

MHAU050009342019 	<u>RCS No.236/2019.</u> <u>Shaikh Babulal Vs.</u> <u>Baban Rahinj</u>
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ORDER BELOW EXH.20

1. This is an application filed by the plaintiff seeking temporary injunction as per Order XXXIX Rule 1 and 2 of the Civil Procedure Code, 1908 (hereinafter referred to as the CPC for brevity).
2. Landed property at Gat No.110, total area admeasuring 13 acre 27 Gunthas out of which land admeasuring 6 acres 34 Gunthas [2 H 77] situated at Village Nagina Pimpalgaon, Tal. Vaijapur, Dist. Aurangabad is the subject matter of this suit (hereinafter referred to as **"the suit property"** for brevity).
3. The plaintiff has comeup with the case that after partition the suit property has come to the share of plaintiff and since then plaintiff is the owner and possessor of the suit property. Thereafter, plaintiff was in need of money for his expenses. Therefore, he made Mortgage deed (Thoke Patra) agreement with one Kashabai Laxman Warpe for the suit property for Rs.4000/- for the term of 98 years. Accordingly on 19/03/1971, vide registered agreement plaintiff handed over the possession of the suit property to Kashabai

Laxman Warpe. The said registered agreement is registered in the Register office Vaijapur, vide no. 166/1971 (Page No. 866/1971). The period for the said mortgage deed is from 19/03/1971 to 18/03/2069 and the suit property was in possession of Kashabai Laxman Warpe. Thereafter, name of Kashabai Laxman Warpe was recorded in the rights and other columns of 7/12 extract of the suit property. Accordingly, mutation entry no. 592 and thereafter as per the agreement mutation entry no. 11 was recorded. After the mortgage deed (Thoke Patra), Kashabai Laxman was in possession of the suit property and was enjoying the fruits from the same. In the said mortgage deed (Thoke Patra) nothing is mentioned that Kashabai Warpe has any right to create any sort of encumbrances on suit property, mortgage, alienate or transfer the suit property by any means. Thereafter, plaintiff went to Kuran, Tal. Sangamner, Dist. Ahemadnagar for their livelihood.

4. In the mortgage deed (Thoke Patra) it is mentioned that Kashabai Warpe after the expiry of mortgage deed would hand over the suit property to plaintiff without creating any interest over the suit property of any sort. Thereafter, Kashabai Warpe without informing the plaintiff mortgaged the suit property to defendant no. 1 and 2 for Rs.2000/- for the period of 88 years and 9 months vide registered

mortgage deed on 07/06/1980 in favour of defendants. Accordingly, the defendants illegally, took entry in the other rights column of 7/12 extract of the suit property and mutation entry no. 132 came into existence. As the plaintiff was not residing in Vaijapur and being of old age he could not visit his village from time to time. Therefore, plaintiff was unaware of the mortgage deed between Kashabai Warpe and defendants. Even plaintiff was unaware of the demise of Kashabai Warpe. Even the children of plaintiff were unaware of the mortgage deed between Kashabai and defendants.

5. Further it is the contention of plaintiff that there are various schemes of Government for the farmers and as the name of plaintiff was in the ownership column the defendants were unable to get the benefits of Government schemes for the suit property. Thereafter, the concern Talathi tried to contact the plaintiff by informing his relatives, but as plaintiff was residing at Kuran village Tal. Sangamner, the information did not reach the plaintiff. Thereafter, the concern Talathi and Divisional Inspector (Mandal Nirikshak) contacted the children of plaintiff in January-2019 and informed about the Government schemes. Thereafter, the elder son of Shaikh Muktar Shaikh Babulal went to Nagina Pimpalgaon and contacted the concerned Talathi to acquire information regarding Government schemes. Thereafter, acquired the 7/12

extract of the suit property on 10/01/2019. After acquiring the 7/12 extract of the suit property the son of plaintiff showed the 7/12 extract to the plaintiff and then the plaintiff came to know that Kashabai Warpe has mortgaged the suit property in favour of defendants for the period of 88 years and 9 months vide Thoke Patra and accordingly mutation entry no. 132 came into existence. Thereafter, the plaintiff came to know about the demise of Kashabai Warpe and accordingly acquired the death certificate of Kashabai Warpe.

6. It is further contention of the plaintiff that the mortgage deed (Thoke Patra) between Kashabai and defendants for the suit property is not binding upon the plaintiff. The mortgage deed (Thoke Patra) made by Kashabai in favour of defendants is illegal and accordingly, the defendants are in illegal possession of the suit property. Kashabai has breached the contract between her and plaintiff. As the defendants With malafide intention were trying to get the benefits of Government schemes, the plaintiff acquired the agreement no. 129/1980 dated 06/07/1980 on 15/04/2019 and filed the suit against defendants within limitation. Therefore, cause of action arose to the plaintiff on 15/04/2019. Also defendants are trying to create encumbrances on suit property, alienate, transfer the suit property to member of their family or

any third party and are transferring the suit property by way of mortgage, security etc., with intention that it would be difficult for the plaintiff to acquire the possession of the suit property. If the defendants are not restrained from doing the same, it would cause irreparable loss to the plaintiff. Therefore, plaintiff was constrained to file suit defendants and hence the present application.

