

R.C.S.No.246/2013.  
Pandurang Vs. Shashikalabai.

**COMMON ORDER BELOW EXH. 05 & 22**

[ Delivered on : 05<sup>th</sup> February, 2014 ]

1] Plaintiffs and defendants both have filed an applications for temporary injunction under Order 39 Rule 1 of Code of Civil Procedure vide Exh.05 and Exh.22 respectively.

2] It is the case of plaintiff's that, landed property bearing block no.216 area 1.H 66.R was purchased by defendant nos.1 and 2 from one Ram Khose. Out of the same 1.H 34.R land was sold by them to Manisha Dhaigude vide registered sale deed no.1448/2000 dated 05/05/2000. Boundaries thereof are towards east -Indirabai Baburao Khose, towards west – government land, towards south – Manik Ranga, towards north – Manik Ranga and Laxman Khose. Said Manisha Dhaigude subsequently purchased 61.R and 60.R land from same block number from Narsing Khose and Indirabai Khose. Accordingly she became owner of 2.H 55.R land block no.216. Said property then purchased by plaintiffs from Manisha Dhaigude vide registered sale deed no.569/2008 dated 14/02/2008. Accordingly they are in possession. Defendants have no concern with the same. Defendants even though, trying to interfere in the possession of plaintiffs, hence the suit and application for temporary injunction vide Exh.05.

3] Defendants resisted the claim and filed counter claim. Thereby they have admitted that, they have purchased 1.H 66.R land from Ram Khose and out of which 1.H 34.R land was sold to Manisha Dhaigude and then to plaintiffs. They also admitted possession of plaintiffs over the suit property. They have resisted the claim only on the ground that the 32.R land which is remained in their name after executing sale deed to

Manisha Dhaigude, is situated towards eastern side of 1.H 34.R land which was sold to Manisha. But due to oversight, in the four boundaries, towards east, in stead of writing as vendors remaining land, it was written as Indirabai Khose. Hence, defendants are having in possession as a owner of 32.R land in block no.216. On the basis of the same plaintiffs are trying to take an undue advantage, hence they have filed one suit against plaintiffs for 32.R land, bearing R.C.S.No. 217/2010 for the relief of perpetual injunction which came to decreed in their favour. Hence, plaintiffs having no concern with the same.

4] In addition to this, defendants contended that, sale deed which was executed in favour of Manisha by defendants no.1 and 2 was hit by the provisions of Prevention of Fragmentation, Consolidation and Holding Act. Hence, Manisha cannot be the owner of the same and resultantly plaintiffs are not legally owner of the suit property. They are the defendants (plaintiffs in counter claim) who remained to be the owner of the same. Hence by way of counter claim they are claiming recovery of possession and injunction. Accordingly vide Exh.22 temporary injunction against plaintiffs (defendants in counter claim) restraining them from alienating the suit property was sought for.

5] While answering to the counter claim, plaintiffs (defendants in counter claim) contended that, they are the owners and possessors of the same. plaintiffs in counter claim have subsequently transferred the 32.R land in favour of one Sahdeo Dnyanoba Mudgalkar vide registered sale deed no.2830/2013 dated 05/08/2013, which is nominal one. In spite of the same, defendants (plaintiffs in counter claim) have no locus-standi of the same. Against the decree of R.C.S.NO.257/2010 Regular Civil Appeal was preferred and is pending. Hence prayed for rejection of the application Exh.22.

6] Heard, both the learned advocates and perused the record. On the basis of rival contention, following points arise for my consideration, I have recorded my findings thereon for the reasons below ;

**POINTS**

**FINDINGS**

- |  |  |
|--|--|
| 1] In whose favour the prima facie case is ?                                   | ..... Plaintiffs.  |
| 2] In whose favour the balance of convenience lies ?                           | ..... Plaintiffs.  |
| 3] Who will suffer from irreparable loss if temporary injunction is rejected ? | ..... Plaintiffs.  |
| 4] What order ?  | ..... Application <b>Exh.5</b> is allowed whereas application <b>Exh.22</b> is rejected. |

**REASONS**

7] To substantiate their respective claims, plaintiffs and defendants (plaintiffs in counter claim) placed several documents on record. plaintiffs have filed certified copy of 7/12 extract of block no.216 at Exh.8, certified copies of sale deeds bearing nos.569/2008 dated 14/02/2008, 1448/2000 dated 05/05/2000, 408/2003 dated 23/01/2003, 3919/2004 dated 08/06/2004, certified copies of mutation entry no.1067, 1194, certified copy of decree in R.C.S.No.217/2010, verified affidavit of plaintiffs dated 22/01/2014. On the other hand defendants (plaintiffs in counter claim) filed pleadings in R.C.S.No.217/2010, certified copy in Judgment of R.C.S.NO.217/2010.

