

Order below Exh. 05 in
R.C.S. No. 26/2020
CNR-MHSN-12-000223-2020
(Balabai Naikwadi Vs. Bhimabai Jadhav & Ors.)

The plaintiff has filed present application against the defendant no. 1 for temporarily restraining him from raising the construction over the C.S. no. 63 situated at village-Nagthane, Tal. Palus (Hereinafter shall be referred as 'suit property').

2. The plaintiff has instituted present suit for partition as well as for perpetual injunction.

3. It is the case of the plaintiff that deceased Tukaram was having two sons namely Pandurang and Rama. Defendant no. 1 is wife of deceased Pandurang. Prakash, Kalpana and Vishwasrao are the children of deceased Pandurang and defendant no. 1. The plaintiff and defendant no. 2 to 5 are the children of deceased Rama. Deceased Kusum was also daughter of deceased Rama. Defendant no. 6 to 8 are the children of plaintiff's deceased sister Kusum. Plaintiff is the sister of defendant no. 2 to 5. Rama died on 24/06/1983 and Pandurang died on 23/01/2018. On 01/04/2019, Prakash and Vishwas have made release deed in favour of defendant no. 1. Therefore, plaintiff has not impleaded Kalpana, Prakash and Vishwasrao as necessary parties to the suit.

4. It is further averred that, plaintiff and defendants are having common possession over the suit property. The aforesaid release deed is not binding upon the share of plaintiff and defendants no. 2 to 8. Suit property is the ancestral property of plaintiff as well as of all defendants. The partition of suit property has not taken place. The defendant no. 1 has taken undue advantage of mutation entry made in her favour in respect of suit property.

5. The defendant no. 1 is raising the construction over the suit property in unauthorized manner. If the defendant no. 1 is succeeded in completion of construction, then it will amount to making encroachment upon the shares of plaintiff as well as upon the shares of defendants no. 2 to 8. Unless and until partition took place, the defendant no. 1 is having no right of construction. Defendant no. 1 shown her reluctance for partition and started to raise construction. Hence, cause of action accrued and plaintiff constrained to institute the present suit. Therefore, plaintiff has filed present application and sought the relief that defendant no. 1 be restrained from raising construction over the suit property as well as be restrained from changing the nature of the suit property and also be restrained from ousting the plaintiff from the suit property.

6. The defendant no. 1 has filed her say below exh. 23 and strongly resisted the application of the plaintiff. According to the defendant no. 1, plaintiff has not come before the court with clean hands. The partition had already been taken place in the year 1978. There were two ancestral house properties one is suit property and another is house which is constructed over C.S. no. 399. After the demise of Tukaram, both house properties including suit property has been already partitioned among the heirs of deceased Padurang and deceased Rama. According to that partition, deceased Pandurang acquired the suit property and deceased Rama acquired C.S. no. 399. The partition in respect of C.S. no. 399 has been already taken place amongst the plaintiff and defendants no. 2 to 8. The deceased Pandurang was living with his family members over the old house which was situated over the suit property. Due to flood occurred in the November 2019, old house situated over the suit property was damaged. Hence, defendant no. 1 started to raise the construction by constructing new house over it.

7. The plaintiff and defendants no. 2 to 8 are residing over the house situated in the C.S. no. 399. Apart from the house properties agricultural properties were also partitioned among deceased Pandurang and Rama. The city survey scheme was implemented in the year 1978 at village-Nagthane. On the basis of partition, deceased Pandurang had acquired suit property and concerned city survey officer after making appropriate enquiry has made entry to that effect. The city survey officer also made enquiry in respect of house situated over the C.S. no. 399 and recorded the name of plaintiff and defendants no. 2 to 8 to that effect.

