

ORDER BELOW EXH.8(Passed on this 24th day of September 2018)**Sunita -vs- Champat & Others**

1] The plaintiff has filed present suit for partition, Separate possession and perpetual injunction in which the present application is filed by plaintiff under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure (Hereinafter referred as 'CPC' for short) for temporary injunction against defendants for restraining them from alienating or creating third party interest over suit lands.(described in Para 2, below) during the pendency of the suit. (In short applicant shall be referred as 'plaintiff' and Non applicant's shall be referred as 'defendants' for convenience).

The brief facts of application are as under-

2] According to plaintiff the agricultural lands bearing Gut No. 34/1 Admeasuring 01 Hector 22 R, Gut No. 34/2 Admeasuring 01 Hector 21 R and Gut No. 34/3 Admeasuring 00 Hector 82 R, (there old survey No51 and there new survey No.23) situated at Bhojnagar, Tq. Umarkhed, Dist. Yavatmal. (hereinafter referred as 'suit lands' for sake of brevity) is subject matter of this suit and instant application. The suit lands are ancestral and joint family of plaintiff and defendants.

03] To show the relations between the parties, the plaintiff has given genealogy in para No.1 of the plaint. Defendant No. 1 is

uncle of plaintiff, defendant Nos 2 and 3 are cousin brother and defendant Nos 4 and 5 are aunts of plaintiff. According to plaintiff, suit lands were self-acquired property late Ganga Bagha Hatkar (Gangaram Devkate) who is grand father of plaintiff. Late Ganga Bagha Hatkar having five issues therein Ganpatrao S/o Ganga Hatkar, he was passed away during the life time Ganga Hatkar, who is father of plaintiff, second son is Champat Devkate (defendant No.1), late Sushila, late Lakshimi and Suverna (defendant No.5) are daughters. The father of plaintiff passed away on 04.12.1980 in their joint family, at that time plaintiff was one year old child. The plaintiff mother got second marriage upon demise her father. Thereafter, all the parental responsibility and maintenance of plaintiff till her marriage performed by defendant No. 1.

04] After demise his father the defendant No.1 being the karta of family, the suit lands are mutated in his name. Thereafter, he has transferred the suit land in the name of defendant Nos. 2 to 4. The plaintiff being daughter of late Ganpatrao and grand-daughter of Ganga Hatkar, she having equal share in suit lands alongwith defendant No 1 that is $\frac{1}{2}$ share. Therefore, on 10.02.2018, plaintiff demanded her share by way of partition but defendant No. 1 refused for partition. The defendants, in order to deprive the plaintiff from her share, are trying to alienate the suit lands. Hence, the plaintiff has filed present suit and as she

apprehend alienation at the hands of defendants during the pendency of suit, she has moved present application.

05] The defendant Nos. 1 to 4 appeared and filed their written statement at Exh. 12 alongwith documents. They have filed pursis below Exh. 13, and submitted that, their written statement below Exh. 12 be treated as say of present application. The defendant No. 5 is appeared and filed affidavit, therein submitted that, the suit land were self-acquired properties of their father, therefore, she do not want to her share in suit lands. Defendant Nos. 1 to 4 have denied all adverse allegations made against them. They have specifically denied relation with the plaintiff. They have admitted relation between themselves and relation with late Gangaram Devakate.

06] According to them, suit lands were self-acquired properties of late father of defendant No. 1. Therefore, he had independent right of distribute the suit lands. Late Gangaram Devkate has been transferred suit lands to the defendant No. 1 as his exclusive lands. Since than defendant No. 1, has become exclusive owner of suit property, Hence plaintiff has no share in the suit lands. Further, contented that, at the time mutation had effected in the name of defendant No. 1, all legal heir of late Gangaram gave their consent to mutated the suit lands. Even though the wife of late Ganpatrao was presented at the time mutation. Accordingly, suit lands are the independent property of

defendant No.1. The plaintiff has not joined necessary parties to suit. Hence, suit is hit by the principles of *non-joinder* of necessary parties. As plaintiff cannot demand partial partition and suit not within limitation, the suit is liable to be dismissed. In the event of the grant of temporary injunction, the defendants will be deprived from the suit lands. On the contrary, in the event of rejection of the said relief, no loss will be caused to the plaintiff. The balance of convenience as well as the *prima facie* case is in favour of the defendants. Hence, he has prayer for reject the application.

07] In view of these rival pleadings of both parties and argument advanced on their behalf, following points arises for determination and I have recorded my findings against each of them for the reasons stated below : -

No.	Points For Determination	Findings
1	Whether plaintiff has <i>prima facie</i> case ?	...In the affirmative
2	Whether balance of convenience is in favour of plaintiff ?	...In the affirmative
3	Whether plaintiff will suffer irreparable loss, in case of refusal of injunction ?	...In the affirmative
4	What order ?	...As per final Order

-: R E A S O N S :-

08] To support the application, plaintiff has filed documents at Exh 3 alongwith list of documents i.e. 3/1 certified

copies of 7/12 extract of Gut Nos 34/1/, 34/2 and 34/3 for year 2016/2017, 3/2 certified copy Jamabandi card for the year 1968 to 1969, 3/3 certified copies 7/12 extract of suit lands for year 1976 to 2003, 3/4 copy of Mutation entry No. 353, 3/5 copy of Map of suit land, 3/6 copy of Tipan Uttara, 3/7 copy of Namuna No. 9(3) 9(4), 3/8 copy of death certificate of Gangaram, 3/9 copy Nirgam Uttara, 3/10 Marriage invitation card of plaintiff. On other hand defendants have filed two oral affidavit that is Suvarna Maske and Sushila Hake.

