

ORDER BELOW EXHIBIT No. 5

1. In a suit for declaration and permanent injunction the plaintiff has filed this application for restraining defendant nos. 1 to 7 from alienating the suit properties described in plaint para no. 1 by way of sale, mortgage, gift, lease etc..

2. The defendants appeared and filed written statement and say vide Exh. 25 and denied all the contents in the plaint as well as application Exh. 5 except the fact of relationship between the plaintiff and defendants.

3. Heard learned counsel appearing for the plaintiff and defendants. Perused the documents produced by the plaintiff with list Exh. 4 at serial nos. 1 to 5 and with list Exh. 33 and the documents produced by the defendants with list Exh. 31. The following points arise for determination. This court record its findings on these points for the reasons discussed thereon.

POINTS**FINDINGS**

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|---|---|
| 1) Whether plaintiffs has made out prima facie case ? | ... <u>In the Affirmative</u> |
| 2) In whose favour balance of convenience lies ? | <u>In favour of Plaintiff</u> |
| 3) Who will suffer irreparable loss, if temporary injunction application is not allowed, as prayed? | ... <u>Plaintiff</u> |
| 4) What order ? | <u>As per final order</u> |

REASONS**AS TO POINT Nos. 1 to 3 :-**

4. These points are interlinked, hence discussed simultaneously.

The plaintiffs come with the case that, defendants are his real sisters. Plaintiff and the defendant's predecessor namely Abbasbhai Mulani has ½ share in the suit properties described in plaint para no. 1. The defendant nos. 1 to 4 relinquished their share in the suit properties in favour of the plaintiff by registered deed dated 29/05/1989. Thereafter the defendant nos. 1 to 4 have filed R.C.S. No. 107/2011 for declaration and permanent injunction against present plaintiff and others. The said suit is pending. It is further case of the plaintiff that in the year 1989 as per the relinquishment deed executed by the defendant nos. 1 to 4, the revenue officer passed mutation entry and deleted names of the defendant nos. 1 to 4. Thereafter the defendant nos. 1 to 4 filed R.T.S. Appeal before Sub Divisional Officer and S.D.O. allowed that appeal on technical ground. The said order is challenged upto Additional Collector, but the order passed by S.D.O. maintained and now R.T.S. Appeal is pending before Commissioner of Pune. Though the revenue officers ordered to mutate the names of defendant nos. 1 to 4, merely on that ground it can not be held that the said relinquish deed is illegal or void. By taking disadvantage of mutated names of defendant nos. 1 to 4 to the record of rights, the defendants

are trying to alienate their share in the suit properties. If the defendants are alienate their share in the suit property, then it will create complications and create multiplicity of proceedings.

5. As against this defendants come with the case that, plaintiff is their real brother. He was cultivating the suit properties on behalf of the defendants. After death of father of the plaintiff and defendants, names of all the plaintiff's and defendant's mutated to the record of rights by mutation entry no. 1015. Due to mutating names of all the legal heirs, plaintiff was not getting loan from the society by mortgaging the suit property. Hence, plaintiff requested to the defendants for executing deed of relinquishing their rights in the suit properties and assured that as per that deed he will get deleted their names, but, in fact, he admit their share in the suit properties. Hence, as per the assurance of the plaintiff, defendant nos. 1 to 4 executed the deed on 29/05/1989, but in fact the defendant nos. 1 to 7 never relinquished their share in the suit properties. Thereafter, as per that deed the plaintiff deleted the names of defendant no. 1 to 4 in the record of rights. Thereafter defendant no. 1 to 4 preferred R.T.S. Appeal no. 42/2008 before S.D.O. Pandharpur. Said appeal is allowed on 31/07/2008 and the mutation entry by which the names of defendant nos. 1 to 4 were deleted, is came to be cancelled. The plaintiff preferred second R.T.S. Appeal bearing no. 177/2008 before Collector of Solapur and said appeal is also

came to be dismissed on 22/07/2010 and order passed by S.D.O. Pandharpur is maintained. Against the order passed by Collector of Solapur, the plaintiff preferred R.T.S. Revision Application No. 562/2010 before Additional Commissioner, Pune. The plaintiff filed an application in that appeal for stay to the order passed by lower Revenue Officers. But, that stay application came to be rejected. Thereafter as per mutation entry no. 7723 names of the defendant nos. 1 to 4 are came to be mutated to the record of rights.

