 01/04/2013	3/13

10.	Certified copy of application Exh. 35 in R.C.S.No. 34/2013.	18
11.	Certified copy of plaint in R.C.S.No.34/2013.	19
12.	Photographs	17/3 to 17/6 and 25/1 to 25/6

11. On perusal of khata extract no. 122 of Village Shelkewadi filed at Exh. 8, it appears that the suit properties are still in common between the plaintiff and defendant nos. 2 to 8. The 7/12th extracts filed at Exh 9 to 12 also disclose that the plaintiff and defendant nos. 2 to 8 are in common possession of those properties.

12. Mutation Entry no. 237 filed at Exh. 12 discloses that the defendant no.2 Vilas Siddhu Mali has sold property admeasuring of about 0 H 20 R out of Gat no. 33 to the defendant no.1 with consent of defendant nos. 3 to 8, which is pending for certifying. Further, mutation entry bearing no. 416 filed at Exh. 14 discloses that the entry about said transaction is already entered vide mutation entry no. 237, but after 2016, the entries to be recorded on-line and therefore, again the mutation entry no. 416 in respect of the said transaction is taken, which is certified on 03/02/2021.

13. The Ld.Advocate for the plaintiff relied upon the decision given in case of **Jitendra Singh Vs The State of**

Madhya Pradesh and others in Special Leave Petition (C)No. 13146/2021 decided by The Hon'ble Supreme Court on 06/09/2021 and upon the case of Prabhagiya Van Adhikari Awadh Van Prabhag Vs Arun Kumar Bhardwaj (Dead) through legal heirs and others in Civil Appeal No. 7017/2009 decided by The Hon'ble Supreme Court on 05/10/2021. The ratio laid down in above cases is the mutation entries are not the document of title and those neither creates nor extinguishes title to the property. Now, it is well settled that mutation entry is not a document of title and it is only made for the purpose of collecting land revenue.

14. Further, on perusal of document filed at Exh. 15, it appears that it is a certified copy of the plaint in R.C.S.No. 218/2020 filed by the defendant no.1 against the defendant no.2 for declaration that the cancellation deed bearing no. 1210/2013 dated 01/04/2013 is declared to be void. Further, on perusal of notice filed at Exh. 3/9, it appears that the plaintiff asked for the partition of the suit properties to defendant nos. 2 to 8. The plaintiff also filed complaint against the defendant no.1 in Jath Police Station vide complaint at Exh. 3/11. The document produced at Exh. 3/12 is the sale deed in question and the document at Exh. 3/13 is deed of cancellation executed by the defendant no.1 in favour of the defendant no.2.

15. On perusal of sale deed bearing no. 5557/2012

dated 24/12/2012, it appears that the defendant no.2 with consent of defendant nos. 3 to 8 have executed a sale deed in favour of the defendant no.1. However, as the plaintiff being uncle of the defendant no.2 in relation and having in common possession of the suit properties, his consent was not obtained to that sale deed. The defendant nos. 1 to 8 have admitted that the suit properties are ancestral properties. According to them, suit properties are partitioned before 25 years but the revenue documents did not disclose that the suit properties are orally partitioned between them.

16. Further objection of defendant nos. 1 to 8 as the plaintiff has filed suit for partition and the same was simply withdrawn by him and therefore, the suit is not maintainable as it is hit by the principle of Res-Judicata. Considering this objection, it is necessary to see Whether the principle of Res-Judicata is applicable to the present set of facts. Admittedly, previous suit bearing R.C.S.No. 34/2013 is withdrawn by the plaintiff. Therefore, it is not decided on merit by the competent court. Hence, principle of Res Judicata is not applicable in present set of facts.

17. Further objection of defendant nos. 1 to 8 that the suit is not maintainable as the plaintiff has withdrawn the previous suit unconditionally in the year 2013 and the suit properties were partitioned between them as per the map attached to the plaint filed at Exh. 19. On perusal of certified

copy of the plaint at Exh. 19, it appears that the said map discloses that the plaintiff and defendant nos. 1 to 7 therein are cultivating the suit properties as family arrangement and not partitioned the properties by metes and bounds. Furthermore, the said suit is withdrawn by the plaintiff without any condition and the same is disposed of. The cause of action for the said suit is sale deed dated 24/12/2012 and starting construction by the defendant no.8 therein. However, the present suit is filed for partition as well as for another ancillary reliefs of right of pre-emption and declaration that the sale deed dated 24/12/2012 is cancelled by deed of cancellation dated 01/04/2013.

18. Considering the objection about maintainability of second suit for partition, it is necessary to see the limitation for filing the suit for partition. The co-parceners in Hindu Family may file a suit for partition of the properties as per their wish when they do not want to keep their share in joint possession along with other co-owners. The first suit is filed in the year 2013 is simply withdraw by the plaintiff. However, the plaintiff came with the story that defendant nos. 1 and 2 have executed a cancellation deed about the said sale deed and therefore, the plaintiff has withdrawn the suit. This theory of the plaintiff seems to be probable because in the first suit, the plaintiff only prayed for partition and right of pre-emption on the cause of action said sale deed dated 24/12/2012 and construction by the defendant no.1 in the

said purchased property.

