

MHKO060006562022 	Received on	:	05-12-2022
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	Decided on	:	11-01-2023
	Duration	:	Ys.Ms.Ds. 00-01-06

**IN THE COURT OF THE DISTRICT JUDGE-1,
JAYSINGPUR, AT JAYSINGPUR.**
(Before G.B. Gurao)

Misc. Civil Appeal No.53/2022.
Exh.

1. **Shri. Krishnat Bajirao Kamble,**
A/a 52 Yrs., Occu.- Labour,
R/o Shirti, Tal.- Shirol,
Dist.- Kolhapur.

2. **Sou. Rekha Krishna Kamble,**
A/a 46 Yrs., Occu.- Housewife,

Both R/o Shirti, Tal.- Shirol,
Dist.- Kolhapur.

... **Appellants**
(Ori. Plaintiffs)

Vs.

1. **Deceased Vinod Rajkumar Kamble**
(Legal heirs)

- (1) **Smt. Geeta Vinod Kamble,**
A/a 38 Yrs., Occu.- Housewife,
R/o Ramabai Colony, 2nd Chawl,
P.K. Lokhande Marg, Chembur,
Mumbai 39.

- (2) **Kumar Sujal Vinod Kamble,**
A/a 17 Yrs., Occu.- Education,
Through his legal guardian mother
Respondent No.1,
R/o – do –

... **Respondents**
(Ori. Defendants)

- (3) **Kumari Manali Vinod Kamble,**
A/a 15 Yrs., Occu.- Education,
Through his legal guardian mother

Respondent No.1,
R/o – do –

- (4) **Sou. Mangla Rajkumar Kamble,**
A/a 66 Yrs., Occu.- Retired,
R/o – do –

**Appeal under Order 43 , Rule 1 and 2
of Civil Procedure Code.**

Mr. D.B. Patil, advocate for appellants.
Mr. R.A. Magdum, advocate for respondents.

J U D G M E N T
(Delivered on 11-01-2023)

Being aggrieved by the order below Exh.5 in Regular Civil Suit No.252/2021 passed by the learned 2nd Jt. Civil Judge Junior Division, Jaysingpur dated 23-11-2022, the original plaintiffs have filed this appeal.

2. The parties to the appeal are referred as per their status in the trial Court.

3. Description of the suit property is as under :-

Property bearing C.S. No.149, admeasuring area 67.6 Sq. Mtrs. having Grampanchayat property No.494/2 and construction over the said city survey number admeasuring 20 x 13 i.e. 260 Sq.ft. by bricks, cement and tin etc. and remaining open land admeasuring 467.37 Sq.ft., within the boundaries to the east Government road, to the west property of Sachin Shamrao Kamble, to the south Government road, to the north property of Rajkumar Yashwant Kamble, situated at village Shirti, Tal.- Shirol, District Kolhapur.

4. Facts in brief are as under :-

Plaintiff No.2 is the wife of plaintiff No.1. The suit property was owned by the predecessor of plaintiff No.1 namely, Ganu Kamble. Thereafter the said property came by succession to Atmaram, Yashwant and father of plaintiff No.1 Baburao. Atmaram was Karta of joint Hindu family. Atmaram died on 14-07-1992. After his death, name of his wife Hirabai was entered to the suit property by entry No.346. However, Bajirao was in possession of the suit property. Bajirao expired on 17-03-2003. Plaintiff, his brother Bhimrao, Ashok and sister Savita came in possession of the suit property. Savita is now married. Bhimrao and Ashok permanently left village Shirti and went to Chembur, Mumbai. Since then plaintiffs are in exclusive possession of the suit property. Plaintiffs have paid Grampanchayat taxes of the suit property.

5. In the year 2005, there was flood in the area and the house of plaintiffs was collapsed. In the year 2006-2007, the concerned Grampanchayat sanctioned house to the plaintiffs under the Indira Gandhi Avas Gharkul Scheme. Thus, plaintiffs are in peaceful possession of the suit property. Plaintiffs have taken electricity supply in the suit property. However, the name of Hirabai was remained in city survey record.

6. Defendants are the legal heirs of deceased Vinod Kamble. Deceased Vinod has taken the disadvantage of the name of Hirabai in the city survey record and on 20-02-2015 got executed the registered sale deed bearing deed No.894. Deceased Vinod has not given consideration to Hirabai.