**AS TO POINT NO. 01 :**

8] So far as prima facie case is concerned, it is not necessary to go into the merits of the case. For the purpose of temporary injunction the most important and crucial aspect is the possession over the suit property. It is also not require to decide the legality and illegality of possession. It is also not expected to decide and pass comment on the prima facie ownership. These are the matters which can be agitated after conclusion of

trial and at the time of final decision of the suit. Decision thereon at this stage would be the premature decision and it cannot be permitted at this stage. Therefore, as stated above the prima facie possession is the prima criteria for the decision of application for temporary injunction.

9] The meaning of prima facie case is that there must be existence of triable questions. It has to be seen that whether apparently there is case which can be decided by leading evidence properly during the trial of the case. It is even not expected to scrutinize the documents on its merits. The external appearance of the documents can be scrutinized in the existing position of law for the purpose of deciding the prima facie case.

10] Now coming towards the case in hand, it is the admitted fact that land area 1.H 66.R from block no.216 was purchased by defendants no.1 and 2 from Ram Khose. It is also admitted fact that out of the said land 1.H 34.R land was sold by defendants no.1 and 2 to Manisha Dhaigude. It means that, Manisha Dhaigude became prima-facie owner of land to the extent of 1.H 34.R land. Accordingly possession was also admittedly handed over. Same possession was handed over by Manisha Dhaigude to plaintiffs at the time of execution of sale deed in their favour. Defendants (plaintiffs in counter claim) have even admitted the possession of plaintiffs over the land to the extent of 1.H 34.R land. In addition to the 1.H 34.R land, the land purchased by the Manisha Dhaigude from Narsing Khose and Indirabai Khose which is adjacent to the 1.H 34.R land, subsequently sold to present plaintiffs. Accordingly prima facie possession was also handed over.

11] So far as prima facie evidence in respect of possession is concerned reliance can be definitely placed on recitals of registered sale deeds. Sale deed bearing no.569/2008 which is in favour of plaintiffs discloses that possession was handed over to the plaintiffs alongwith its

ownership. This possession was came from Manisha Dhaigude which she has acquired from defendants itself. This was in respect of 1.H 34.R. The possession of rest of the land was prima facie handed over to the Manisha Dhaigude by her vendors which she has subsequently handed over to the plaintiffs. Same was also evidence from the registered sale deeds bearing no.1448/2000, 408/2003 and 3919/2004. The recitals of the said sale deeds are prima facie sufficient to come to the conclusion about delivery of possession. In addition to this 7/12 extract of block no.216 discloses plaintiffs name in the ownership column. The cultivation column though does not showing any name about possession but there is presumption that whose name appearing in the ownership column is presumed to be cultivating the land unless contrary is proved. The most crucial admission even by the defendants (plaintiffs in counter claim) in their counter claim as well as written statement that plaintiffs are in possession over the suit land. But they contended that, said possession is unlawful one.

12] Plaintiffs have filed an affidavit of Pandurang i.e. plaintiff No.1 for the purpose of proving their prima-facie possession. Same has not even denied by the defendants. The contents of affidavit are prima-facie admissible unless same was countered with. This is the additional proof produced by plaintiff for showing his prima-facie possession. The relief of recovery of possession claimed in counter claim is also prima facie sufficient to hold that plaintiffs are in possession of the suit land.

13] Plaintiffs have produced certain decisions of Hon'ble parent High Court and Hon'ble Supreme Court of India. In **Tukaram Shinde V/s. Vishwanath Khandele reported in A.I.R.2003[6] Bom.C.R. 389**, The Hon'ble Bombay High Court decided the aspect of voidability of ownership on the basis of Bombay Prevention of Fragmentation and Consolidation of Holdings Act. With great respect to the same the facts of that case is not applicable the case in hand at this stage. Another decision

of Bombay High Court, in **Baban Niak V/s. Sau. Pramila Yenare, reported in 2011[6] All M.R.15** was placed on record. Though the facts are different but the ratio laid down by the Hon'ble High Court is the material one, which says that at the time of determination of temporary injunction the factum of possession would be the relevant factor. The proposition of each case based on the facts in hand. In the said judgment the question of readiness and willingness was arise but for the purpose of temporary injunction Hon'ble parent High Court has placed possession at their first preference. Third judgment of Hon'ble Supreme Court, in **Ramji Rai V/s. Jagdish Mallah, reported in A.I.R. 2007 Supreme Court, 900** is placed on record. With due respect to the same, the judgment is based on the same facts in issue, hence at this stage it is not applicable to the case in hand.

