

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

924 WRIT PETITION NO. 8320 OF 2024



1. Kalpana Dattatreya Nifade
Age : 60 years, Occupation : Housework
Resident of : Shraddhanand Park,
Apurva ro-house, Kalenagar-2, Behind Guruji
Hospital, Gangapur Road, Nashik
2. Jaishree Sanjay Wagh
Age: 42 years, Occupation: Housework,
Resident of: Sinnar, District Nashik.
3. Sanjay Gokul Patil
Age: 58 years, Occupation: Agriculture.
4. Chhotu Gokul Patil,
Age: 55 years, Occupation: Agriculture,
5. Kamalbai Gokul Patil,
Age: 82 years, Occupation: Housework,

Nos. 3 to 5 resident of : At village Aayne,
Taluka Sakri, District Dhule

...Petitioners

VERSUS

1. Hitesh Madhukar Khairnar (Patil)
Age: 16 years, Occupation: Education,
Through guardian mother Respondent No. 2
Shital Madhukar Khairnar (Patil)
2. Shital Madhukar Khairnar (Patil)
Age: 39 years, Occupation: Housework,

All Resident OF : n-42, vd/1/8/2,
Audumbar Chowk, Savta Nagar,
Infront of Jaju park, Cidco,
Nashik, District Nashik

4. Shiva Yada Gore (Thelari)
Age : 25 years, Occupation : Labour

5. Bhayya Raghunath Bhaskar (Thelari)
Age : years, Occupation : Labour

Both Resident of : Aayane, Taluka Sakri,
District Dhule

...Respondents

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Mr. Mukul S. Kulkarni, Advocate for the Petitioner
Mr. Amol Sudam Mali, Advocate for Respondents

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CORAM : ROHIT W. JOSHI, J.

DATED : 30th JULY 2025

ORAL JUDGEMENT :-

1. The petitioners are plaintiffs and defendant nos.1 to 3 in Special Civil Suit No.01 of 2023 which is a suit for partition and separate possession. In the said suit plaintiffs had moved an application at Exhibit-5 *inter alia* praying for order of temporary injunction against the defendants restraining them from creating third party interest in suit properties. The said application for grant of temporary injunction came to be rejected by the learned Trial Court vide order dated 09.03.2023.

2. The learned Trial Court has observed that *prima facie* the properties appear to be Joint Hindu Family Properties in which the plaintiffs and defendant nos.1 to 3 have a share. However the learned Trial Court has held that a co-owner is not entitled to seek order of injunction as against another co-owner and also that a co-owner or co-parcener is entitled to sell his share in the joint family property.

The petitioners/plaintiffs have not challenged the said order dated 09.03.2023 which has assumed finality and shall operate till disposal of the suit. After rejection of the application for grant of temporary injunction, defendant nos.1 to 3 have sold 0.60 HR land in Gat No.103/1 in favour of defendant nos.4 and 5. Defendant nos.4 and 5 have been subsequently joined in the suit as defendants by amending the plaint. The plaintiffs filed another application for grant of temporary injunction vide 'Exhibit-39' in which a prayer is made restraining the defendants from creating third party interest over the suit property and not to disturb possession of the plaintiffs over the same. The learned Trial Court has rejected the application for grant of temporary injunction (Exhibit-39), vide order dated 22.12.2023 in view of rejection of the earlier application filed vide 'Exhibit-5'.

3. Aggrieved by rejection of the said application at 'Exhibit-39', the petitioners/plaintiffs preferred an appeal being Miscellaneous Civil Appeal No.2 of 2024. This appeal is partly allowed vide order dated 10.05.2024. The learned Appellate Court has granted order of temporary injunction against the subsequent purchasers namely, the respondent nos.4 and 5 thereby restraining them from alienating or creating third party interest over portion of Gat No.103/01 purchased by them. Relief of temporary injunction with respect to other properties is rejected. Being aggrieved by that part of the order by

which relief of temporary injunction is refused, the present petition is filed by the original plaintiffs.

4. Mr. Kulkarni, the learned Advocate for the petitioners contends that twofold prayers were made in the application for injunction at 'Exhibit-39' namely that third party interest should not be created over the suit property till the final disposal of the suit and that possession of the plaintiffs over the suit properties should not be disturbed.

5. As regards the first prayer for injunction against creation of the third party interest, the application at 'Exhibit-5' was already rejected against the respondent nos.1 to 3 and therefore subsequent application for injunction at 'Exhibit-39' was not maintainable and the said prayer is rightly refused by the learned Trial Court against the said respondents. The learned Appellate Court however, considering that respondent nos. 4 and 5 are lis pendence transferees has granted injunction against creating of third party interest against them. In view of the above, the prayer for injunction restraining respondent nos.1 to 3 from creating third party interest could not be considered, since the initial order refusing the said prayer passed below 'Exhibit-5' is not challenged. To this extent the order is just and proper and does not warrant any interference.

6. Although prayer for temporary injunction for protection of possession was also made, it appears from perusal of the order below 'Exhibit-5' that submissions were advanced only with respect to injunction against creation of third party interest. The learned Advocate for the respondents contends that it must be held that the said relief i.e. relief of temporary injunction against disturbing possession should be deemed to be refused since it is prayed for and not granted.

7. It will be pertinent to mention that while the application for temporary injunction at 'Exhibit-5' was decided the suit properties were held by members of the family as co-owners. Now undisputedly a part of suit property is sold to respondent nos. 4 and 5 who are not family members. Respondent nos.4 and 5 cannot assume possession of any part of the suit property on their own. They will have to initiate appropriate proceeding for partition and possession if they want to take possession of part of the suit property purchased by them. The said legal position is absolutely clear and is statutorily recognized by Section 44 of the Transfer of Property Act. The first order which operates *inter se* between family members will not operate *qua* respondent nos.4 and 5 who are not family members.

8. While the application at 'Exhibit- 5' was rejected, the properties

were held by family members as co-owners and therefore, the learned Trial Court rejected the prayer for temporary injunction placing reliance on legal principle that co-owner cannot seek injunction against another co-owner. This principle cannot be applied between the petitioners and respondent nos.4 and 5. In view of the initial order passed by the learned Trial Court, which is confirmed by the learned Appellate court, it is clear that the petitioners have a share and interest in the suit properties. As co-owners they are *prima facie* in possession of the suit properties along with respondent nos.1 to 3. In view of Section 44 of the Transfer of Properties Act they have right to protect this possession against outsiders. Thus, the petitioners have made out a *prima facie* case for grant of temporary injunction against respondent nos.4 and 5 that they should not disturb their possession over the suit property purchased by them. Since, the injunction is sought with respect to possession over immovable property it needs to be held that balance of convenience is loaded in favour of the petitioners and that grave and irreparable loss will be caused to them if order of temporary injunction is not granted.

9. In view of the above, the petition needs to be **partly allowed** by restraining respondent nos.4 and 5 from disturbing possession of the petitioners as co-owners of the suit property without following due process of law. It must be mentioned that although there is no

injunction restraining respondent nos.1 to 3 from creating further third party interest, the prospective purchasers will have to bear in mind that they cannot assume possession without following due process of law.

10. Writ Petition is partly allowed and disposed of as such.

[ROHIT W. JOSHI, J.]