

Order below Exh.5 in Regular Civil Suit No.13/2022

(Harish Petkar etc. vs. Annasaheb Petkar etc.)

(CNRNo.MHAH170000722022)

Plaintiffs have filed an application for temporary injunction *vide* Rule 1 and 2 of Order XXXIX of The Code of Civil Procedure, 1908 (In short CPC) praying for a direction to defendant no.1 to 5 not to make any new construction, not to encroach and not to discharge any sewage water etc.

2. Gat No.347/1a/2/a/2/b area ad-measuring 5 Hector 38, Gat No.347/1a/2/a/2/b area ad-measuring 1 hector 80 Are, Gat No.347/1a/2/a/2/b area ad-measuring 1 hector 79 Are, Gat No.347/1a/2/a/2/b area ad-measuring 1 hector 79 Are, Gat No.358 area ad-measuring 1 Hector 82, situated at Mauje Puntamba, Teh. Rahata, Dist. Ahmednagar (more particularly described in para No.1A to E of plaint) is the subject matter of this application. Hence is referred as suit property 1A, 1B, 1C, 1D and 1E respectively hereinafter.

Plaintiffs' case in brief :-

3. Plaintiff No.1 and defendant No.1,2 and 4 are brothers. Plaintiff no.2 is wife of plaintiff no.1. Defendant No.3 is wife of defendant No.2 and defendant No.5 is wife of defendant No.4. Suit is for recovery of possession of house property and injunction. Suit properties are ancestral properties of plaintiff and defendant no.1,2 and 4. On 12.09.2013 partition deed was executed. As per deed shares were allotted. Suit property no.1B was given to plaintiffs in partition. In the south-west corner of that property 20 *guntha* land (house property) was reserved for residence. It was agreed that defendant no.1,2 and 4 are to give 5 *guntha* land each, in exchange for house property. It was agreed that defendant no.1 is to give 5 *guntha* land out of property obtained from *sheti*

mahamandal. Defendant No.1 applied for partition U/s 85 of MLRC. Accordingly partition was effected. Mutation entry No.21427 was effected.

4. Mutation entries on 7/12 extract were taken. However after mutation lands were not measured. Defendants did not comply with partition deed and did not give him his 5 *guntha* land as agreed. Defendants told him that they would vacate the house property, but they did not. Frontage of plaintiff's property is blocked due to house property. Due to construction of defendants, plaintiff cannot reach the main road. Defendants are encroaching over plaintiff's property and digging pits everywhere. Defendants are neither giving 5 *guntha* nor they re vacating house property. Due to excreta of cattle, sewage water plaintiff is unable to reside in his property. Plaintiffs have *prima facie* case, balance of convenience is in their favour. If injunction is not granted, irreparable loss would cause to him. Therefore, defendants be restrained as prayed.

Say of Defendant No.1 in brief :-

5. Suit is hit by non joinder of necessary parties. Suit is based upon partition deed dated 12.09.2013 hence it is barred by limitation. There are two partitions. One is of land and other is of house. However defendant no.2 to 5 hurriedly admitted partition deed of land and mutated their names. 20 *guntha* land of suit property 1A was left aside during the partition. Separate partition was effected of 20 *guntha* land. It was partitioned between plaintiff no.1 and defendant no.1, 2 and 4. accordingly each one is in possession of respective share. 20 *guntha* land was kept open for the purpose of cattle-shed and garbage etc. defendant no.1 offered 5 *guntha* land out of Gat No.339/110/2 land which he obtained from Sheti Mahamandal but plaintiff refused to accept. In collusion with defendant no.2 to 5 present suit is filed. Even though suit property 1E is included in partition, defendant no.2 to 5 and plaintiff have

no concern with it as defendant no.1 has received the property 1E by Will. He relinquished his share for the sake of his younger brothers. To challenge suit for partition filed by defendant no.1, this suit is filed.

