

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 17 OF 2019

1. Devidas s/o Bagaram Shinde,  
Age : 74 years, Occ: Pensioner,
2. Ashutosh s/o Devidas Shinde,  
Age : 34 years, Occu: Business,  
  
Both R/o. Gangotri Niwas, Thatte Ground,  
Ward No. 7, Shrirampur, Dist. Ahmednagar.
3. Mansukhlal s/o Vishram Thakkar,  
Age : 72 years, Occu: Business,  
R/o. Samta Colony, Ward No. 7,  
Shrirampur, Dist. Ahmednagar. ... Applicants

Versus

1. Abhijit s/o Devidas Shinde,  
Age: 37 years, Occu: Business,  
R/o. Gangotri Niwas, Thatte Ground,  
Ward No.7, Shrirampur, Dist. Ahmednagar.
2. Ramnath s/o Annasaheb Nirmal,  
Age : 70 years, Occu : Pensioner,  
R/o. Saraswati Colony, Ward No.7,  
Shrirampur, Dist. Ahmednagar. ... Respondents

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Mr. Shivaji T. Shelke, Advocate for the Applicants.

Mr. R.R. Karpe, Advocate h/f Mr. Yogesh Kale, Advocate for  
Respondent No.1.

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**CORAM : V. K. JADHAV, J.**  
**DATED : 21<sup>ST</sup> November, 2019**

**ORDER :-**

1. The applicants are the original defendants in Regular Civil Suit No. 215 of 2015. Respondent no. 1 herein has instituted the said Regular Civil Suit for declaration and a decree of perpetual injunction. Pending suit, respondent no.1/original plaintiff had filed application Exhibit 29 for granting temporary injunction restraining thereby the applicants and respondent no.2 herein from creating charge, mortgage, gift or lease in respect of the suit property. Learned Judge of the trial court, by order dated 19.09.2018 passed below Exhibit 29, rejected the application. Being aggrieved by the same, respondent no.1/original plaintiff preferred Misc. Civil Appeal No. 19 of 2018 and by judgment and order dated 25.10.2018, the learned District Judge-1, Shrirampur has allowed the appeal, quashed and set aside the order passed below Exhibit 29 by the trial court, allowed the application Exhibit 29 and restrained thereby temporarily the applicants along with respondent no.2 herein from alienating or creating third party interest in respect of the suit property till its actual partition and division in accordance with law. Hence this Civil Revision Application.

2. Learned counsel for the applicants/original defendants submits that according to respondent no.1/plaintiff, he is having limited share in the suit property. The applicant/original defendant no.1 is father of the plaintiff whereas applicant no.2 is real brother of the plaintiff. Applicant no.1/original defendant no.1 along with his wife Mangala (mother of the plaintiff) and original defendant nos. 3 and 4 had purchased the land Gat no. 86/A/5 to the extent of 29.25 R under registered sale deed dated 03.06.2005. After death of wife of applicant no.1 herein in the year 2006, the property stands mutated in the name of the plaintiff and defendant nos. 1 and 2, to the extent of her share, as her legal heirs. Learned counsel submits that instead of claiming partition to the extent of the share in the said property which is an undivided share, respondent no.1/original plaintiff has instituted the suit for declaration to the effect that he is entitled to purchase the aforesaid property on pre-emption and also sought a decree of perpetual injunction. No partition in respect of the suit land is effected. Learned counsel submits that there are allegations that the applicants/defendants have sold certain portion of the suit property prior to institution of the suit and thus, there is an

