


<p>MHAH250025442022</p> 	<p><u>R.C.S.NO. 759/2022</u> Shakuntala Auti Vs. Balasaheb Gavali & Ors.</p>
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ORDER BELOW EXH. 5

This order shall dispose of an application filed by plaintiff under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure.

2. It is submitted by plaintiff that, suit property admeasuring 38 Ares out of total area 1H 49 Ares land in Gat No.46 situated at village Narayangavhan is owned by plaintiff. Defendant is nephew of plaintiff. The 76 Ares land in Gat no.46 (plaintiff and defendant having 38 Ares each) is self-acquired property of plaintiff and defendant. Plaintiff and defendant purchased the said land on 16/08/1999 and as per the sale deed names of plaintiff and defendant have been entered on the record of rights by virtue of mutation entry no.698 which was then certified by Circle Officer on 18/09/1991. Further, as per the oral partition between plaintiff and other purchasers, the lands in the Gat No.46 have been given respectively to each in their possession independently by ownership right. The same has been reflected in the judgment in R.C.S. No.328/2004 dated 08/12/2008. In such position, plaintiff's brother and cousin of defendant namely Dattatray Navale filed a suit in respect of ancestral properties of plaintiff and father and mother of defendant for partition and perpetual injunction as consequential relief against plaintiff, defendant's father and 36 others at Parner bearing R.C.S.

No.362/2001 and the suit property bearing 36 Ares land of the plaintiff which was his purchased and owned property was also added in that suit.

3. Plaintiff further submits that, a compromise was arrived at in that suit and based on the compromise, the Court passed a compromise decree in R.C.S. No.362/2001 on 25/04/2001. In that compromise decree, it was agreed and mentioned in point no.17 that, the land of 38 Ares each in Gat No.46 as per its purchase will be kept respectively in the name of plaintiff and defendant and other ancestral properties were partitioned as mentioned in the compromise decree. Thereafter, the compromise decree was sent to Tehsildar, Parner for taking entry of the partition along with an application and accordingly, Tehsildar vide order no.433/2011 dated 31/05/2011 sent the decree to Talathi for taking entries about partition of lands and for taking the entries about the concerned parties in the record of rights. Talathi took the entry of partition by mutation entry no.1839 but in the said compromise decree, as there was clear mention of 38 Ares land of plaintiff and 38 Ares land of defendant in Gat No.46 being purchased by them and hence, those are kept in their respective shares and as there was no dispute about mutation entry no.698 and as there was no change in the owned area of the land of the defendant in Gat No.46 as per the decree, Talathi unauthorized and by oversight mistake showed the partition of 38 Ares of plaintiff's land and entered the name of defendant in it, which is illegal.

4. Plaintiff further submits that he therefore, filed an application before Tehsildar on 26/06/2013 and prayed to cancel such entry and to keep the entry of 38 Ares each in the name of

plaintiff and defendant as it was earlier existing in accordance with sale deed and compromise decree. Thereafter, Tehsildar disposed the application on the ground that, it has no jurisdiction to cancel the mutation entry or amend it and opinionated to approach the Sub-Divisional Officer Parner by filing revision. Plaintiff and defendant filed revision no.154/2015 before S.D.O. on 24/09/2015 and it was decided on merits on 29/02/2016 and it was ordered by S.D.O to Tehsildar to decide the application of plaintiff and to compare and verify the area of the land on merits and to pass the appropriate order for taking the entry on 7/12 extract. Plaintiff filed an application before Tehsildar for executing the order passed by S.D.O., however, plaintiff lately came to know that the rehearing application no.136/2016 has been disposed on 31/07/2017. Plaintiff filed appeal along with delay condonation application no.95/2019 against the order of Tehsildar however, the delay condonation application was rejected by S.D.O. on 18/02/2020. Plaintiff therefore, preferred appeal against decision of S.D.O. before Additional Collector by filing R.T.S. Appeal No.207/2020 which was rejected on 17/12/2021.