6. It is further case of the defendants that, parties are Mohamedan and as per the provision of Mohamedan law, the plaintiff has not right of pre-emption to purchase the share of defendant nos. 5 to 7. The defendants have never put on sale their share in the suit properties. It is further case of the defendants that, the suit filed by the defendant nos. 1 to 4 bearing R.C.S. No. 107/2011 is instituted prior to this suit. The subject matter in the both suit is the same, the parties are also almost same and the reliefs claimed by the parties are also same. In such circumstances, this suit is liable to stayed as per the provisions of section 10 of the Code of Civil Procedure.

7. Learned counsel appearing for the plaintiff submitted that, the plaintiff and defendant nos. 1 to 7's predecessor namely Abbasbhai Mulani has $\frac{1}{2}$ share in the suit properties. The defendants are the real sisters of plaintiff. The defendant nos. 1 to 4 relinquished their share in the suit

properties in favour of the plaintiff by executing registered deed dated 29/05/1989. Thereafter as per that deed the mutation entry has been certified by the Revenue Officer and the names of defendant nos. 1 to 4 came to be deleted from the record of rights. Against said order, defendant nos. 1 to 4 preferred revision appeal and only on the technical ground said appeal came to be allowed and again the names of defendant nos. 1 to 4 came to be mutated to the record of rights. By taking disadvantage of this fact, the defendant nos. 1 to 4 are started to take steps to alienate their share in the suit property by way of sale. It is further submitted that, the defendant nos. 1 to 4 have also filed suit bearing R.C.S. No. 107/2011 for declaration and permanent injunction against present plaintiff and others. Under such circumstances, there is serious question of title is for determination. The determination of serious question of title itself shows about the prima facie case. If the defendants are sold their share in the suit properties merely by taking disadvantage of mutating their names to the revenue record, then it will creates multiplicity of proceedings and cause irreparable loss to the plaintiff. Under such circumstances balance of convenience also lies in favour of the plaintiff and the plaintiff will suffer irreparable loss, if the defendants are succeeded in their intended act.

To buttress his submission, learned counsel appearing for the plaintiff relied upon following case laws :

- (1) Vimal Chand Ghevarchand Jain & Ors. Vs. Ramakant Eknath Jajoo reported in [2009 ALL SCR 2027]
- (2) Shri Shrikant R. Sankanwar & Ors. Vs. Shri Krishna Balu Naukudkar reported in [2003(1) ALL MR 1161]
- (3) Ramchandra s/o. Ganpati Shedam & Ors. Vs. Sub-Divisional Officer (SDO), Chandrapur & Ors. reported in [2008(6) ALL MR 852]
- (4) Pralhad Jagannath Jawale & Ors. Vs. Sau. Sitabai Chander Nikam & Ors. reported in [2011(7) ALL MR 255]

8. As against this, learned counsel appearing for the defendants vehemently submitted that, the defendants are the real sisters of the plaintiff. The plaintiff has got executed so called deed of relinquishment of rights from the defendant no. 1 to 4 in his favour by deed dated 29/05/1989. The plaintiff got executed that deed by cheating to the defendant nos. 1 to 4. As per that so called relinquishment deed, plaintiff has deleted the names of defendant nos. 1 to 4 in the record of rights. The defendant nos. 1 to 4 preferred R.T.S. Appeal against the order of deletion of their names before S.D.O. Pandharpur and S.D.O. Pandhapur has allowed that appeal and the order passed by S.D.O. is maintained upto the Collector of Solapur. Thereafter as per the mutation entry no. 7723 the names of defendant nos. 1 to 4 are again mutated to the record of rights. The suit filed by the defendant nos. 1 to 4 is pending before this Court. Plaintiff in this suit can claim

such type of relief in that suit also. But only to cause harassment to the defendants, the plaintiff has filed this separate suit and it is liable to be stayed as per the provisions of section 10 of the Code of Civil Procedure. It is further submitted that, the defendants never put their property on sale. Under such circumstances, there is no substance in the apprehension in the mind of the plaintiff that the defendants would alienate their share in the suit properties. It is further submitted that, as per the provisions of the section 52 of the Transfer of the Property Act, if the transfer is took place during the pendency of the suit, then the transferee is bound by the decision of the Court. Under such circumstances, it is not necessary to invoke the jurisdiction of this Court under Order 39, Rule 1 and 2 of the Code of Civil Procedure.