8. The deceased Pandurang had obtained electric connection as well as water connection in respect of house situated over the suit property. The defendant no. 1 is paying the gram panchayat tax since long. As already partition had taken place since long, therefore, plaintiff and defendant no. 2 to 8 is having no right of claiming the partition in respect of suit property. At present defendant no. 1 is residing under the temporary roof tin (पत्र्याचे शेड) . The defendant no. 1 has constructed the foundation required for building the house and already 5 to 6 lakh expenses has been beared. Due to rainy season, defendant no. 1 is suffering more inconvenience for want of shelter. On the contrary, plaintiff is having the right over the property situated in the C.S. no. 399. On all these grounds, application is liable to be rejected.

9. Heard the both sides.

10. After considering the contents of application following points arise for my determination along with my findings thereon.

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the plaintiff proves that she is having prima-facie case ?	<u>In the Negative</u>
2.	Whether the plaintiff proves that balance of convenience lies in her favour ?	<u>In the Negative</u>
3.	Whether the plaintiff proves that she will suffer irreparable loss if the injunction is not granted ?	<u>In the Negative</u>
4.	What Order ?	<u>As Per Final Order</u>

AS TO POINT NO. 1 TO 3 :

11. These points are interlinked with each other, therefore, they are discussed together for the sake of convenience.

12. Both parties have relief upon certain documents which will be adverted at appropriate place.

13. Here, it would be appropriate to mention the argument made by learned advocates of both sides.

14. The learned advocate for the plaintiff has argued that plaintiff has come before the court with clean hands. No partition of the suit property has been taken place by metes and bounds. He has also argued that mutation entry does not confer or extinguish the title. Therefore, on the basis of mutation entry, defendant no. 1 cannot claim that suit property is the property acquired by the partition. He has further argued that there is no registered partition deed. Unless and until, joint family properties are partitioned by metes and bounds, defendant no. 1 cannot alone raise construction

over the suit property without consent of other coparceners (i.e. plaintiff and defendants no. 2 to 8)

15. Lastly, learned advocate for the plaintiff has argued that, plaintiff has successfully shown prima facie case. The balance of convenience lies in favor of plaintiff. If the relief of injunction is not granted as sought for, the plaintiff will suffer irreparable loss. Therefore, application kindly be allowed.

16. On the other hand, learned advocate for the defendant no. 1 has argued that plaintiff has not come before the court with clean hands. It is further argued that the partition has been already taken between deceased Pandurang and deceased Rama. On the basis of partition, suit property has been acquired by deceased Pandurang and thereafter, his wife (i.e. by defendant no. 1). Therefore, release deed made in favour of defendant no. 1 is also valid.

17. The learned advocate for the defendant no.1 has further invited my attention towards the city survey extracts of suit property vide exh. 30 and of C.S. no. 399 vide exh. 31 and also towards copy of city survey enquiry register vide exh. 32 and 33. On the basis of said documents, learned advocate for the defendant no. 1 has argued that city survey officer after making the enquiry has recorded the statement to that effect. Those mutation entries are long standing entries and remained unchallenged for many years. This itself indicates that partition had already taken place long back. He has further invited my attention towards xerox copies of 7/12 extract of block no. 1369 and 1370 situated at village- Nagthane and argued that agricultural properties are also partitioned. Lastly, he invited my attention towards the tax receipts issued in the name of deceased Pandurang by gram panchayat vide exh. 3/8 to 3/14. The next submission made before the court is that oral partition is also valid

under Hindu law. Therefore, application of the plaintiff is devoid of merit and kindly be rejected.

18. The case is at the stage of temporary injunction and it is for the court to see whether the plaintiff has prima facie shown that Suit property is unpartitioned property? On the other hand, court is also required to take into consideration, whether defendant no. 1 has prima facie shown that partition has already taken place as contended by her?

19. At the outset, it would be appropriate to mention that genealogy of parties as described in para 2 of the plaint is undisputed.