14] So far as remaining 32.R land is concerned plaintiffs do not even claimed his right over the same. plaintiffs only claimed his ownership by way of sale deed over the land which they have purchased. Defendants (plaintiffs in counter claim) have placed their reliance on the judgment passed in R.C.S.No.217/2010. Wherein it was contended that defendants (plaintiffs in counter claim) are in possession over the land area 32.R and accordingly perpetual injunction is granted in their favour. Here is the dispute in respect of four boundaries i.e. in which side the remaining land of defendants is situated. That matter was decided by decree in R.C.S.No.217/2010. Therefore, that cannot be the point of determination at this stage. plaintiffs only claiming relief in respect of the property which they have purchased.

15] The relief under Exh.22 claimed by the defendants in counter claim is in respect of not to alienate the suit land till the disposal of the suit. For the purpose of claiming such right, there must be prima facie existence of right over the suit property. Though defendants raised the plea of creation of fragment which allegedly raised doubt over the

ownership of plaintiffs, it is the matter of trial. In spite of the same defendants themselves have produced the pleadings of R.C.S.No. 217/2010. That was the suit filed by the defendants themselves. In that suit present defendants have admitted that they have sold the same. Vide the same they have not claimed any relief which is claimed in this suit. Defendants are now turning their table and raising the plea of creation of fragment. No one should be hot and cold at the same time. On one hand defendants admitting the transfer without raising any such plea in previous suit and in other hand vide this suit they are raising objection over the said transaction. This will not create any prima facie case in favour of defendants. Ultimately, these are the matters of trial. Therefore, the prima facie case is lies only in favour of plaintiffs in original suit, specially when defendants are admitting the possession of plaintiffs over the suit property. Accordingly, I have recorded my finding for point no.1 in favour of plaintiffs.

**AS TO POINT NO. 02 & 03:**

16] So far as balance of convenience and irreparable loss are concerned, it must be calculated in the form of balance of inconvenience. They are the second out put of the prima facie case. As discussed above plaintiffs are in prima facie possession over the suit property. Their possession is require to be protected. If they will dispossess without following due process of law, ultimately they will suffer from irreparable loss. The inconvenience would be caused to the plaintiffs only, if they will dispossessed. Prima facie possession is the prime criteria for the purpose of decision over balance of convenience also. Actually it is a balance of inconvenience which has to be measured, if interference will be continued in absence of any order. Therefore, the balance of convenience is lies in favour of plaintiffs and they are the plaintiffs who will suffer from irreparable loss if Exh.5 is rejected and Exh.22 is allowed. Accordingly I have recorded my finding to point nos.02 and 03.

**AS TO POINT NO. 04 :**

17] In the result, plaintiffs are having prima facie case. Balance of convenience also lies in their favour. plaintiffs are also bound to suffer an irreparable loss if Exh.5 not allowed. Defendants (plaintiffs in counter claim) have failed to prove their prima facie case. Balance of convenience and irreparable loss also does not lies in their favour. Resultantly existence and non-existence of above three factors would entitle the plaintiffs for temporary injunction and dis-entitle to the defendants (plaintiffs in counter claim) from the same. Therefore, defendants should be restrained from causing any sort of obstruction over the possession of plaintiffs over the suit property without following due process of law. Accordingly Exh.5 deserves to be allowed and Exh.22 is liable to be rejected. Hence, I proceed to pass following order.

**ORDER**

- I] Application Exh.5 is allowed.
- II] Application Exh.22 is rejected.
- III] Defendants (plaintiffs in counter claim) are restrained temporarily from causing any sort of obstruction and interference in the possession of plaintiffs over the suit land which is more particularly specified in plaint para no. 2, till the disposal of the suit, without following due process of law.
- IV] Costs in cause.

Sd/-

[ P. R. Kulkarni ]

3<sup>rd</sup> Jt. Civil Judge, [Jr. Divn.]

Ambajogai.

Date : 05/02/2014.  
Ambajogai.