7. Defendant no.1 filed W.S by E-filing portal. The defendant no.1 has admitted that the name of plaintiff is in the ownership column of the 7/12 extract of the suit property. However, stated that the suit property is not in the possession of the plaintiff. Also the name of defendants is entered as occupant in the 7/12 extract. It is admitted that plaintiff entered into agreement with Kashabai and accordingly possession was handed over to Kashabai. However, the agreement was Thoka Patra and not mortgage deed. The period of Thoka Patra between plaintiff and Kashabai was for the period of 98 years i.e. 19/03/1971 to 18/03/2069. The defendant no.1 has denied that in the Thoka Patra there was nothing mentioned about creating any sort of encumbrances on suit property, alienating or transferring the suit property by way of will deed to any member of their family or any third party and from transferring the suit property by way of mortgage, security etc. The plaintiff was aware of the Thoka Patra

agreement between Kashabai and defendants. However, the plaintiff has not challenged the same. It is also admitted that the period of Thoka Patra will expire on 2069 and at that time the defendants will hand over the possession to the plaintiff. Kashabai has informed the plaintiff that due to old age she is unable to cultivate the suit property and therefore, she is executing Thoka Patra Agreement with defendants. Accordingly, registered agreement in the Sub-Registrar office Vaijapur was recorded vide no. 929/1980 on 07/06/1980. Accordingly, mutation entry was taken vide no. 132 and name of defendants was recorded in the 7/12 extract of the suit property.

8. It is further contended by the defendant no.1 that plaintiff was in need of money for repayment of loan and other expenses. Therefore, plaintiff had asked the defendants to take the suit property vide Thoka Patra. However, as defendants did not have the money at that time, he requested plaintiff to give the property to Kashabai on Thoka Patra for Rs.4000/-. Even Kashabai agreed to the same but it was mutually agreed between the parties that the possession of the property would be with the defendants and after they taking money the Thoka Patra will be transferred in the name of defendants. Accordingly, document no. 166/71 was executed in the favour of Kashabai by the plaintiff. Plaintiff consented and was aware that the suit

property would be in possession of defendants and they would cultivate the same. When the money came to defendants they informed the same to plaintiff and called him to Vaijapur. Then defendants gave Rs.2000/- to Kashabai on 07/06/1980 and got executed the Thoka Patra for suit property for the remaining period of 88 years 9 months. At that time plaintiff was present at the office of Sub-Registrar. Plaintiff was well aware of the transaction between Kashabai and defendants since 1980.

9. The said suit property was barren land, however in last 10 to 12 years due to availability of water from Nandur Madhmeshwar the said land became fertile. The price of suit property hiked and plaintiff became greedy for more money. Plaintiff demanded money from defendants. As defendants were unable to fulfill the demand of plaintiff, the present false case is filed by the plaintiff. In the suit the plaintiff has intentionally referred to Thoke Patra as Gahan Patra (Mortgage Deed). Document executed was Thoke Patra and not Gahan Patra (Mortgage deed). Therefore, plaintiff cannot take benefit of Mortgage deed. Even prior to filing of the suit, no notice was issued by plaintiff to defendants. According to the defendant the suit itself is not maintainable. Hence, prayed for rejection of present application.

10. Defendant no.2 filed his at Exh. 35. Defendant no. 2 denied that plaintiff is the owner and possessor of the suit property. He admitted that document 166/1971 Thoke Patra / Mortgage deed was executed by plaintiff in favour of Kashabai for suit property. Accordingly, name of Kashabai was entered into other rights column in the revenue record of the suit property. Defendant no.2 further submitted that when the Thoke Patra 929/1980 was executed by Kashabai in his favour at that time Kashabai informed defendant no.2 that she wanted to return the suit property to plaintiff. However, plaintiff told her that, " I have given the property to you for 99 years. If you don't want to cultivate the land, you can give the land for remaining period to another person on Thoke Patra". Accordingly, both the defendants entered into the suit property as sub-tenant by Kashabai in the year 1980. Plaintiff was well aware of the transactions between Kashabai and defendants. Defendant no.1 is sub-tenant of the suit property. Kashabai had all the right to create the sub-tenancy. Thoke Patra 929/1980 executed by Kashabai in favour of defendant no.2 is legal and valid and does not breach the condition of Thoka Patra executed between plaintiff and Kashabai. According to defendant there is no prima facie case in favour of plaintiff. Hence, prayed for rejection of the present application.