Say of defendant no.4 and 5 in brief :-

6. Suit is admitted. Defendants are ready to hand over 5 *guntha* land to plaintiff. In the lifetime of plaintiff's mother Laxmibai and father partition deed is executed on 26.06.2003. Oral partition is acted upon by memorandum deed in 2003. Parties have been residing separately since 20 years. Defendant no.1 was not in good terms with plaintiff and family. So property of his mother Laxmibai was given to him i.e. Survey No.358/5. By Will. It was ancestral property. It was agreed that defendant no.1 will look after his mother but he did not. Hence on 26.06.2003 memorandum was executed and defendant no.1 was given survey No.358/5 in partition. Partition deed dated 12.09.2013 is executed as per memorandum of 2003. Also partition is effected as per S.85 of MLRC. In partition deed house property was given to Harish. So it was agreed that each should give 5 *guntha* land to Harish in exchange of house property. But none gave 5 *guntha* land to plaintiff. Defendants are encroaching, creating garbage, throwing excreta. Defendant no.1 is committing encroachment by making construction.

Say of defendant No.2 and 3 in brief-

7. In the lifetime of plaintiff's mother Laxmibai and father partition deed is executed on 26.06.2003. Oral partition is acted upon by memorandum deed in 2003. Parties have been residing separately since 20 years. Defendant no.2 and 3 have erected compound also as agreed upon. in 1996 defendant no.1 was residing separately. So property of his mother Laxmibai was given to him i.e. Survey No.358/5 by Will. It was ancestral property. It was agreed that defendant no.1 will look after his

mother but he did not. Hence on 26.06.2003 memorandum was executed and defendant no.1 was given survey No.358/5 in partition. Partition deed dated 12.09.2013 is executed as per memorandum of 2003. Also partition is effected as per S.85 of MLRC. In partition deed house property was given to Harish. So it was agreed that each should give 5 *guntha* land to Harish in exchange of house property. But none gave 5 *guntha* land to plaintiff. Defendant no.2 and 3 are ready to give 5 *guntha*. Suit property 1E is sold out to Harish for Rs.2,00,000/- as per partition deed dated 12.09.2013. Defendant 1,2, 4 and plaintiff were to give Rs.25,000/- each and deposit in the bank. But plaintiff No.1 has not given it till date. Suit is false. Defendants have not dug pits nor they have encroached. Defendants have raised compound and permanent house as per partition deed. Plaintiff is avoiding to include consideration for 6 *khan* in the name of Sushila Sitaram Petkar. Defendant no.2 and 3 have no cattles. Septic tank is closed. They have not thrown any garbage. Hence application be rejected with costs.

8. Perused application, affidavit and material placed on record. Heard learned counsel for the plaintiff and defendants. Considering the same following points arise for my consideration with their findings and reasons -

Sr. No.	Points	Findings
1.	Does the plaintiff prove that he has <i>prima facie</i> case?	Partly Yes
2.	Does the plaintiff prove that balance of convenience lies in his favour ?	No
3.	Does the plaintiff prove that he will suffer irreparable loss if injunction is not granted to him ?	No
4.	What order ?	As per final

order.

REASONS

9. Plaintiff and defendants in order to substantiate their case have relied upon number of documents. They are discussed as and when relevant hereinafter.

As point No. 1 to 3 are interlinked, they are discussed together to avoid repetition of facts :-

10. First of all it must be understood that *prima facie* case does not mean that plaintiff should have cent percent case which will in all probabilities succeed in trial. *Prima facie* case means that contentions which the plaintiff is raising require consideration on merit and are not liable to be rejected summarily. The Court must be satisfied that *bona fide* dispute is raised by the plaintiff and there is a strong case for trial. Merits of the case is not be judged or assessed at this stage and most importantly plaintiff must come with clean hands since the relief is equitable and discretionary.

