

MHKO050033442017 	<u>Order below Exh.57 in RCS No.354/2017</u> <u>Shri Ashok Bapu Kamble Vs.</u> <u>Smt. Rekhatrai Dagadu Chopade</u> <u>CNR No.MHKO050033442017</u>
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This is an application under Order XXXIX Rule 1 and 2 read with Section 151 of the Civil Procedure Code for grant of temporary injunction preferred by plaintiff to restrain defendants no.1 to 5 from raising construction over suit property 1A and 1B until the final disposal of the suit.

2. The factual matrix of plaintiff's case runs as under:-

The property mentioned in paragraph no.1 of the plaint i.e. property at serial no.1A & at serial no.1B is the property in question. Henceforth, for the sake of brevity, the said property referred to as suit property.

3. It is the case of the plaintiff that the suit property belonged to ancestors of the plaintiff and the same was in common possession and common ownership of ancestors of plaintiff as well as other persons. It is the case of the plaintiff that after the death of his father, plaintiff, defendant no.6, 7 and 8 have become legal heirs in the suit property and therefore, they are entitled for share in the same.

4. According to the plaintiff, he has 1/4th share in the suit property 1A. The defendants no.1 to 5 created false and bogus documents in relation to the suit property and got their name

recorded on relevant documents in collusion with defendant no.15. According to the plaintiff, the defendants no.1 to 3 without recognizing rights of the plaintiff in the year 2017 started construction by way of encroachment. When the plaintiff filed an application below Exh.5 for grant of temporary injunction, it was submitted by the defendants that the construction over the same has been completed. Accordingly on 11/12/2018, the prayer in the said application was not pressed by the plaintiff.

5. The instant application is filed by the plaintiff for the second time praying for grant of temporary injunction restraining the defendants no.1 to 5 from raising construction over the suit property at serial no.1A & 1B. According to the plaintiff, the defendants no.1 to 3 have again started construction over the suit property which is illegal and in form of encroachment. According to the plaintiff, the defendants no.1 to 5 have raised pillars over the suit property and are trying to construct over the same. When the plaintiff approached the defendants on 11/11/2022 and asked them to stop the construction, the defendants no.1 to 3 refused to do so and continued with construction.

6. It is the case of the plaintiff that on 14/11/2022, the defendants no.1 to 5 sent a Caveat notice to the plaintiff. It is the said Caveat notice which according to the plaintiff is his cause of action to file the instant application. According to the plaintiff, the act of the defendants about raising construction is illegal, invalid, and without any proper permission. According to the plaintiff, he is a co-sharer in

the property and as of now the suit properties have not been partitioned. According to him, he would suffer a serious prejudice if the defendants are not restrained by way of temporary injunction. The plaintiff lastly submits that his application satisfies the triple test led down by the law and he accordingly prays for grant of temporary injunction.

7. The defendants no.1 to 3 filed their reply to the instant application below Exh.61 and their additional reply with permission of the Court below Exh.63. The defendants no.1 to 3 vehemently opposed the instant application and denied in toto the entire averments of the plaintiff. They submitted that the construction being raised by them is as per the "*Gharkul Yojna*" being under taken by Government of India. They have taken necessary permissions from the Grampanchayat and after due compliances they have started construction over the suit property. According to them, the construction being raised is approved by the Grampanchayat in resolution no.45 dated 21/10/2022 and after the said permission they have started to raise the construction.

8. According to defendants no.1 to 3, the said construction is completely legal and cannot be termed as encroachment. Further according to them, the plaintiff has no concern with the suit property and therefore, the defendants by way of precaution issued a Caveat notice to the plaintiff. According to them, the entire contention of the plaintiff about the suit property being joint / common property itself is false. The defendants further submitted that in the entire suit, the

plaintiff has failed to satisfactorily identify the suit property and therefore, no relief of injunction can be granted in favour of plaintiff. They accordingly prayed for rejection of the instant application.

9. Following points arise for determination and I have recorded my findings with reasons to be followed thereon :-

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1)	Whether the plaintiff proves prima facie case lies in his favour?	No
2)	In whose favour the balance of convenience lies?	Defendants No.1 to 3
3)	Whether the plaintiff would be put to irreparable loss, if injunction is not granted?	No
4)	What order?	As per final order.

REASONS

10. I have heard Mr. Sharma learned counsel for the plaintiff and Mr. Kandale, learned counsel for defendants no. 1 to 3. The main relief sought by the plaintiff is only against defendants no.1 to 3 and therefore, only the defendants no.1 to 3 have been issued notice on the instant application.