5. Plaintiff submits that, due to the wrong interpretation of the terms and conditions of compromise decree of Civil Court in R.C.S. No.362/2001, the revenue officer, has gone beyond the decree and shown the partition of plaintiff's land by showing the share of defendant in the land of plaintiff, which has posed threat to the independently owned area of 38 Ares of plaintiff which has caused irreparable loss to the plaintiff. Defendant was not a party to the R.C.S. No.362/2001 and hence, there is no question of partitioning of the 38 Ares land purchased by plaintiff and giving

the share to defendant in it. Plaintiff failed in his attempts to get the mistake rectified hence, the filed the present suit for declaration. As plaintiff was not successful in his attempts before revenue authorities, defendant took advantage of it and told plaintiff that he is having a share in the suit property and defendant took out some onion crops of the plaintiff in the suit property of plaintiff and on 07/09/2022, with the intention to plough the field, defendant attempted to obstruct the plaintiff in his peaceful possession over the suit property and by taking advantage of the illegal entry in his name, defendant is in a preparation to alienate the suit property to third person. Plaintiff has a prima facie case and he has balance of convenience in his favour. Adjudication of the suit will take time. Plaintiff will suffer irreparable loss if in the meantime, defendant obstructs him in his possession over the suit property to dispossess him and alienates the suit property or changes its nature by taking advantage of the entry standing in his name on the suit property. Hence, plaintiff has prayed for grant of temporary injunction by restraining the defendant from obstructing his peaceful possession over the suit property and from creating any third-party interest in the suit property in any manner or from changing the nature of the suit property till disposal of the suit.

6. Defendant has submitted his say at Exh.13. Defendant submits that, the description and boundaries of Gat No.46 are not correct. It is not correct position that, plaintiff had purchased 38 Are land in Gat No.46 and the land of 38 Ares being jointly entered in the names of plaintiff and defendant only belongs to plaintiff. Rather, prior to the partition of the ancestral properties between plaintiff and defendant's father, the defendant's father was yielding

huge income from his agriculture and out of such income, his father purchased Grampanchayat property no.229 and 232 at village Narayangavhan, Parner and in those properties, defendant as well as his father was having share however, plaintiff has not given any share to defendant and he has only got his name entered on the said properties. Out of the joint family income of plaintiff and defendant, $\frac{1}{2}$ share of the land in Gat No.136 at village Waghunde Bk. Parner, was purchased for the joint family of plaintiff and defendant in the name of plaintiff by registered sale deed and plaintiff's name was entered on the record of rights by mutation entry no.283. However, despite such land being purchased for joint family of plaintiff and defendant, plaintiff sold $\frac{1}{2}$ share of the land to Bansi Divate by sale deed without the consent of defendant and his father and such transaction has been entered in the village record by mutation entry no.589. The share of amount out of the consideration amount for such sale was not given to defendant or his father by the plaintiff. Hence, the land in the name of defendant never came to the share of the plaintiff.

7. Defendant further submits that, Dattatray Navale had filed R.C.S. No.362/2001 before Court of Civil Judge Junior Division, Parner and in that suit, compromise was filed at Exh.56. Despite the land measuring 38 Ares in Gat No.46 being in the name of plaintiff, he sold the land purchased for joint family situated at Waghunde Bk. Without consent and did not give share to defendant and his father in the said property, hence, out of 38 Ares land $\frac{1}{2}$ share i.e. 19 Ares of land was given in the share of defendant in the partition as per condition no.17 of the compromise and as per the said partition, its entry was taken in the

village record and since then, defendant is in possession of the said property as an owner. However, only because there is mention of 38 Ares of land in the sale deed dated 16/08/1991 of Gat No.46, plaintiff is taking advantage of it and he is trying to imply that the said property is owned by him.

8. It is further submitted by defendant that, plaintiff had filed an application before Tehsildar for cancelling the mutation entry no.1839 taken on the basis of compromise decree in R.C.S. No.362/2001 and to take the entry of 38 Ares of land in the name of plaintiff. Tehsildar disposed of the application on 22/04/2015 and advised to file an appeal before S.D.O. Plaintiff accordingly filed RTS Revision No.154/2015 before S.D.O. Parner and it was adjudicated on merits and the matter was sent to Tehsildar Parner for re-inquiry. Tehsildar Parner passed an order in Re-inquiry case no.136/2016 by conducting re-inquiry that the mutation entry no.1839 was taken on the basis of compromise decree in R.C.S. No.362/2001 and hence, Tehsildar has no power to amend the entry or to amend the decree and plaintiff shall re-partition from the Civil Court and hence, the re-inquiry application was rejected. Thereafter, there was delay in filing the appeal by plaintiff before S.D.O. Parner and hence, delay condonation application no.95/2019 was filed. The application was dismissed by S.D.O. Parner against which, plaintiff preferred second R.T.S. Appeal no.207/2020 before Upper Collector Ahmednagar and the said appeal was also dismissed. Plaintiff has not preferred appeal or revision against the order of Upper Collector. Hence, plaintiff has no right to seek cancellation of the entry and declaration about the owner of the suit property. The said property has come to the share

of defendant independently by the compromise decree in RCS No.362/2001. Plaintiff has not filed appeal against the said suit. The compromise decree in RCS No.362/2001 has not been cancelled by the competent Court and hence, plaintiff has no right to complain in that regard and he has no right to seek declaration and injunction. Defendant has not obstructed the 19 Ares land owned and possessed by plaintiff. Only for grabbing the land came to the defendant by partition, plaintiff has filed this false suit. Hence, defendant has prayed to reject the application.