20. To support his contention, plaintiff has filed the city survey extract of suit property (vide exh. 3/1), 8A extract (vide exh. 3/2), inquiry register copy (vide exh.3/3). However, after perusal of enquiry register copy (vide exh. 3/3) prima facie it appears that, in the column of name holder, it is stated that deceased Pandurang has acquired the milkat no. 266 i.e. house situated over the suit property on the basis of partition. Even after perusal of the inquiry register extract issued by city survey office vide exh. 32 belonging to house situated over the suit property, prima facie it appears that deceased Pandurang has acquired ancestral property it by way of partition. Even after perusal of inquiry register extract vide exh. 33, prima facie it appears that on the basis of partition of ancestral property deceased Tukaram has acquired the milkat no. 317A i.e. house situated over the city survey no. 399.

21. The case is at the stage of temporary injunction. Plaintiff is expected to come with clean hands, because, the relief of injuntion is based upon equity. The plaintiff is only claiming the partition in

respect of suit property and plaintiff is keeping herself mum in respect of claiming the partition regarding C.S. no. 399 as well as regarding agricultural properties situated in the block no. 1369, 1370. The conduct of the plaintiff is also required to be taken into consideration.

22. No doubt, mutation entry does not create or extinguish the title. However, it cannot be an straight jacket formula. It will depend upon facts and circumstances of each case. Reference is essential to the case of *Atmaram S/o Ganu Nagrale Vs. Baliram S/o Ganu Nagrale 2009 CJ (Bom) 139*. In this case, the trial court decreed the suit and first appellate court reversed the judgment. The substantial question of law was that whether the conclusion of the first appellate court that there was in fact a partition of the suit property on account of long standing entries in the revenue record was correct or as suggested by the plaintiff it could be treated as family arrangement. While answering the question, Hon'ble Bombay High Court has held that even if the family arrangement is assumed have taken place in the year 1966, the parties accepted and the same to be termed as partition. The acquiescence as to the partition is evidenced by entries in the revenue records. Considering the fact that there was the partition of the family property between the parties in the year 1966-67, suit for possession or for re-opening the partition in the alternative ought to have been dismissed, because, the plaintiff and defendant were already in possession of their respective share and there was no need for the partition. The conclusion drawn by the first appellate court that the property was partitioned since the year 1966 and it had been acted upon continuously as evidenced by the entries in the revenue records, cannot be interfered on the ground that there was a merely oral family arrangement of temporary nature.

23. Considering the case in hand, prima facie it appears that only defendant no. 1 is having actual physical possession over suit property. The copies of inquiry register issued vide exh. 32 and exh. 33 prima facie showing that partition has been taken place. The copies of inquiry register extract prima facie showing that enquiry is made in the year 1978. So also, prima facie it appears that deceased Pandurang was paying gram panchayat tax since long. Therefore, as per contention of the defendant no. 1, prima facie it appears that partition has taken place and effect has been given to it before city survey inquiry registers. On the other hand, plaintiff has prima facie failed to show that suit property is unpartitioned property. It is made clear that these observations are prima facie in nature. It may vary after the evidence lead by the parties at the appropriate stage of the trial. Whether the theory of partition as contended by defendant no. 1 is valid or not is a part of trial. At this stage of the case, ratio laid down in *Atmaram S/o Ganu Nagrale's* case is applicable to case in hand. Plaintiff has failed to made out the prima facie case. The balance of convenience does not lies in favour of the plaintiff. Plaintiff has failed to prove that she will suffer an irreparable loss. Therefore, I am not inclined to allow the application. Hence, I answer as to point no. 1 to 3 in the 'Negative'. Accordingly, I pass the following order.

ORDER

1. Application stands rejected.

Palus
Date- 29/07/2020.

(N.D. Rudrabhate)
Jt.Civil Judge Jr.Dn., Palus

CERTIFICATE

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

Name of Stenographer : Pravin G. Sabale

Court : Jt.Civil Judge Jr.Dn., Palus

Date : 29/07/2020

Signed by the Presiding Officer on : 29/07/2020

Uploaded on : 30/07/2020