

Ramchandra Rite Vs. Laxman Rite etc.

Order Below Exh. 21

(CNR: MHST14-000757-2013)

This is an application filed by plaintiff under section 151 of C.P.C. for seeking relief of temporary injunction against defendant no.1, 3 and 5 for restraining them from alienating suit properties to third person and creating third party interest therein.

2] Description of suit properties - It is as follows -

a] Gat no. 581 ad-measuring area 12 are, situated at village – wakhari, Tal. Phaltan, Dist. Satara, which is bounded as below -

On East - Gat no. 575.

On West - Gat no. 585 and 586.

On North - Gat no. 574 and 575.

On South - Road.

b] Gat no. 583 ad-measuring area 1 are, situated at village – wakhari, Tal. Phaltan, Dist. Satara, which is bounded as below -

On East - Gat no. 581.

On West - Gat no. 588 and 587.

On North - Gat no. 584.

On South - Gat no. 582.

c] Gat no. 575 ad-measuring area 67 are, situated at village – wakhari, Tal. Phaltan, Dist. Satara, which is bounded as below -

On East - Gat no. 576, Gat no.577 and Gat no.580.

On West - Gat no. 574 and 581.

On North - Road.

On South - Road.

3] **Plaintiff's Case in brief is as under -**

Defendant no.1 and 2 are real brothers of plaintiff suit

properties are purchased when plaintiff and defendant no.1 and 2 have joint family. Jagnath Bapu Rite is also brother of plaintiff and defendant no.1, 2. Jagnath Rite is adopted child. Sonubai Baburao Khadjode is sister of plaintiff and defendant no.1, 2. She is married suit properties are purchased from income of joint family property. Therefore, suit properties are joint family properties. Plaintiff, defendant no.1 and 2 are equal owners of suit properties. Gat no.581 and 583 are purchased in the name of defendant no.3 and defendant no.5 on 14/-5/1991. Accordingly, mutation entry no. 1223 came in existence. Gat no.575 was purchased in the name of defendant no.1 for family arrangement. Now plaintiff is in possession of his share. Defendant have executed registered partition deed in respect of Gat no.575 on 10/07/2012 without consent of plaintiff. Hence, plaintiff has constrained to file present suit of declaration. Names of Defendant no.1, 3 and 5 are entered on 7/12 extracts of suit properties. Therefore, defendant no.1, 3 and 5 are going to alienate suit properties by creating third party interest over there by taking advantage of entries of their names on 7/12 extracts. If property is sold out it will, create multiplicity of litigation. Hence, this application.

4] Defendant no.1, 3 and 5 have appeared and filed their say jointly at exh.22. They have contested the application on ground that, contents of an application are false and imaginary. The application is not maintainable by law. Defendants further contended that, Gat no.581, 583 are originally owned by Vishnu Savala Mohite R/o. Wakhari. They were purchased by Laxman Rite and Dattu Rite in the name of Defendant no.3 and 5 out of their own income. Since then, defendant no.3 and 5 are in possession of Gat no.581 and 583. Plaintiff is not in possession of suit properties. Plaintiff and defendants have ancestral properties situated at village Wakhari. Partition in respect of that properties are already done in 2000 as per section 85 of Maharashtra Land Revenue Code, 1966. Accordingly, mutation entry no.1728 is done. Plaintiff has no prima facie

case. Balance of convenience is in favour of defendants. Hence, they have prayed to reject the application.

5] Taking into consideration the material on record and rival contentions of the parties, the following points arise for my determination and I have recorded my findings thereon alongwith reasons as follows -

Sr. No.	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether plaintiff has made out : prima-facie case ?	No.
2.	Whether the balance of : convenience lies in favour plaintiff ?	Yes.
3.	Whether any irreparable loss : would cause to the plaintiff, if injunction as prayed is not granted ?	Yes.
4.	What order ? : 	The application is allowed.

REASONS

6] Advocate for plaintiff has filed on record 7/12 extract of Gat no.575 (exh.5), Gat no.581 (Exh.no.6), Gat no.583 (Exh.no.7) situated at village -Wakhari, copy of extracts of mutation entry no.1223, extract of M.E.No.94, Copy of order of Tahasildar dt.22/01/2001, Copy of extract of M.E.No.2837, copy of registered partition deed dt.10/07/2012 at exh.3. On the other hand, defendant did not file any document.

7] Advocate for plaintiff Shri.R.V.Borate argued that, suit properties are purchased from income of joint family property. Other agricultural lands are partitioned in year 2000 as per section 85 of Maharashtra Land Revenue Code, 1860. Suit lands are not partitioned yet. Suit properties are purchased prior to year 2000. That time joint

Hindu family was in existence. On 10/07/2012, defendants executed partition deed. They will alienate the suit lands. Hence, he prayed to allow the application.

8] Advocate for defendant no.1, 3 and 5 Shri.S.S.Jadhav argued that, suit lands are not ancestral. They are purchased by defendants. On 10/07/2012, partition of suit lands was carried out. On 22/01/2001, partition of ancestral lands was carried out. Plaintiff has no right in Gat no.575. Plaintiff has not challenged previous partition since 2001 to 2012. Hence, he prayed to reject application.

AS TO POINT NO.1 TO 3 -

9] All points are interlinked. Hence, to avoid repetition of facts, I have discussed them altogether.

10] It is not in dispute that, Gat no.581 and 583 were originally owned by Vishnu Mohite. They were purchased by Laxman Rite and Dattatray Rite in the name of defendant no.3 and 5. It is also not in dispute that, Gat no.575 was originally owned by Vishnu Mohite and purchased in the name of defendant no.1.