7. Hirabai was maternal aunt of plaintiff No.1. After the demise of Hirabai, on 23-12-2020 plaintiff prepared affidavit for taking entry of legal heirs. When plaintiff drew city survey extract, he found that the suit property is in the name of deceased Vinod Kamble. Thereafter on 30-05-2020, plaintiff No.1 went to Mumbai and met defendants. Plaintiff No.1 brought to their notice that he is in possession of the suit property since last forty years. At that time, defendants had assured that they have no any concern with the suit property and permitted the plaintiffs to remain in possession of suit property.

8. Thereafter defendants refused to execute re-conveyance deed in favour of plaintiffs. Defendants are not in possession of the suit property. Now plaintiffs learnt that defendants are trying to alienate the suit property and also threatening the plaintiffs to dispossess from the suit property. Therefore, by this application, plaintiffs sought relief to restrain the defendants from obstructing their possession over the suit property and also not to create third party interest in the suit property till the decision of the suit on merit.

9. Notice served to the defendants. Defendants appeared and filed their say. Defendants denied that plaintiffs are in possession of the suit property. Defendants denied that plaintiff No.1 has right in the suit property by succession. Defendants denied that plaintiffs are flood affected persons and the Grampanchayat constructed the house for plaintiffs in the scheme on the suit property. Defendants denied that deceased Vinod falsely got executed the sale deed from Hirabai. Defendant denied that plaintiff No.1 met them at Mumbai and they had assured him that they have no concern with the suit property. Defendants denied that they are trying to alienate the suit property.

10. According to defendants, plaintiffs have not come with clean hands. Plaintiffs have no concern with the suit property. Deceased Vinod has purchased the suit property from Hirabai for consideration. Defendant Nos.1 to 3 reside at Mumbai and thus plaintiffs are taking disadvantage of the said facts and amongst these grounds prayed to dismiss the suit.

11. During pendency of the appeal, plaintiffs have filed an application at Exh.8 under Order 26 Rule 9 of the Civil Procedure Code for appointment of TILR as a Court Commissioner. According to plaintiffs, property C.S.No. 149 and Grampanchayat property No. 494/2 are one and same. The learned trial Court while rejecting the application of the plaintiffs observed that both the properties are different and, therefore, by this application plaintiffs prayed to appoint TILR as a Court Commissioner to inspect the spot.

12. Defendants filed their say and resisted the application on the ground that plaintiffs have no concern with the suit property. The application is not maintainable.

13. The learned trial Court by the impugned order held that plaintiffs have failed to prove that Grampanchayat property No. 494/2 and C.S. No.149 is one and same. The learned trial Court relied on the sale deed in favour of deceased Vinod Kamble. The learned trial Court further held that plaintiffs failed to prove prima facie case, balance of convenience and irreparable loss in case of refusal of injunction in their favour. Accordingly, the learned trial Court refused the relief of temporary injunction.

14. The plaintiffs have raised grounds in this appeal that the learned trial Court has passed the order against the equity, justice and good conscience. The order of learned trial Court is one sided. The learned trial court has not considered the evidence produced by the plaintiffs. The learned trial Court ought to have recorded the finding that the sale deed in favour of deceased Vinod is void. The learned trial Court has wrongly held that defendants are in possession of the suit property. Hence, this appeal.

15. I have heard Mr. D.B. Patil, advocate for plaintiffs and Mr. R.A. Magdum, advocate for the defendants. From the rival submissions and the grounds of appeal, following points arise for my consideration, to which I record my findings against them for the reasons given below.

Sr. No.	Points	Findings
1.	Whether plaintiffs prove that they have prima facie case ?	No.
2.	Whether balance of convenience tilt in favour of plaintiffs?	No.
3.	To whom irreparable loss will be caused, if the injunction is granted?	To the defendants.
4.	Whether the impugned order calls for any interference?	No.
5.	What order ?	As per final order.