19. Further, on perusal of said cancellation deed dated 01/04/2013 it appears that the defendant no. 2 is kept in possession of the said purchased land by the defendant no.1. It means the possession of the suit property is also transferred from defendant no.1 to defendant no.2, which was transferred by the said sale deed. The withdrawn application filed in RCS No. 34/2013 is filed at Exh. 18, which shows that the defendant no.1 get cancelled the sale deed and therefore, dispute between the plaintiff and defendant nos. 1 to 8 is amicably settled and also the plaintiff and defendant nos. 2 to 8 have decided to keep the suit properties in common possession. The said application is allowed and the plaintiff is allowed to withdraw the suit unconditionally and the same is disposed of on 24/01/2014. These documents are supported to the plaintiffs theory that upon execution of cancellation deed dated 01/04/2013, the plaintiff has withdrawn the suit as their dispute is amicably settled.

20. Now considering cause of action for the present suit, the defendant no. 1 again applied for entering his name to the revenue record of the suit property mentioned in para 1E vide mutation entry no. 416 of 18/06/2020. Again the defendant no.1 has filed suit for declaration that the cancellation deed bearing no. 1210/2013 dated 01/04/2013 is void, ab initio against the defendant no.2 on 09/11/2020,

on which, the objection of limitation was raised and it is pending for further disposal according to law. This act of the defendant no.1 shows that the defendant no.1 resiled from his statement made in cancellation deed dated 01/04/2013 and again wants to enter his name to the revenue record of the suit property. Further, the photographs filed on record shows that the construction is started in the suit property no. 1E, which are not denied by the defendant no.1 and admittedly, he has started the construction. Therefore, considering the cause of action accrued again to file suit for partition, the subsequent suit for partition is maintainable. Moreover, if it is considered that the plaintiff willing to separate his share in the year 2013, then also the plaintiffs suit for partition is within 12 years as per Article 65 of The Limitation Act. Therefore, I am not agree with the submission of Ld. Advocates for defendant nos. 1 to 8 that the subsequent suit for partition is not maintainable and not filed within limitation.

21. Further, objection raised by the Ld. Advocate for defendant nos. 1 to 8 that to cancel or set aside any instrument of sale deed, the limitation for which is 3 years. However, this being the suit for partition and if the sale deed is executed without consent of one of the co-parcener, then the plaintiff do not require to seek cancellation of sale deed. He only required to declare that the sale deed is not binding upon him. Further, the said sale deed is already cancelled vide

cancellation deed dated 01/04/2013 but the same is not valid as per the law. Therefore, the plaintiff sought the relief of declaration that the said sale deed dated 24/12/2012 is declared to be cancelled vide said cancellation deed dated 01/04/2013 and also prayed for right of pre-emption. However, considering the date of sale deed, the suit for right of pre-emption is not within the limitation as the plaintiff has withdrawn the suit, which is filed within one year from the date of sale deed.

22. As admitted by defendant nos. 1 to 8, suit properties are ancestral properties, those are not partitioned between the plaintiff and the father of defendant nos. 2 to 8. Therefore, the plaintiff also right in all suit properties along with other co-parceners. Further, the plaintiff sought partition by issuing notice but the defendants did not reply the same. Therefore, the plaintiff constrained to file present suit. The acts on the part of the defendant no.1 such as to execute the cancellation deed about said sale deed and thereafter filing of suit for declaration that said cancellation deed is void and further the filing of application for entering his name to the revenue record of the suit property mentioned in para no. 1E shows that he want to continue with this sale deed dated 24/12/2012, which was executed without the consent of the plaintiff. Above said acts on the part of the defendant no.1 probably shows that he want to construct over the suit property bearing 1E. Photographs filed on record discloses

that the construction is started over the suit property by the defendant no.1 as admitted by him. The defendant no.1 is stranger for the plaintiff and defendant nos. 2 to 8. Therefore, considering the documents on record, I am of the considered opinion that the plaintiff has right in all the suit properties and to protect his right over the suit properties till partition, it is necessary to restrain the defendant no.1 from constructing over the suit property 1E and also restrain from alienating the same to anybody else to avoid multiplicity of the proceeding. Therefore, the plaintiff has made out a prima facie case. Hence, I answer point no.1 in the affirmative.

AS TO POINT NOS. 2 AND 3 :-

23. I have already held that the plaintiff has prima facie case in his favour. The acts to enter the name on record and to construct over the suit property on the part of the defendant no.1 would violate the plaintiffs right. If the defendant no.1 is not restrained from constructing over the suit property or alienating suit properties, then it would cause the irreparable loss to the plaintiff as the suit properties are not partitioned by metes and bounds. Further, the plaintiff being the co-parcener along with defendant nos. 2 to 8 and the defendant no.1 is stranger, the balance of convenience lies in favour of the plaintiff. Hence, considering above discussion, I answer point nos. 2 and 3 in the affirmative.

AS TO POINT NO. 4 :-

24. Considering the answer to point nos. 1 to 3, in answer to point no.4, I pass the following order :-

ORDER

1. Application at Exh. 5 is allowed.
2. Defendant no.1 himself and through his agents, servants or anybody on behalf of him are hereby temporarily restrained from obstructing peaceful possession of the plaintiff, alienating it or constructing over the suit property 1E till final decision of the suit.
3. Cost shall in main cause.

Place :- Jath
Date :- 16.09.2022

(Amarjeet B. Jadhav)
Joint Civil Judge, Junior Division,
JATH.

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

Name of steno : Shri. I.G. Ainapure,
(Stenographer Grade - III)
Name of court : Shri. A. B. Jadhav,
Jt. C.J.J.D.& J.M.F.C., Jath,
Order Date : 16.09.2022
Judgment/order signed
by Presiding Officer on : 19.09.2022
Judgment/order
uploaded on : 27.09.2022