

ORDER BELOW EXH. 5 IN R.C.S. NO. 833/2023

This is an application filed by the plaintiff under Order XXXIX Rule 1 of the Code of Civil Procedure (hereinafter referred to as C.P.C.) for granting an interim injunction restraining defendant no. 1 from obstructing peaceful possession of the plaintiff and defendant no. 2 over the Block No. 350 (old no. 123).

2. The plaintiff contended that Block No. 89 (old no. 92), 123 (old no. 350), 939 (old no. 112), 952 (old no. 126A), 940 (old no. 113) are joint family properties which were originally owned by his father Maruti Dattu Mali. On 08.01.1980 he had sold Block No. 123 (350) to Kisan Narayan Jagdale without handing over its possession. Even after execution of sale deed the possession of the said property was with Maruti Mali and thereafter with his legal representatives that is plaintiff and defendant no. 1.

3. He further averred that Kisan Jagdale had never filed suit for partition. Therefore his right to partition and possession was extinguished. On 04.02.1980 Kisan Jagdale had executed a sale deed of Block No. 350 in favour of his daughter-in-law Malan Popat Jagdale (defendant no. 1). However, she never had possession of the said property.

4. The plaintiff further averred that the plaintiff, Prabhakar Maruti Mali, and Janabai Maruti Mali had filed R.C.S. No. 317/1985 for partition of the suit properties against Maruti Dattu Mali, Kisan Jagdale and defendant no. 1 wherein plaintiffs get 1/4th share each in the suit properties. Defendant no. 1 also had filed a civil suit for the partition and the possession. However, subsequently, she had withdrawn the same. Thereafter she filed a writ petition before the Honorable Bombay High Court challenging the order passed in R.D.No.3/1997 which was dismissed.

5. He further averred that defendant no. 1 or his predecessor never had a share in Block No. 123. However revenue officer allotted the said block number to her share which is illegal and contrary to the decision of the Court passed in R.C.S. No. 317/1985. The revenue authority exceeded its powers. Therefore, their order is null and void. The plaintiff further averred that the shares of the parties were changed by the death of Maruti Mali and Janabai Mali. Shares of the deceased devolved in plaintiff and defendant nos. 2 and 3. Therefore it is necessary to modify the preliminary decree to that extent. Hence he prayed for restraining defendant no. 1 from obstructing peaceful possession of him and the defendant no. 1 over block no. 350 till decision of the suit.

6. On the other hand defendant no. 1 has filed her say (**Exh.15**) and contended that the application is false and frivolous. The father of the plaintiff had sold the joint family property to her father-in-law for the joint family necessity. The possession of the

property was handed over on the same day. Thereafter her father-in-law transferred the said property to her. Since then she has been in possession of and cultivating the said property. In R.C.S. No. 317/1985 the property which was sold to the father-in-law of defendant no. 1 was specifically mentioned to be allotted in share of Maruti Mali. The plaintiff has consented to the partition draft which was drawn in execution proceeding which afterwards finalized. The plaintiff has not preferred appeal from the said order. Hence the law of estoppel is applicable.

7. Till today the sale deed was not canceled by competent authority. The Civil Court does not have jurisdiction to modify the preliminary decree, stay the execution proceeding or declare the final decree passed in R.C.S. No. 3/1987 as illegal, null and void. All the powers regarding the drawing and execution of the final decree lie with the revenue wing. Hence prayed for rejection of the application.

8. Heard the learned advocate for the plaintiff and defendant no. 1.

9. The following points arise for determination. I record my findings thereon for reasons stated hereinafter.

Arun Mali

versus

Malan Jagdale and others

P O I N T S**F I N D I N G S**

- | | | |
|----|---|------------------------------|
| 1. | Whether the plaintiff has a prima facie case in his favour? | No |
| 2. | Whether the balance of convenience is in favour of the plaintiff? | No |
| 3. | Whether plaintiff will suffer irreparable loss if the application is refused? | No |
| 4. | What order? | The application is rejected. |

R E A S O N S**10. Admitted facts of the application**

The father of the plaintiff had sold Block No. 350 to Kisan Jagdale and thereafter he sold it to his daughter-in-law that is defendant no. 1.