11] It is the case of plaintiff that suit lands are purchased out of income of joint Hindu Family. Suit lands are purchased in 1991. That time, joint family of plaintiff and defendant no.1, 2 was in existence. On the other hand, it is the case of defendants that, suit lands are self acquired properties of defendant no.1 and 2. Suit lands are not ancestral properties. On 10/07/2012, partition of suit lands took place. On 22/01/2001 partition of ancestral lands took place. Plaintiff did not adduce any documentary evidence on record which prima-facie shows that, suit lands are purchased from income of joint Hindu Family. No any other evidence is on the record other than mere words of plaintiff. Similarly, no evidence came on record which shows that, suit lands are self acquired properties of defendant no.1 and 2. Copy of registered

partition deed and extract of M.E.No.2837 are filed on the record. Upon its perusal it clears that out of suit lands only Gat no.575 is included in partition deed Gat no.581 and 583 are not included in it. Partition took place between Laxman, Dattatray, Dashrath and Sharad. Plaintiff did not receive any share of any agricultural land. In this respect during the argument, Adv. For defendants put his reliance on case law of Hon'ble Bombay High Court i.e. Suman Pathak and others Vs Usha w/o. Prabhakar Koparkar and others (2012 (2) Mh.L.J. 268), in which Hon'ble Bombay High Court observed that, 'merely because there is an evidence available on record that there existed HUF, that by itself would not make the property standing in the name of individual member of a joint family to be the joint family property. Burden rests upon the plaintiff to establish the fact that the property is the joint property. It is further observed that if property in the name of co-parcener, presumption is that it is his self acquired property unless it is shown that, it is acquired with the aid of nucleus of the joint family property.

12] I have gone through case law. It is settled presumption that, burden of proof lies on the person one who asserts. But, as this is being interim stage, case law put forth by advocate of defendant can not be taken into consideration at this stage. It can be considered at final stage, after giving opportunity to both parties to adduce their evidence on the record.

13] Perusal of record shows that, plaintiff has filed the present suit for partition and declaration. Though the plaintiff has not given genealogy in the plaint, averments in the plaint shows that, plaintiff and defendants belongs to one family. Therefore, plaintiff is one of the co-owners and co-sharer of suit properties. It is the case of plaintiff that, he is equal owner of suit lands. He is in possession of his share out of suit lands. 7/12 extracts of Gat no.581, 583 and 575 shows that, names of defendant no.13 and 5 are entered in the column of owner. Name of plaintiff is not mentioned anywhere. Similarly, extracts of M.E.No.1223 and 94 shows

that, gat no.581, 583 and 575 were purchased by defendant no.1 and 2 from one Vishnu Mohite. Therefore, I am of the view that, plaintiff has no prima-facie case. Though plaintiff has no prima-facie case, but being co-owner and co-sharer, he has equal share in the suit land and it is duty of court to protect and safeguard interest and right of plaintiff in to suit land. If application is rejected, it will cause ir-reparable loss to plaintiff.

14] Adv. For defendant took objection that, present application is not maintainable as it is not filed under O. 39, R. 1 and 2 of C.P.C. Present application is filed u/s 151 of C.P.C. praying temporary injunction against defendant no.1, 3 and 5 for restraining them from alienating suit lands to third person and creating third party interest therein. In this regard I have gone through observations made by Hon'ble Supreme Court in Manohar Lal Cohpra Vs Rai Bahadur Rao Raja Seth Hira Lal, AIR 1962 SC 527, in which Hon'ble Supreme Court observed that, Civil Court has a power to grant interim injunction in exercise of it's inherent jurisdiction even if the case does not fall within the ambit of provisions of order 39 of Code of Civil Procedure, 1908. Also, I have gone through, Hon'ble Supreme Court in Tanushree Basu Vs Ishanya Bagal, 2008 All SCR 1186, in which Hon'ble Supreme Court observed that, O. 39, R.1 is not the sole repository of the power of Court to grant injunction but section 151 confers power upon in Court to grant injunction if the matter is not covered by Rule 182. But the Court shall exercise inherent jurisdiction only when they considered it absolutely necessary for the ends of justice and exercise said discretion with extreme caution and only in very rare case. In view of above observations of Hon'ble Supreme Court, present application is maintainable.

15] The plaintiff has succeeded to establish Golden principles of temporary injunction. Defendant will not be liable for any hardship, if application is allowed. On the contrary, plaintiffs will suffer great hardship, if application is dismissed. Therefore, balance of convenience lies in favour of plaintiffs. By allowing this application, defendant no. 1, 3

and 5 will not suffer any loss. On the contrary, if the application is dismissed, the plaintiffs will suffer greater hardship, because plaintiff being co-owner and co-sharer, have share in suit lands. Therefore, I answer point no.1 to 3 in affirmative.

AS TO POINT NO.5

16] The Plaintiffs have established golden rules that is balance of convenience and ir-reparable loss which are required for issuance of temporary injunction against defendants. Therefore, the application is deserved to be allowed. Cost of application shall follow the event. Hence, in answer to point no.4, I pass the following order.

ORDER

1. The application (exh.21) is hereby allowed.
2. The defendant no.1, 3 and 5 are hereby temporarily restrained from alienating suit lands by creating third party interest therein till final decision of the suit.
3. Costs in Cause.

Phaltan

(K.K.Patil)

Date : 05.01.2019.

2nd Jt Civil Judge, Jr.Dn., Phaltan.