11. As to point nos. 1 to 4:- As point nos. 1 to 4 are inter linked with each other I prefer to discuss it under one common caption. Mr. Sharma submitted in consonance to his plaint and application. He submitted that the plaintiff is a co-sharer in the suit property. He submits that the suit properties were in joint/common ownership and common possession of the father of the plaintiffs as

well as the other persons. He submits that the defendants no.1 to 5 illegally in collusion with defendant no.15 mutated their names over relevant revenue documents and in reality they have no concern with the suit property. He submits that at the time of filing of the suit the defendant no.1 to 3 had started to raise construction over the suit property and when the plaintiff filed an application for temporary injunction, the defendants with a malafide intent completed the construction and accordingly filed a pursis. He submits that currently the defendants no.1 to 3 are again trying to raise construction over the suit property which itself is illegal, in form of encroachment and against the right of the plaintiff. He submits that the plaintiff has share in the suit property and the act of the defendants no.1 to 3 would cause serious prejudice to the rights of the plaintiff. He submits that it is settled principle of law that co-sharer cannot construct in any manner prejudicial to the rights of other co-sharer. He has invited my attention towards documents filed on record and has placed his reliance upon judgment of Hon'ble Punjab & Haryana High court in case of *Om Prakash & Ors. Vs. Chhaju Ram in AIR 1992 P & H 219.* He accordingly prays for allowing the instant application.

12. Per contra learned counsel Mr. Kandale has vehemently opposed the instant application on the ground that the plaintiff is nowhere concerned with the suit property. He submits that the plaintiff has failed to show as to how he is entitled for share in the suit property. He further submits that the construction being raised by the defendants is as per the provisions of law and after seeking due and necessary permissions from the concerned authorities. He submits that by way of abundant precautions, the defendants before initiating

construction had issued a Caveat notice in favour of plaintiff. He submits that Caveat notice cannot be termed as cause of action to file the instant application. He further submits that the application filed by the plaintiff is false, bogus and made with an intent to cause harassment to the defendants. He has invited my attention towards list of documents at Exh.32 & Exh.65 respectively. He submits that the defendants have acted lawfully and therefore, no order of injunction can be passed. He accordingly prays for rejection of instant application.

13. It is canon of settled legal principle that power to grant injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as the matter of right or course. The grant of injunction is at the discretion and must be exercised in favour of the party only if the Court is satisfied that, unless the other party is restrained by an order of injunction, irreparable loss or damage would be caused to that party.

14. In case of **Dalpat Kumar and Another Vs. Prahlad Singh and Others, AIR 1993 SC 276** wherein Hon'ble Supreme Court has held that

“It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the

court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. The Hon'ble Supreme Court further also held that the Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit” .

15. In case of **Gujrath Bottling Co. Ltd Vs. The Coca-Cola Co., And others (1995) 5 SCC 545 = AIR 1995 SC 2372** wherein Hon'ble Supreme Court has held that-

“Under order 39 of the Code of Civil Procedure, jurisdiction of the court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court on being approached, will, apart from other considerations, also look to the Conduct of the party involving the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature the party involving the

jurisdiction of the court has to show that he himself was not at fault and that he was not unfair or inequitable in his dealings with the party against who he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under order 39 Rule 1 or Rule 2 of the Code of Civil Procedure but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings”.

16. Reverting back to the hub of the matter, the real bone of contention between the parties inter se dispute is the fact whether the plaintiff has any right in the suit property and secondly, whether the act of the defendants i.e. raising construction over the suit property is legal or not.

17. Perusal of the instant application along with the suit shows that the plaintiff has filed the instant suit for partition, permanent injunction and declaration. Upon perusal of the entire suit, it is seen that the plaintiff has averred that he has 1/4th share out of 1/6th common share in suit property at serial no.1A. Similarly, he has averred that the defendant no.1 to 3 have no legal right title and interest to raise any construction over the suit property 1A & 1B. Thus, it can be gathered from the plaint that the plaintiff is primarily seeking partition in the suit property 1A & 1C.