11. In order to be entitled to be entitled to relief of injunction firstly plaintiff must prove that defendants are not in lawful possession of house property. Possession of defendants over house property is admitted. The whole dispute is that as per partition deed it was agreed that defendants can continue their possession over suit property but in exchange they have to give 5 *guntha* land from their share to plaintiff. However according to plaintiff, defendants did not give 5 *guntha*. Partition is already effected so again after so many years partition cannot be disputed. It is also admitted that some work is happening in house property. Whether it is only repairs or new construction is disputed. Plaintiff's claim is based on the fact that

defendants failed to oblige the terms of partition. They did not give 5 *guntha* land till date. Now defendant no.2 to 5 filed say and contended that they are ready to give 5 *guntha*. Defendant no.1 argued that that defendant no.2 to 5 are in collusion with plaintiff. Both the parties have advanced arguments based on their respective pleadings. Therefore the same are not repeated.

12. It is pleaded that Gat No.358/5 was given to defendant by Will. However Will is not on record. 7/12 extract of said Gat No.358/5 at Exh.3/3 bears name of defendant no.1. 7/12 extract of said Gat No.347/1/A/2/A/2/B at Exh.3/1 bears name of plaintiffs, defendant no.2, 3, 4 and 5. Partition deed dated 12.09.2003 is at Eh.3/2. Defendant has also produced partition deed at Eh.26/1. Plaintiff has also relied on complaint dated 24.12.2022 at Exh.34/1 against defendant no.1 and his wife. Photos of construction are produced at Exh.34/2. Defendant no.1 has produced Assessment extract of property No.2279 at Exh.43/3, it bears name of defendants as occupants. Photos of construction are at Exh.43/1, medical certificate at Exh.43/2, partition deed at Exh.43/4, tax receipt of Property No.2279 in the name of defendant no.1 is at Exh.43/5, NCR copy filed against plaintiff on 29.12.2022 at Exh.43/6 and 7. Plaintiff has also filed copy of NCR at Exh.45/4, medical certificate of plaintiffs at Exh.45/5 and 45/6, Order in Delay Application No.11/2022 at Exh.45/7. Plaintiffs have also filed copy of memorandum at Exh.54/1, mutation entry no.21427 at Exh.54/2 and Order in Delay Application at Exh.45/3.

13. Photos produced by both the parties do not *prima facie* indicate or suggest that any new construction is being carried out. There is no RCC structure or iron rods, cement appear in the photos. Defendant no.1 filed affidavit of 3 witnesses to support his case that defendant no.1 is not constructing, he is only executing repair works. Counter affidavits of 3

witnesses are filed by plaintiff stating that defendant no.1 is carrying out new construction. Therefore affidavit versus affidavit situation has arisen. Therefore affidavits of both the parties are of no help to determine whether repair works is carried out or new construction. Photos produced by defendant *prima facie* show that there are cracks in the bricks. Further partition deed shows that plaintiff gave house property to defendants. In exchange of that defendants are to give 5 *guntha* each to him.

14. Plaintiffs have filed copy of NCR and defendant no.1 has also filed copy of NCR lodged against plaintiff. Both parties have grievance against each other. At this stage only *prima facie* case is to ascertain whether plaintiffs' frontage is blocked, whether possession of defendants is illegal, whether defendants are throwing garbage and excreta which is causing inconvenience to plaintiff.

15. Plaintiffs have relied upon memorandum of partition. Which *prima facie* shows that plaintiff and defendant No.2 and 3 got the property in Gat No.347. Accordingly mutation entry No.21427 was effected. Decision of Delay Application No.11/2022 filed by defendant No.1 was rejected. The main objection is that defendants are not handing over 5 *guntha* land. Defendant no.2 to 5 filed say and admitted that 5 *guntha* land is not handed over to plaintiff. Defendant no.1 has specifically come up with a case that he offered 5 *guntha* land to plaintiff but he refused. Now, plaintiff is claiming suit property 1E which is not in consonance with partition deed. However there is no satisfactory proof at this stage to support this contention.