Point No.1:

11. For the order of temporary injunction, the plaintiff must make out a prima facie case. The Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it, there is probability that the plaintiff is entitled to relief. The suit is filed for declaration that the plaintiff has $\frac{1}{2}$ share in the suit properties and alternatively prayed for modifying the preliminary

decree, staying the proceeding initiated in R.D. No. 10/2016 and cancellation of final decree drawn in it and for declaration that the sale deed dated 04.02.1980 is not binding on the share of the plaintiff.

12. The main grievance of the plaintiff is about the allotment of Block No. 350 by the revenue authority to the share of defendant no. 1 when neither she nor her predecessor ever got a share in the said property by preliminary decree. The learned advocate for the plaintiff submitted that the Court should not dispose of the execution proceeding by merely sending the documents to the Collector. The Court should wait for the final decree draft drawn by the Collector and should check its correctness. On the other hand, the learned advocate for defendant no. 1 submitted that the plaintiff cannot challenge the execution proceeding by filing a separate suit. He ought to have raised an objection in the final proceeding.

13. In a partition suit for the land assessable to land revenue, the preliminary decree is to be effected by the Collector for drawing the final decree. Though further proceedings are left to the Collector under **Section 54 of the C.P.C.**, the obvious reason being that revenue authorities are considered more conversant and better qualified to deal with such matters and are expected to be able better to safeguard the interests of the Government with regard to the revenue assessed on the lands to be partitioned.

14. There is no corresponding provision in the C.P.C. that after making a partition the Collector should report to the Court, as submitted by learned advocate for the plaintiff. In **Bhagwan Singh versus Babu Shiv Prasad and another AIR 1974 Madhya Pradesh 12**, it is observed that “after passing a preliminary decree for partition of undivided estate assessed to the payment of land revenue, the Civil Courts becomes functus officio and does not have jurisdiction to act in any manner therefore so as to pass a final decree or deliver possession in terms of the decree. The execution of such decree is effected by the Collector only”.

15. However, in **Dev Gopal Savant versus Vasudev Vithal Savant (1887) I.L.R. 12 Bom. 371, 376** it is held that the Court is not deprived of the judicial control of its decree. But that control is very limited. It is only if the Collector contravenes the decretal order, or transgresses the law or otherwise acts ultra vires, or refuses to carry out the decree, that his action is liable to be controlled and corrected by the Court that passed the decree. Apart from this limited control the Collector can give effect to the partition made by him, without waiting for confirmation by the Court, and deliver possession of the shares to the respective sharers. Thus the Court has nothing further to do with the decree passed by it under Order XX, Rule 18 (1).

16. Another contention that is advanced by the learned advocate for the plaintiff during the argument is regarding the augmentation of shares of the parties by the death of Maruti Mali and Janabai Mali. Learned advocate for the plaintiff submitted the share

of the deceased devolved in the share of the plaintiff, defendant nos. 2 and 3. Therefore preliminary decree to that extent needs to be modified. It is settled law that the Court can draw more than one preliminary decree in the same suit if such circumstances arise. Even in **Phoolchand versus Gopal Lal AIR 1967 SC 1470** Honourable Supreme Court observed that nothing in the Civil Procedure Code prohibits from passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in a partition suit when after preliminary decree some parties die and shares of other parties are thereby augmented. Therefore, augmentation of shares by the death of any party can certainly be decided in final decree proceedings. However, this question raised by the plaintiff cannot be decided at this stage and in this application.

17. Turning to the relief claim by the plaintiff. he prayed for restraining defendant no.1 from obstructing his and defendant no.2's possession over Block No. 350. In the support, the plaintiff has filed a certified copy of the sale deeds (**Exh.3/6 and 3/7**) which shows the whole of Block No. 123 was sold by Maruti Mali to Kisan Jagdale on 08.01.1979 and the possession of the property was handed over on the same day. Subsequently, Kisan Jagdale sold the said property to defendant no.1 on 04.02.1980.