9. Heard learned advocate for plaintiff. Despite having opportunities to argue, defendant and his advocate remained absent. Hence, the application proceeded without the arguments of defendant vide order passed below Exh.5 dated 21/10/2024.

10. Having considered the submissions and documents placed on record, following points arose for my determination, the findings on which with reasons, I have stated as below:

<u>Sr.No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether plaintiff has made out a prima-facie case for issuance of temporary injunction against defendant as prayed?	Partly Yes.
2.	Whether the balance of convenience lies in the favour of plaintiff?	Partly Yes.
3.	Whether irreparable loss would cause to the plaintiff, if injunction as sought for is not granted?	Partly Yes.
4.	What order?	As per final order.

11. In support of his case, plaintiff has filed 8A extract of

account no.3547 and 843, 7/12 extract of Gat No.46, Xerox of sale deed no.1800/1991, copy of mutation extract of mutation entry no.698, xerox of plaint in RCS No.328/2004, copy of decree in RCS No.362/2001, copy of mutation extract of mutation entry no.1839, application given to Tehsildar dated 21/04/2015, copy of order in Revision no.154/2015, copy of judgment and roznama in re-inquiry Case no.136/2016, copy of delay condonation application no.95/2019, copy of order in delay condonation application no.95/2019, copy of judgment in second R.T.S. Appeal No.207/2020, copy of order in delay condonation application, copy of judgment of Upper Collector and Identity Card of plaintiff as ex-servicemen vide list of documents of at Exh.3. Plaintiff has also filed certified copy of 7/12 extract of Gat No.46 for the year 2001-2013 and copy of schedule A map in RCS No.328/2004. Defendant has not filed any documentary material on record at this stage.

REASONS

AS TO POINT NO.1 :-

12. The suit is filed for declaration and perpetual injunction. The granting of temporary injunction is a matter of discretion of the Court. The discretion is to be exercised judicially according to well-settled principles. Rule 1 of Order XXXIX of the Code of Civil Procedure, 1908 provides that where in any suit it is proved by affidavit or otherwise:

- (a) that any property in disputed in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold is of a decree, or
- (b) that the defendant threatens or intends to remove or dispose of

his property with a view to defrauding his creditors, or

(c) that the defendant threatens or dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, or

(d) where a court is of the opinion that the interest of justice so requires

Before granting of the temporary injunction, the following considerations are required to be satisfied:

(i) There is a prima facie case in favour of the plaintiff and against the defendant.

(ii) That irreparable injury is likely to be caused to the plaintiff which cannot be compensated for in terms of money.

(iii) That the balance of convenience lies in favour of the plaintiff and against the defendant.

(iv) The conduct of the plaintiff should be fair and honest.

13. In view of the aforesaid provision, the burden to prove prima facie case lies on the plaintiff. In order to grant temporary injunction, regard shall always be had to the principle of probability of success and a bonafide case. Probability of success will depend upon the material on record and a bona fide case will depend upon principles of equity. In order to decide a prima-facie case, the material placed before the Court need to be taken into consideration as well as it is important to peruse the facts and circumstances involved in a particular case.

14. It is the case of plaintiff that the suit property of 38 Ares

of land in Gat no.46 is owned and possessed by him by virtue of the sale deed dated 16/08/1991 and mutation entry no.698 is taken in that regard. According to plaintiff, Talathi, as a result of oversight mistake entered the name of defendant on the land of 38 Ares of the plaintiff in Gat No.46 while taking entries of the partition by virtue of compromise decree in RCS No.362/2001. Defendant on the other hand, submits that out of 38 Ares of land in Gat No.46, he is having $\frac{1}{2}$ share of the land i.e. 19 Ares of land by virtue of compromise decree in RCS No.362/2001.