16. It is apparent that possession of defendants is admitted. Defendant no.2 and 3 have denied about throwing any excreta or garbage. Defendant

no.4 and 5 have supported plaintiff's case about defendants throwing garbage, excreta etc. Photos produced do not show any excreta or garbage thrown over plaintiff's area. Photographs produced by plaintiff also do not show any RCC construction. *Prima facie* it appears that it is not new construction. Partition deed mentions that defendants are to give 5 *guntha* to plaintiff. There is no document on record which shows that 5 *guntha* land was given to plaintiff. Therefore plaintiffs have succeeded in proving their case partly. Since defendants are in longstanding possession, they cannot be enjoined from carrying out essential repairs. However plaintiffs have also raised *bona-fide* claim which needs further interrogation. Therefore when some of the defendants are supporting plaintiffs' plea of harassment by throwing excreta and garbage and some of them are denying it, it does not inspire confidence of this Court. There is no satisfactory proof on record which suggests that defendants are carrying out new construction and committing encroachment or blocking frontage of plaintiff, there is no reason why defendants should be restrained from carrying out necessary repairs. Though plaintiffs have *prima facie* case but no case made out for temporary injunction.

17. There is no immediate threat to the plaintiffs regarding dispossession or encroachment *prima facie*. Partition is effected in 2003 and later in 2013. since then plaintiffs have not raised any dispute as to possession of defendants. Therefore possession of defendants at this stage appears to be legal *prima facie*. It is settled position that partition is recognized if it is effected by decree of court or registered partition deed. Plaintiffs have raised some *bona-fide* dispute which needs further interrogation as record does not show whether 5 *guntha* land is given to plaintiff or not. But it is admitted that defendants are in possession. Record does not suggest any new construction. When defendants are in longstanding possession, it needs to be protected. Therefore at this stage

carrying out repairs seems essential for safe residence. No case made out in respect of other allegations as to defendants throwing garbage on his property etc. Therefore I answer point No.1 partly in affirmative.

18. To grant the injunction the balance of convenience must be in favour of plaintiff along with *prima facie* case. The Court must be satisfied that comparative mischief, hardship or inconvenience which is likely to be caused to the plaintiff by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it. Further the plaintiff must satisfy the Court that there is no other remedy available to him to protect himself from apprehended injury.

19. It is well known that at the stage of interim injunction possession is paramount. In the present case defendants are admittedly in the possession of house property. From the photographs produced it seems that there is no new construction being carried out *prima facie*. House property in photos doesn't appear to be in fine condition. Therefore at this stage claim of plaintiff does not appear to be probable. Case laws are not filed by the parties in present matter. However while adjudicating this application court has considered all the case laws of both the parties cited in connected matter of RCS No.417/2021.

20. In the case at hand there is no proof on record which *prima facie* shows that defendants have given 5 *guntha* property. However it is apparent that they are in possession. Therefore repairs being essential work they need to be protected. At this stage only *prima facie* case is to be seen. Findings on merit is not expected. Therefore if defendants are not protected despite having lawful possession they would suffer more inconvenience and irreparable loss. Right of the plaintiff is not taken

away. In the event of final decision, if suit is decreed, each one would be entitled to their share. If suit filed by present plaintiff is decreed, then also he would get either 5 *guntha* land or possession of house property. Therefore plaintiffs are not prejudiced or deprived of any right. There is no pleading of dispossession at the hands of defendants. There are no pit holes dug in the photos. Therefore till the final adjudication, if repair works is stayed irreparable loss and comparative hardship would cause to the defendants. Hence in answer point No.2 and 3 in negative.

As to point No.4 :-

21. As I have already recorded point No.1 partly in affirmative and point No.2, 3 in negative, in view of point No.4 I pass following order -

ORDER

1.	Application at Exh.5 is rejected.
2.	Costs in cause.
	(Dictated and pronounced in open court)

sd/-

Rahata
Date : 06/05/2023

(A. A. Kulkarni)
2nd Jt. Civil Judge Junior Division,
Rahata.

CERTIFICATE

I affirm that the contents of this P.D.F. file are same, word to word, as per the original order.

Name of the Stenographer : ***R. N. Mali, Grade-III***
Court : 3rd Jt. Civil Judge Jr.Dn.,
Rahata.
Date of order : 06/05/2023
Order signed by the Presiding : 06/05/2023
Officer on
Order uploaded on : 08/05/2023