To buttress his submission, learned counsel appearing for the defendants relied upon following rulings :

- (1) Kachhi Properties, Satara Vs. Ganpatrao Shankarrao Kadam and others reported in [2010(5) Mh.L.J. 905]
- (2) Ajay Mittal Industrial Premises Co-Operative Society Vs. Raj Publicity reported in [2004(4) Mh.L.J. 305]

9. This Court carefully gone through the pleading of both the parties, submissions of both the learned counsels and the documents produced on record. Both parties have not disputed the relationship between them. Further there is no dispute that the plaintiff and the defendant's father namely

Abbasbhai Mulani has $\frac{1}{2}$ share in the suit properties described in the plaint para no. 1. It is not disputed that the defendant nos. 1 to 4 have filed suit bearing R.C.S. No. 107/2011 for declaration and permanent injunction restraining the plaintiff (in this suit) from alienating the suit properties.

9. The defendants have produced on record the certified copies of Exh. 1 in R.C.S. No. 107/2011. On perusal of plaint in R.C.S. No. 107/2011 it appears that, defendant nos. 1 to 4 in this suit have filed that suit and in the prayer clause, they have claimed the relief of declaration that the alleged relinquishment deed dated 29/05/1989 is illegal and not binding on the plaintiffs (in that suit). The second relief claimed in that suit is that the defendant in that suit be restrained from alienating the suit properties and from making any change in the record of rights, which is adverse to the rights of the plaintiff and for permanent injunction from alienating the suit properties by the defendant in that suit by any manner. The defendant no. 1 in that suit is the plaintiff in this suit.

10. In this suit, plaintiff has claimed relief of declaration that the defendant nos. 1 to 4 have no right, title or interest in the suit property and the plaintiff is the only owner of their share. The plaintiff has further claimed relief of restraining the defendant nos. 1 to 4 from alienating the suit properties and also claimed the relief of pre-emption against

the defendant nos. 5 to 7.

11. From the pleading of both the parties, it is clear that, the defendant nos. 1 to 4 are alleging that the alleged deed of relinquishment of their share in the suit properties in favour of the plaintiff dated 29/05/1989 is illegal and not binding upon them. And plaintiff is claiming remedy of declaration that as per the deed dated 29/05/1989 defendant nos. 1 to 4 have relinquished their share in the suit properties and he is the sole owner of the share of the defendant nos. 1 to 4. This rival pleading of both the parties shows that, there is serious question of title for determination. It is settled proposition of law that the revenue entries are made for fiscal purposes and it is only for the revenue purpose and it does not create or extinguish title of any person. The prima facie case means it is not that prima facie success, but making the case of serious question of title shows about prima facie case. Plaintiff has made out prima facie case.

12. So far as balance of convenience is concerned, as per the plaintiff's case, defendant nos. 1 to 4 have relinquished their rights by executing registered deed dated 29/05/1989. According to the defendant nos. 1 to 4 plaintiff has got executed such deed by cheating the defendants. When the defendants took such defence, then heavy burden lies on the defendants to establish the fact that the alleged deed has got executed by the plaintiff by playing fraud upon them. At this

stage, i.e., till date the relinquishment deed dated 29/05/1989 is not declared void by competent Civil Court. Under such circumstances, at this stage, balance of convenience also lies in favour of the plaintiff. So far as irreparable loss is concerned, though the defendant nos. 1 to 4 have pleaded that, they have not put on sale the suit properties, but in the pleading in the R.C.S. No. 107/2011, it is apprehension in their mind that, present plaintiff i.e., defendant no. 1 in that suit is trying to alienate the suit property by way of sale, gift, etc.. It shows that, there is apprehension in the mind of both the parties that they sale or alienate their share. Under such circumstances, there appears substance in the apprehension in the mind of the plaintiff that defendants will transfer or alienate their share in the suit properties. If the defendants transferred or alienated their share in the suit properties, then it will create multiplicity of proceedings and cause irreparable loss to the plaintiff. Hence, this Court record its findings on point nos. 1 to 3 accordingly. But considering the fact of apprehension in the mind of both the parties, that either party will alienate their share in the suit properties, passing order of directing to maintain *status-quo* to the both the parties will be just and proper.