apprehension in the mind of respondent no.1/original plaintiff that the applicants/original defendants would create third party interest in respect of the suit property. Learned counsel submits that it is a matter of record that when the portion of the suit property was sold out, respondent/plaintiff was also party to the said sale deeds. Learned counsel submits that there is a clear cut bar of Section 34 of the Specific Relief Act, 1963 (for short, "Act of 1963"). Learned counsel submits that the trial court has rightly rejected the application Exhibit 29, however, by allowing the Misc. Civil Appeal, learned District Judge has clamped the injunction on the applicants and respondent nos.2 herein in respect of the entire land when the share of respondent/plaintiff is limited to the extent of the share of his deceased mother Mangala along with the other legal heirs, that is applicant nos. 1 and 2 respectively. Furthermore, declaration about preferential right to purchase the suit land is not filed within limitation. Learned counsel submits that as provided under Section 41(h) of the Act of 1963, the plaintiff has not availed the alternate efficacious remedy of partition. Thus, the judgment and order passed by the District Judge in Misc. Civil Appeal No. 19 of 2018 deserves to be quashed and set aside.

3. Learned counsel appearing for respondent/original plaintiff submits that *prima facie* it is evident that the plaintiff's mother, defendant nos. 1, 3 and 4 have paid the consideration out of the common fund and therefore, their share would be same as their interest in that fund. They are equally interested in the suit property. Thus, the share of plaintiff's mother would be  $1/4^{\text{th}}$  in the suit property and since she died thereafter, her  $1/4^{\text{th}}$  share would devolve upon her legal heirs including the plaintiff and the defendants. There is no dispute that the deceased mother was having  $1/4^{\text{th}}$  share in the suit property and after her death, respondent/plaintiff has inherited the same as her legal heir. It is also evident that substantial portion out of the suit property has been sold out by original defendant nos. 1, 3 and 4. Learned District Judge has therefore rightly allowed the Misc. Civil Appeal and quashed and set aside the order passed by the trial court. Learned counsel submits that no interference is required. There is no substance in the Civil Revision Application and it is liable to be dismissed.

4. On going through the pleadings of the parties and on perusal of the orders passed by the courts below, it appears that the

respondent/plaintiff has not approached the court with clean hands. The respondent/plaintiff has suppressed the material fact that when the portion of suit property was sold out on earlier occasion, he was also party to the sale deeds. In paragraph no. 16 of the order, the trial court has referred Mutation Entry No. 14774 dated 29.08.2012, Mutation Entry No. 15021 dated 07.02.2013 and Mutation Entry No. 15400 dated 02.08.2013 and observed that thus, the mutation entries clearly demonstrate that the respondent/plaintiff was also party to the sale deeds, on the basis of which, the aforesaid mutations came to be sanctioned. Thus, respondent/plaintiff has filed application Exhibit 29 with the apprehension that the applicants/original defendants are likely to create third party interest. However, the said apprehension is not only ill-founded but also appears to be misleading.

5. It further appears from the pleadings that instead of instituting a suit for partition to the extent of the share of the plaintiff in the suit property, the plaintiff has instituted the suit for declaration about his right of pre-emption to purchase the suit property. *Prima facie* there appears to be a bar under Section 34 so also under Section 41(h) of the Act of 1963. Though the plaintiff is able to seek further relief, then mere declaration about his right of

pre-emption and instituting the suit only for that purpose along with a decree of injunction *prima facie* attracts the provisions of Section 34 of the Act of 1963 so also in the same analogy, Section 41(h) stands attracted. Apart from this, the learned District Judge has clamped the injunction on the applicants/defendants in respect of the entire portion of the land. In view of the same, I find much substance in this Civil Revision Application. Hence, I proceed to pass the following order:

#### **ORDER**

- I. The Civil Revision Application is hereby allowed.
- II. The impugned judgment and order dated 25.10.2018 passed by District Judge-1, Shrirampur, District Ahmednagar in Misc. Civil Appeal No. 19 of 2018 is hereby quashed and set aside.
- III. The order dated 19.09.2018 passed by the 3<sup>rd</sup> Joint Civil Judge, Junior Division, Shrirampur, District Ahmednagar below Exhibit 29 in Regular Civil Suit No. 215 of 2015 stands confirmed.
- IV. The Civil Revision Application is accordingly disposed off.

**( V. K. JADHAV, J.)**

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