18. A photocopy of the decree and judgment passed in R.C.S. No. 317/1985 (**Exh.3/8 and 14/1**) shows that the present plaintiff, Prabhakar Maruti Mali, and Janabai Maruti Mali had filed

R.C.S. No. 317/1985 for partition of Block Nos. 31, 89, 123, 939, 940 and 952 and Village Panchayat House No.1239 situated at Masur against Maruti Dattu Mali, Kisan Jagdale and defendant no. 1. The said suit was partly decreed and the partition to the extent of house property was rejected. The plaintiffs get 1/4th share each in the suit properties except house property and it was directed that Block No. 123 (350) be adjusted towards the share of Maruti Mali which was the alternative prayer of the plaintiffs in that suit.

19. Over this preliminary decree an appeal was preferred by the plaintiffs of that suit. In the said appeal, neither Kisan Jagdale nor defendant no.1 was arrayed as a party. The said appeal was allowed and shares in the house property were also declared.

20. The plaintiff has filed a photocopy of the Judgment passed by Tahshildar, Karad in Darkhast No. 3/97 (**Exh.3/10**) wherein it is mentioned that both the parties agreed on the proposed partition draft. In that said draft Block No. 350 was allotted to defendant no. 1. Also the certified copy of the Judgment passed by Tahshildar, Karad in Partition Darkhast S.R.No. 10/2016 (**Exh.3/14**) it is mentioned that defendant no. 1 is in possession of property from the date of sale deed which was executed by Kisan Jagdale in her favour and ordered that Block No. 350 is devolved in her share.

21. A photocopy of the notice shows that it was issued by Circle Officer, Masur (**Exh.3/15**) regarding the intimation of handing

over the possession of the properties in view of the order passed in S.R.No. 10/2016 dated 25.09.2017. The date of execution of the proposed act is fixed on 24.11.2023.

22. On this count learned advocate for the plaintiff submitted that the authority has allotted the whole of Block No. 350 to defendant no.1. This order is not in consonance with the preliminary decree passed in R.C.S. No. 317/1985. No doubt in the judgment passed in R.C.S. No. 317/1985 share of present defendant no. 1 is not declared. However, it was ordered that Block No.123 be adjusted to the share of Maruti Mali and that too on the prayer of the plaintiffs. Moreover, the parties were consented to the draft drawn in Darkhast No. 3/97.

23. From the record it is seen that the sale deeds are prior to the filing of R.C.S. No 317/1985. For claiming interim injunction the plaintiff has to establish his possession over Block No. 350. Apart from the mere averment there is no evidence put forth for establishing his possession over the said Block No. 350. On the contrary, the sale deed executed by Maruti Mali shows that the possession was handed over to Maruti Jagdale on the same day. Moreover, the Judgments of revenue authorities support the same. Even the 7/12 extract of Block No. 350 shows name of defendant no. 1 is standing possessor of the property and the said property is under cultivation. The plaintiff has sought an interim injunction against defendant no. 1 not to obstruct peaceful possession of him and defendant no. 2. However, the plaintiff has not established his

possession over the said property therefore question of obstruction of his peaceful possession does not arise.

24. The submission of a learned advocate for the plaintiff that the order and proposed action of the revenue authorities are ultra virus and hence illegal. In the said application the relief is sought only against defendant no. 1 and not against the revenue authorities for their proposed action. Whether the action is ultra-virus or illegal cannot be decided at this stage as well as in this application. Hence, this submission cannot be considered at this stage. The plaintiff has not established a prima facie case in his favour. Hence, the answer to point no. 1 in negative.

Points Nos. 2 and 3:

25. The plaintiff has not made out prima facie case in his favour therefore questions of balance of convenience and irreparable loss have not arisen. Hence, the answer to points nos. 2 and 3 in negative.

Point No.4:

26. Considering the above discussion the application is rejected. Hence, I pass the following order.

ORDER

1. The application is rejected.
2. Costs in main cause.

Sd/-xx

Date: 21.12.2023

Place: Karad

(P. G. Shelar)

6th Jt. C.J.J.D., Karad.