15. Upon perusal of the 8A extract of Account no.3547, it appears that names of plaintiff and defendant are mentioned as joint account holders for 33 Ares of land. 8A extract of account no.843 appear to mention the name of defendant for 33 Ares of land in Gat No.46. It can be prima facie seen that defendant is having entry in his name for 33 Ares of land exclusively as well as joint with the plaintiff for other 33 Ares of land. The copy of sale deed dated 16/08/1991 prima facie appears to mention the land of 38 Ares being given to plaintiff and other 38 Ares land being given to defendant as well as 38 Ares of land each being given to Kashinath Nawale and Shripati Nawale and 45 Ares of land being given to Ananda Navale through the sale deed. However, the sale deed not only is in regard with Gat no.46 but it is also about Gat no.123 and Gat no.48. The sale deed does not appear to clearly mention that 38 Ares of land each has been given to plaintiff and defendant from the total land in Gat no.46. The same has also been observed in the judgment of Civil Judge Junior Division Parner in RCS No.328/2004 as the total area of the lands in the name of all the purchasers in the sale deed exceeds the total area of the land in

Gat No.46. Moreover, the copy of mutation entry no.698 does not clearly specify as to in which Gat number 38 Ares of land is given to plaintiff and defendant.

16. The compromise decree in RCS No.362/2001 is material because plaintiff and defendant have a dispute in that regard about the point no.17 of the compromise which appears to mention that “नारायणगव्हाण येथील गट नं.४६ क्षेत्र ०.३८ आर हे ज्ञानदेव नवले व साहेबराव दादाभाऊ नवले ०.३८ आज यांचे खरेदीचे असल्याने ते त्यांच्या हिस्स्यास ठेवले आहे.” This wording prima facie appears to show that twice, 38 Ares of land has been mentioned. It has been alleged that the revenue entries on the basis of such compromise decree are incorrectly taken by revenue authorities which has further led to numerous litigations before the revenue authorities. It is material to consider that the judgment in RCS No.328/2004 appears to mention the pleading of plaintiff and defendant who were both defendants in that suit and they both had submitted that after purchasing the suit property there was partition after two years as mentioned in the sale deed and as per the partition 38 Ares of land of East-South corner was given to plaintiff of this suit and 38 Ares of land of West-South corner was given to defendant of this suit. Hence, the submissions of both plaintiff and defendant as defendant no.1 and 2 in RCS No.328/2004 appears to mention that 38 Ares each was given to plaintiff and defendant. However, it also appears to be position at this stage that in the same judgment it was also mentioned that even if Kashinath, Shripati, plaintiff and defendant are contending having 38 Ares of land each and Ananda is having 45 Ares of land, the total of such lands is 1H 97 Ares and the total land of the Gat No.46 is 1H 87 Ares. Hence, it was

observed in the said judgment that such contentions of plaintiff and defendants in that suit cannot be accepted. It is also observed in judgment that, area of the land purchased in Gat No.123 is 10 Ares and area of land in Gat No.46 is 1H 87 Ares i.e. total it is 1H 97 Ares out of which, plaintiff and defendant of this suit, Shripati and Kashinath are having 38 Ares land each and Ananda is having 45 Ares of land and hence, the mistake about the area of the land is shown in the 7/12 extract at Exh.10 and on the basis of the said incorrect entry, the plaintiff and defendants in R.C.S. No.328/2004 are submitting that they are having more share in the Gat No.46. Considering such observation. Hence, it appears that there is no clarity in this regard that plaintiff, defendant, Shripati and Kashinath are having 38 Ares land each and Ananda is having 45 Ares land in Gat No.46. Moreover, the sale deed does not appear to be clear about 38 Ares of land being given each to plaintiff and defendant only from Gat No.46. It is also important to consider that, the 7/12 extract of Gat No.46 filed by plaintiff in the present case at Exh.3/3 is dated 24/07/2021 and it shows the total area of the Gat as 1H 49 Ares including 1H 39 Ares land and 10 Ares potkharab land and the land in the name of plaintiff and defendant mentioned jointly is mentioned as admeasuring 33 Ares. There is no mention of plaintiff and defendant having 38 Ares each on the 7/12 extract of Gat No.46 filed on record.

17. It is material to note that, the entry which is disputed was challenged by plaintiff before the revenue authorities, however, it was not canceled. On the other hand, defendant claim to be in possession of 19 Ares of land out of 38 Ares of land allegedly belonging to the plaintiff, by virtue of mutation entry taken with

respect to the compromise decree in RCS no.362/2001. As a last resort, plaintiff appears to have filed the present suit for declaration claiming ownership over 38 Ares of land in Gat No.46. Whether, plaintiff is entitled to such relief or not is a matter of trial. At this stage, there is no sufficient material on record which prima facie shows that plaintiff only is having exclusive possession over the suit property of 38 Ares of land. Moreover, there appears to be no clarity at this stage that, plaintiff is having 38 Ares of land standing in his name completely in Gat No.46 only. Still, plaintiff will have an opportunity to prove his case by adducing evidence at later stage, however, at this stage, temporary injunction in favour of the plaintiff as regards with the non-obstruction by the defendant to the possession of plaintiff over the suit property cannot be granted, as plaintiff has failed to prima facie show that he only is having exclusive possession over the suit property of 38 Ares of land. Hence, plaintiff has no prima facie case about the aspect of non-obstruction by defendant to his possession over the suit property.