REASONS

As to point Nos.1 to 4 :-

16. Mr.D.B. Patil, advocate for plaintiffs has submitted that plaintiffs are in possession of the suit property. Deceased Hirabai was the paternal aunt of plaintiffs. Hirabai and her husband Atmaram had no

issue. Hirabai was residing at Haroli after the demise of Atmaram. Her Aadhar card is at the address of Haroli. Plaintiff No.1 and his brothers were in possession of the suit property. Thereafter plaintiffs brother executed gift deed in favour of plaintiffs. In the year 2005, there was flood in the village and the house of plaintiffs was collapsed. Therefore, the concerned Grampanchayat constructed the house for plaintiffs under Indira Gandhi Avas Gharkul Scheme. He further submitted that C.S. No.149 and Grampanchayat property No.494/2 is the same and one. He has invited my attention towards the sale deed in favour of deceased Vinod. In the sale deed initially it is written open place and thereafter it is written open place and house. The clause in the sale deed in respect that no litigation is pending in the Court, itself proves that plaintiffs are in possession of the suit property.

17. According to him, defendants reside at Mumbai. They were and are not in possession of the suit property. Plaintiffs have taken electricity supply in the suit property. Because of non entry of house No.494/2 in the city survey record, defendants are taking the disadvantage of the fact. He has invited my attention towards the documents on record. According to him, if all documents are considered, it prima facie appears that Grampanchayat property No. 494/2 is C.S. No.149. He further submitted that plaintiffs have filed application before this Court under Order 26, Rule 9 of Civil Procedure Code to appoint TILR as a Court Commissioner. The Court Commissioner will inspect the spot and submit the report about verification of the property. The learned trial Court has not considered the documents on record and the order is based on surmises and conjunctures. He has invited my attention towards the impugned order. According to him, the learned trial Court erred in

holding that plaintiff failed to prove that house property No. 494/2 is the same in C.S. No.149. On the strength of sale deed, defendants are trying to dispossess the plaintiffs. The sale deed executed by Hirabai in favour of deceased Vinod Kamble is void and liable to be canceled. Therefore, he prayed to appoint the Court Commissioner as well to set aside impugned order. In support of his contentions, he relied on -

- (1) **Shantilal Kesara Vs. Sumitrabai Porwal, Madhya Pradesh High Court, MP No.984/19.**
- (2) **Maharwal Khewaji Trust (Regd.) Faridkot Vs. Baldev Dass, Supreme Court.**
- (3) **Baburao Namdeo Nalwade Vs. Tukaram Keshav Nalwade, 2015 (2) ALL MR 277.**
- (4) **Shanti Devi and others Vs. Raj Kumari and others, AIR Online 2022 HP 201.**
- (5) **Bali Ram Vs. Mela Ram and another, AIR 2003 HP 87.**

18. Per contra, Mr. R.A. Magdum, advocate for defendants has invited my attention towards the documents consisting Grampanchayat record, city survey record. According to him, plaintiffs have not concerned with the suit property. The deceased Hirabai was the owner of the suit property and the predecessor of defendants have purchased the suit property for lawful consideration. He further submitted that plaintiffs' predecessor Bajirao, Atmaram and Yashwant were real brothers. They had owned property bearing C.S. No. 147,148 and 149 at village Shirati. Thereafter partition took place between them and C.S. No.149 came in share of Atmaram. After the demise of Atmaram, Hirabai became owner of the said property. Plaintiffs have property in other C.S. number. Thus, plaintiffs have not concerned with the suit property. He further

submitted that in the Grampanchayat record Grampanchayat property No.1080 is shown in C.S. No.149. However, in Grampanchayat record the column of C.S. number is blank against the property of Grampanchayat property No.494/2. The learned trial Court has rightly held that plaintiffs have no prima facie case and balance of convenience. Defendants are the owner and in possession of the suit property. If the injunction as prayed is granted, then irreparable loss will be caused to defendants. He further submitted that there is no necessity to appoint Court Commissioner. Evidence can not be collected through Court Commissioner. Plaintiffs have to stand on their own legs. Hence, he submitted to dismiss the appeal.

19. By this application, plaintiffs sought relief to restrain the defendants from interfering their possession and also not to alienate the suit property. The relief of injunction is an equitable relief. Plaintiffs have to prove that they have prima facie case, balance of convenience and irreparable loss in case of refusal of injunction. Prima facie case means there must be a triable issue between the parties.

20. From the pleadings of both the parties, plaintiffs have to prove that plaintiff No.1 has come in possession of the suit property by succession and they are in possession of the same. Plaintiffs have come with a specific case that house property C.S. No.149 was owned by the predecessors of plaintiff No.1 namely, Ganu Kamble. Ganu Kamble had three sons - Atmaram, Yashwant and Bajirao. Admittedly plaintiff is from the strip of Bajirao and whereas Hirabai was the wife of Atmaram. Atmaram and Hirabai had no issues. After the demise of Atmaram, the name of Hirabai was entered in the C.S. record. Plaintiff's brother Ashok executed gift deed in favour of plaintiff.