11. After going through the application and documents filed along with it, following points arose for consideration and I have given findings thereon for reasons stated thereunder-

Sr.No.	Points	Findings
1	Whether plaintiffs have established prima-facie case ?	Affirmative
2	Whether the balance of convenience lies in favour of plaintiffs ?	Affirmative
3	Whether plaintiff will be put to irreparable loss, if injunction is not granted ?	Affirmative
4	What order ?	As per final order.

Reasons

12. In support of his contention the plaintiff filed 7/12 extract of the suit property, death certificate of Kashabai, Thoke Patra of 1971 and 1980.

AS TO POINT NO.1 TO 3 :-

13. It is settled position of the law that, any party claiming injunction against the other must prove firstly that, he has prima-facie case in his favor. Secondly that, balance of convenience lies in his favor, and lastly that, if injunction is refused, he will be put to irreparable loss. It is also settled law that, mere institution of suit does not entitle the plaintiff to relief. He must satisfy the Court that there is a fair and

substantial question to be tried. No injunction would be issued if the final relief cannot be granted. To make out a prima-facie case for a temporary injunction, it is not required that, the plaintiff should establish his title, but it is enough if he can show that he has a fair question to raise as to the existence of the right alleged and the property in the meantime should be preserved as it is till the final order.

14. Perused the application, documents filed on record and considered the argument of the plaintiffs and defendants. Through the present interim application plaintiffs are praying before this Court to restrain the defendants from further creating third party interest in the suit property.

15. It is admitted by both the defendants that the suit property was originally owned and possessed by plaintiff. It is further admitted position that vide Thoke Patra of 1971, i.e. document no. 166/1971, the suit property was given on Thoke Patra to Kashabai for 98 years. It is also admitted position that since the execution of Thoke Patra 1971 plaintiff parted with the possession of suit property. According to plaintiff and defendant no.2 from 1971 to 1980, the possession of suit property was with Kashabai. However, according to defendant no.1 since 1971 only the possession of suit property was with defendants. Irrespective of above

admittedly, the possession of the suit property as of today is with defendants.

16. It is further admitted position that in the year 1980 vide document 1929/1980 Kashabai executed the Thoke Patra of suit property in favour of both the defendants. According to plaintiff Kashabai has no right to execute Thoke Patra of suit property in favour of defendants. She executed the same without informing the plaintiff. She has breached the condition of thoke Patra/mortgage deed, of 1971 executed by plaintiff in favour of Kashabai. Hence, plaintiff has filed the present suit for redemption of mortgage. According to plaintiff the document of 1980 of Thoke Patra / Mortgage deed executed by Kashabai in favour of defendants is void-ab-initio. Therefore, defendants have acquired no right in the suit property. However, defendants are further trying to create third party interest in the suit property.

17. According to both the defendants plaintiff was well aware of the transaction between Kashabai and the defendants. Kashabai had all the right to executed Thoke Patra in favour of defendants. Both the defendants have admitted that they are not the owners of the suit property. Their name appear in the other rights column of the revenue record of the suit property. Therefore, they not being the owners cannot

further sell the suit property to third person or take loan from bank by mortgaging the suit property.

18. At present the possession of suit property is with defendants. The 7/12 extract filed on record shows that name of defendants appear in the other rights column. Whether the transaction between plaintiff and Kashabai was Thoke Patra or a mortgage deed and whether Kashabai had right to executed Thoke Patra in favour of defendants can only be decided after evidence is led by both the parties. At present if injunction is not granted and the possession of property is parted by the defendants, or if defendants create any third party right in the suit property, it would definitely cause irreparable loss to the plaintiff and result in multiplicity of proceeding. Therefore, it appears that prima- facie case is in favour of plaintiff. If the application is allowed it would not cause much harm to defendants, then in reverse situation to plaintiff. Hence, balance of convenience is also in favour of the plaintiff. In the result, I answer point no. 1 to 3, in the affirmative.

AS TO POINT NO.4:-

19. In view of my findings to point No.1 to 3, it is clear that plaintiff established prima-facie case in his favour. Therefore, his right over the suit property needs to be protected. Thus, in answer to point No.4, I

proceed to pass following order.

Order

1. Application is hereby allowed.
2. Defendants are restrained from creating any sort of encumbrances or hypothecation on suit property, from alienating or transferring the suit property to any member of their family or any third party and from transferring the suit property by way of mortgage, security etc, till decision of the suit.

Vaijapur.
Date- 13/03/2024

(Smt. S. K. Khan)
2nd Jt.Civil Judge J.D.,
Vaijapur.

CERTIFICATE

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

Name of the Stenographer	:	S. M. Bhosale, Stenographer Grade-III,
Court	:	Smt. S. K. Khan, 2 nd Jt.Civil Judge J.D., Vaijapur, Dist. Aurangabad.
Date of order	:	13/03/2024
Order signed by the presiding officer on	:	13/03/2024
Order uploaded on	:	15/03/2024.