18. As far as the aspect of non-alienation is concerned, it is contended by plaintiff that the suit property actually belong to him by virtue of sale deed dated 16/08/1991 and it is the self-acquired purchased property of the plaintiff. On the other hand, it is objected by the defendant on the ground that himself and plaintiff are having 19 Ares of land each in the suit property. Considering the 7/12 extract of the suit property, plaintiff prima facie appears to have a right in the suit property as he also has an entry standing in his name on the 7/12 extract. It is also important to consider that, plaintiff has come with specific pleading about being an owner of

the suit property and that the entry on the revenue record of the suit property allegedly mentioning the name of defendant jointly with the plaintiff is only taken as a result of the mistake of revenue officer in taking the entry. Plaintiff has sought relief of declaration with respect to the suit property praying for declaring himself as an owner of the suit property. The burden to prove entitlement to such declaration is upon the plaintiff. However, at this stage, considering that prima facie plaintiff is having a right in the suit property and considering the pleading of the plaintiff, he has a prima facie case for grant of temporary injunction against defendant as regards with the relief of restraining the defendant from creating third party interest in the suit property and from changing the nature of suit property, till disposal of suit.

19. Considering the reliefs sought and considering that the question about the entitlement about the relief of declaration need to be decided after recording the evidence, in order to prevent the status of suit property from being changed, in order to avoid multiplicity of litigations and in order to avoid the purpose of suit being frustrated, temporary injunction can be granted against defendant from creating third party interest or right in the suit property and from changing the nature of suit property. If the present application is rejected, plaintiff will suffer irreparable loss. If there is creation of third-party interest or right in the suit property or if the nature of suit property is changed by the defendant, it would cause complexity in the suit. Plaintiff therefore, has a prima facie case and balance of convenience in his favour as regards aspect of restraining defendant from creating third party interest or right in the suit property and from changing the nature

of suit property, is concerned. The creation of third party rights or interest in the suit property or changing the nature of the suit property during the pendency of the suit would affect the status of the suit property and hence, the status of suit property needs to be preserved. At this stage, the interest of the plaintiff needs to be protected from creation of third-party rights or interest in the suit property or changing the nature of the suit property by the defendant. Hence, in view of the aforesaid reasons, point No.1 is answered partly in affirmative.

AS TO POINT NOS. 2 TO 4:

20. In order to decide, who has the balance of convenience, the Court has to decide who will suffer great hardship in case injunction is not granted. A prima-facie case as regards the prayer of restraining the defendant temporarily from obstruction is not proved by plaintiff. As regards the relief of temporary injunction against the defendant about creation of third-party rights or interest in the suit property or changing the nature of the suit property by the defendant is concerned, prima facie case and balance of convenience lies in favor of plaintiff. Creation of third party rights or interest in the suit property or changing the nature of the suit property would cause hardship to the plaintiff and it might cause inconvenience to the plaintiff. The comparative hardship caused to the plaintiff as regards with creation of third party rights or interest in the suit property or changing the nature of the suit property would be much greater than the defendant if the application is rejected. As far as irreparable loss is concerned, revenue entries still appear to be jointly in the name of plaintiff and defendant and hence, the creation of third party rights or interest

in the suit property or changing the nature of suit property is not going to adversely affect the defendant but the plaintiff as plaintiff has come up with a case of exclusive ownership and possession over the suit property. Considering that the issue about whether 38 Ares of land I.e suit property is exclusively owned and possessed by plaintiff or not, is the point of dispute, it can be decided only after the conclusion of trial. At this stage, however, the interest of plaintiff needs to be protected because, creation of third party rights or interest in the suit property or changing the nature of the suit property would cause irreparable loss to the plaintiff, considering that he has prima facie proved his case on such point. Hence, I answer point no.2 and 3 partly in affirmative. In this backdrop and in answer to point No. 4, the following order is passed.

ORDER

1. Application at Exh. 5 is partly allowed.
2. Defendant is restrained from creating third-party rights in the suit property in any manner and from changing the nature of the suit property in any manner till final disposal of the suit.

Date: 18/11/2024

(N.S. Sabnis)
2nd Jt.Civil Judge, Junior Division,
Parner.