09] Heard learned Advocate Mr. B.D. Kamble appearing for plaintiff and learned Advocate Mr S.B. Jadhav, appearing for defendants. Learned Advocate for plaintiff submitted that defendants have taken disadvantages of suit land in their name, trying to alienate or creating third party interest. Further argue that, late father of plaintiff is son of late Ganga Hatkar. Therefore, plaintiff being legal heir of late Ganga and she having share in the suit lands. Further submitted that, as existence of *prima facie* case and balance of convenience in favour of plaintiff, definitely it would be caused irreparable loss of plaintiff. Hence, he has prayed for allowed the application.

10] *Per contra*, learned Advocate for defendants submitted that, as admitted by the plaintiff suit lands were self-acquired properties of late Gangaram Hatkar. Therefore, suit lands were his self acquired properties and he was every right to dispose off said

property as per his choice. Hence Late Gangaram had transferred the suit land in favour of defendant No.1. Moreover, other legal heirs have given consent to it, by way of mutation entry in the name of defendant No. 1. Hence, defendant No1 has become owner by virtue of said mutation. Therefore, plaintiff has no right to seek partition in respect of suit lands. Further argued that, the application is liable to be rejected.

11] Upon considering the arguments advanced by both the parties, it will have to be seen from the pleading and documents on record whether plaintiff must prove existence of *prima facie* case in his favour and balance of convenience as well as question of irreparable loss is in his favour. Simultaneous burden of rebutting the case of plaintiff is on the defendants. It is also essential to consider the conduct of the parties, as the grant of injunction is an equitable relief.

POINT NO. 1 TO 3:-

12] Having regard to the pleadings and submissions advanced before me by learned advocate for the parties, it becomes amply clear that suit lands are self-acquired properties of late Ganga Bhaga Devkate. The plaintiff has come with the case that, late Ganga Devkate is her grandfather and defendant No. 1 is her real uncle. Late Ganga Devkate having two sons and three daughters. The father of plaintiff was passed away during the life

time late Ganga Bagha. As Ganga Baga her grandfather, she has equal share in suit land therefore she claimed partition suit. Pleadings of defendants show that they denied relation with the plaintiff. They have submitted that the exclusive owner of suit lands is defendant No.1.

13] I have minutely scrutinized records of the suit. Plaintiff has filed 7/12 extracts of suit lands. It clear goes to show that, the name of defendant Nos. 1 to 4 entered into record of rights as a owner and possessor. It is admitted by parties that, Mutation entry No 353 had been effected in the name of defendant No 1 to 4. Suit is for partition and separate possession.

14] According to plaintiff the suit lands are ancestral properties and partition not effected between herself and defendant Nos. 1 and 5, whose share are undivided in the suit lands, but defendant No.1 mutated some portions of suit land in favour of defendant Nos 2 to 4 behind her back. Defendant No 5 filed her affidavit and submitted that, suit lands are given to the defendant, therefore, she has no share in the suit lands.

15] It is pertinent to note that, defendant have never stated in their say that, partition effected of suit lands between plaintiff and themselves, but he stated that, defendant No.1 is exclusive owner of suit land, therefore, he mutated some portions in favour of defendant No 2 to 4. It clear goes to show that,

defendants admitted that partition not effected in suit land between plaintiff and defendant Nos. 1 and 5.

16] On perusal the contention of defendants it reveals that, they have denied the relation between plaintiff and themselves. But the defendants in their pleading have stated that, the plaintiffs father was brother of defendant No. 1 and 5. More specifically pleaded in their w.s. in para No.8 that all the parental responsibility and maintenance of plaintiff till her marriage performed by defendant No. 1. The contentions of defendants itself sufficient to hold that, suit lands are ancestral properties of plaintiff and defendants.

17] Scrutinized 7/12 extract it shows that, suit lands are owned and possesses by the defendant No.1 to 4. therefore, the plaintiff has no right to move present application against defendant No. 5. It is pertinent to note that the transactions between the Ganga Hatkar and defendant No. 1 has not been on record as to how effected. Therefore the question whether suit lands is ancestral properties or joint family properties of plaintiff and defendant Nos. 1 and 5 are having any share in the suit lands, the matter of facts which require evidence of parties to decide these issues orally or documentary, at this stage, these issues cannot be considered. Apart from this, the doc. No. 3/10 marriage invitation card it reveals that the father of plaintiff was member of Joint Hindu family of Ganga Hatkar, in order to avoid complications

and multiplicity of suit, application needs to be allowed in the interest of justice and equity.

18] Considering the facts and circumstances of the case and documents available on record I hold that plaintiff has proved her prima facie case, so also balance of convenience lies in her favour, therefore irreparable loss will be caused her if injunction is not granted in her favour. The observation made in this application is restricted to present application only, therefore accordingly I answer Point Nos. 1 to 3 in the affirmative.

POINT NO. 04 :- (What order)

19] As three essential ingredient are established in favour of plaintiff. She is entitled to get temporary injunction as sought, in her favour restraining the defendant No. 1 to 4 from alienating or creating third party interest over suit lands. Hence, in the result, I proceed to pass following order.

ORDER

1. Instant application is allowed.
2. The defendant Nos.1 to 4, and their agents, servants are hereby restrained temporarily not to alienating or creating third party interest in any manner over the suit lands bearing Gut No. 34/1 Adm 01.22 R, Gut No. 34/2 Adm 01.21 R and Gut No. 34/3 Adm 00.82 R, situated at Bhojnagar, Tq. Umarkhed, Dist. Yavatmal, till the final decision of this suit.

(10)

Order below Exh.8
Reg.C.S.No. 33/2018

3. Costs in the main cause.
(Dictated and pronounced in open court)

Place:- Umarkhed
Date:-24.09.2018

Sd/-
(Shyam S. Tondchire)
2nd Jt. Civil Judge Junior Division,
Umarkhed.