Plaintiff's sister Savita is married. Hirabai was residing at Haroli and thus the plaintiffs are in possession of the suit property.

21. It is true that the Grampanchayat issued certificate stating that in the year 2007, house was constructed to the plaintiff under the Housing Scheme for poor people. In the said certificate it is stated that the house was constructed by Grampanchayat on property No.494/2. It is to be noted that electricity bill shows that plaintiff No.1 has taken electricity connection in house property No.494/2. Now therefore, it is necessary to determine whether the Grampanchayat property No.494/2 and C.S. No.149 is the same. However, before this it is necessary to consider the documents of city survey record. As stated above, Atmaram, Yashwant and Bajirao were brothers. They had owned C.S.Nos. 146,147 and 149 at village Shirati. It is true that earlier Atmaram was shown as Karta of family. However, in the year 1980 partition took place between three brothers and plaintiff's father received property bearing C.S. No.146. Atmaram received property C.S. No.149. After the demise of Atmaram, the name of Hirabai is recorded on C.S. No.149 as a owner and possessor by entry dated 23-12-2010. Later on, it appears that on 18-05-2015 the name of deceased Vinod Kamble, predecessor of defendants is recorded as he has purchased the said property from Hirabai. Thus, it prima facie appears that plaintiffs have no concern with property C.S. No.149. It is to be noted that the property in C.S. No.146 i.e. of the plaintiffs is shown as property No.1181 whereas property in C.S. No.149 is shown as property No.1114. However, in the Grampanchayat record the column of C.S. number is blank in respect of house property No. 494/2. Thus, it clearly appears that the property No. 494/2 is not in C.S. No.149.

22. As stated above, the partition was effected between Atmaram, Yashwant and Bajirao and they received separate C.S. numbers. Therefore, there is no force in the contention of plaintiffs that Atmaram was the Karta of family and plaintiff No.1 remained in possession of the property in C.S. No.149. The property No. 494/2 can not be identified and can not be connected with C.S. No.149.

23. Plaintiffs have given application for appointment of TILR as a Court Commissioner. However, plaintiffs have remedy to approach the TILR and to correct the record if necessary. I have perused the authorities cited by learned counsel of plaintiffs. In **Shantinath Kesara Vs. Sumitrabai**, the Hon'ble Madhya Pradesh High Court held that the dispute can be resolved by appointing Court Commissioner. In **Maharwal Khewaji Trust (Regd.) Faridkot Vs. Baldev Dass**, the Hon'ble Supreme Court held that if the defendants are restrained by way of injunction from alienating the suit property then there will be multiplicity of proceedings.

24. However, I most respectfully submit that the ratio laid down in the above rulings is not applicable to the case in hand. Because the facts are different. Plaintiffs have failed to show that Grampanchayat property No.494/2 and C.S. No.149 is the same. On the contrary, it appears that deceased Hirabai was owner and in possession of C.S. No.149. She executed sale deed in favour of deceased Vinod Kamble, predecessor of defendants. Defendants are in possession of the suit property. Therefore, plaintiffs have no prima facie case, balance of convenience does not lie in favour of plaintiffs and if injunction as prayed is granted, there is every possibility that defendants will be dispossessed from the suit property. The learned trial Court has properly appreciated the evidence on record and rejected the

application. Hence, impugned order does not call for any interference. I answer the points accordingly and pass the following order.

ORDER

- (1) The appeal is dismissed with costs.
- (2) The application at Exh. 8 is rejected.

Jaysingpur.
Dt.: 11-01-2023.

(G. B. Gurao)
District Judge -1, Jaysingpur.

Dictated on : 11-01-2023 & 13-01-2023.
Transcribed on : 13-01-2023
Date of sign : 17-01-2023

CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL
SIGNED JUDGMENT/ORDER.

17-01-2023
UPLOADED DATE AND TIME

A.S. Tiruke
NAME OF STENOGRAPHER

Name of the Judge	Shri.G.B. Gurao, District Judge-1, Jaysingpur.
Date of pronouncement of Order	11-01-2023
Order signed by P.O. on	17-01-2023
Order uploaded on	17-01-2023