13. Learned counsel appearing for the defendants relied upon the reported case Kachhi Properties Satara Vs. Ganpatrao. Shankarrao Kadam and others and submitted that, there is no necessity of invoking powers under Order 39, Rule 1 and 2 of

the Code of Civil Procedure as the protection of section 52 of the Transfer of Property Act provides adequate protection to the parties to lis. In this case in para no. 30, his lordship of Hon'ble Bombay High Court summarized as :

“30. To sum up :

- (a) *Section 52 of the TP Act provides adequate protection to the parties from transfers pendente lite and such transferres are neither required to be impleaded nor can claim impleadment. They cannot even resist execution proceedings.*
- (b) *In Mumbai (as also elsewhere as and when amended provisions are made applicable) plaintiffs could (or rather ought to) have notices of their suits registered under section 18 of the Indian Registration Act in view of the amended provisions of TP Act and the Registration Act. They cannot seek to restrain adversary by an injunction by refusing to go in for registration of the lis.*
- (c) *Rule 1 of order XXXIX of the Civil Procedure Code enabling Court to grant temporary injunctions to restrain transfers pendente lite is only an enabling provision, recognizing the power in the Court to issue such injunction and does not imply that because there is power, it must be exercised. The provisions could be invoked only if protection provided by section 52 of the TP Act is shown to be inadequate.*
- (d) *In the face of protection provided by section 52 of the TP Act, Courts should be cautious in examining the claims by plaintiffs of irreparable loss if injunction to restrain alienations is refused.*
- (e) *In suits for specific performance/right to develop against the recorded/rightful owners, Courts may consider if an injunction would cause greater inconvenience to a rightful owner by being deprived the right to deal with his property for the sake of a claim which is yet to mature into right*

and which metamorphosis rests in the discretion of the Court and is not certain.

- (f) *Courts may consider necessity of imposing suitable conditions to protect plaintiffs' interests short of granting injunction – like seeking undertaking that no equities would be claimed, on account of sale/development of properties; effecting sales only after putting transferees to notice that their rights would be subject to suit etc.. Interests of prospective purchasers would also be protected if plaintiffs in such cases register the lis, though it may be optional.”*

14. As against this learned counsel appearing for the plaintiff relied upon reported case *Pralhad Jagannath Jawale & Ors. Vs. Sau. Sitabai Chander Nikam & Ors. reported in [2011(7) ALL MR 255]* and submitted that, the scope of section 52 of TP Act and scope of Order 39, Rule 1 and 2 of the Code of Civil Procedure is different. In this case his lordship of Hon'ble Bombay High Court considered the observation of his lordship in the case *Kachhi Properties, Satara Vs. Ganpatrao Shankarrao Kadam and others reported in [2010(5) Mh.L.J. 905]* and in para no. 28 of the Judgment summarized the position of law as :

“28. The conclusion drawn from aforesaid discussion are :

- (i) as far as right of impleadment of transferee pendente lite is concerned, what will bind this Court is what is held by the Apex Court in the case of Amit Kumar Shaw & Anr (supra);*
- (ii) in view of the binding precedents of the Apex Court, the observation in clause (c) of paragraph No. 30 that the provision of Rule 1 of Order XXXIX could be invoked only if protection provided by*

Section 52 is shown to be inadequate cannot bind this Court. Even the observation in first part of clause (a) of paragraph No. 30 that Section 52 provides adequate protection to the parties from transfers pendent lite cannot be read as a binding precedent. In any event, in view of the law laid down by the Apex Court, it cannot be said that provisions of Section 52 of the said Act of 1882 in any manner put fetters on the powers of Civil Court conferred by Rules 1 and 2 of Order XXXIX of the said Code. As stated earlier, in a given case, while exercising discretionary powers, the Court can always come to the conclusion in peculiar facts of the given case, that in view of provisions of Section 52 of the said Act of 1882, equitable relief of temporary injunction need not be granted.”

15. This Court carefully gone through the above discussed both the case laws. In the case of Pralhad Jagannath Jawale & Ors. Vs. Sau. Sitabai Chander Nikam & Ors. his lordship of Hon'ble Bombay High Court also discussed case Kachhi Properties, Satara Vs. Ganpatrao Shankarrao Kadam and others upon which the learned counsel appearing for the defendants placed reliance and summarized in para no. 28 of the judgment. Considering the facts and circumstances in this case and the nature of dispute between the parties and the serious question of title for determination, this Court relied upon the case law cited on behalf of plaintiff i.e., Pralhad Jagannath Jawale & Ors. Vs. Sau. Sitabai Chander Nikam & Ors. With these observations and recording findings on points, this Court proceed to pass following order.

ORDER

1. Application Exh. 5 is hereby allowed.
2. Both the parties are directed to maintain *status-quo* in respect of alienation of suit properties till final disposal of suit.
3. Cost of the application shall be the cost in cause.

(D. B. Mane)

**Jt. Civil Judge, Junior Division,
Malshiras.**

Date : 14/08/2012