18. For plaintiff to seek relief of partition, in my considered view it is necessary for the plaintiff to prima facie establish and show

as to how and on what basis he is claiming his share in the suit property. Upon perusal of the plaint it is seen that the plaintiff has come up with the case that his father Devappa Kamble was having common ownership and common possession along with other persons in the suit property. However, there is absolutely nothing on record to show the same. It is necessary to note here that it is not the case of the plaintiff that the defendants are related to him and under the principles of Hindu Law he is entitled for the share in the suit property. However, the plaintiff comes up with a ambiguous case contending that he has a share in the suit property on the basis of common ownership/common possession. To support his stand there is absolutely no documentary evidence led by the plaintiff. At this juncture it would be worthwhile to note here that the property card filed by the defendants at document no.2 below Exh.65, specifically shows that the name of defendants no.1 to 5 have been recorded over the same. The name of defendants no.1 to 5 appear to be recorded in view of mutation entry no.1130 & 1132 dated 07/06/2017. Thus, prima facie it is seen that the names of defendants no.1 to 5 have been recorded on suit property at serial no.1B. Upon perusal of entire suit, it can be seen that, there is not a single document filed by the plaintiff to show that he has some nexus with the suit property. There is absolutely no material on record which would go to show that the plaintiff has any connection, right, title and interest in regards to the suit property. In such a situation, it cannot be said that the plaintiff has satisfactorily demonstrated his interest in the suit property.

19. It is apposite to note here that the instant application is filed by the plaintiff showing that the case of action to file the same is

the Caveat notice sent by the defendants to the plaintiff. It is necessary to note here that the defendants have taken abundant caution and precaution before starting their constitution and therefore have issued the said Caveat notice. In my considered view, Caveat notice sent by the defendants cannot be termed as as a legal cause of action for the plaintiff to file the instant application. The plaintiff has to stand on his own legs. He cannot rely upon the defendants to plead his case. Therefore, I find that the cause of action to file the instant application itself is invalid.

20. Now, at this juncture, I find it just and proper to discuss whether the act of the defendants of raising construction is legal or not. During the course of arguments, learned counsel Mr. Kandale has invited my attention towards documents filed below Exh.65. Perusal of document no.1 shows that the same is an permission application to the Grampanchayat. Perusal of the document no.3 shows that the same is a map of proposed construction. Document no.3 is the construction permission letter issued by Grampanchyat i.e. defendant no.15 by virtue of which permission has been granted to defendants no.1 to 3 to raise construction. Thus, at the very outset it is seen that the act of the defendants i.e. raising construction over the suit property appears to be legal and after seeking necessary permissions from the competent authority.

21. Learned counsel Mr. Sharma has vehemently opposed and submitted that the construction permission granted by the defendant no.15, itself is illegal and not in consonance to the direction of the

Government. He submits that therefore construction cannot be permitted to go on. However, I find no merit in the said submission. Whether the permission given by defendant no.15 is legal or illegal cannot be determined by this Court at this juncture. The same can be adjudicated during the course of trial only after framing necessary issues regarding the same. As of now, the construction started by the defendants appears to be in consonance with permission issued by the defendant no.15. At the cost of repetition, it is necessary to mention here that the property card filed at document no.2 below Exh.65, clearly goes to show that the defendants no.1 to 3 are the owners and possessors of the property at serial no.1B. Moreover, they appear to be owners and possessors by virtue of mutation entry of the year 2017. There is absolutely no material on record to show that the plaintiff has challenged the said entry. Thus, at this juncture, it is seen that the ownership/possession of the defendants no.1 to 5 is apparent on the suit property. When the defendants have successfully established their ownership and possession over the suit property, they cannot be restrained from doing any act over the suit property unless the plaintiff is successful in showing the prejudice being caused to him. In the instant set of circumstances, the plaintiff has miserably failed to prove his prima facie case. There is no strong, cogent and reliable evidence brought by the plaintiff on record. In such a situation, restraining the defendants from raising construction would be unjust and would result in hardship to the defendants as they appear to have acted in a legal manner and have followed the process of law till date.

22. In such a situation, in my considered view, the plaintiff

has miserably failed to establish prima facie case. As stated above the acts of the defendants appear to be legal and done by following due process of law. As far as the ruling cited by learned counsel Mr. Sharma in case of **Om Prakash** (cited *supra*) is concerned, the same would not be applicable to the instant case at hand as the plaintiff has failed to prove that he is a co-sharer in the suit property.

23. Even otherwise, the facts of the suit are such that the pleadings of the parties are counter blast to each other. The grounds raised by the plaintiff can only be adjudicated after framing of necessary issues and after the parties lead evidence regarding the same. At this juncture, no case is made out for grant of temporary injunction as prima facie the plaintiff is unsuccessful in proving his case on merits. In view of the same, I am of the opinion that the application being devoid of merits has to be rejected. Accordingly, I proceed to pass the following order : -

ORDER

- 1) The application at Exh.57 hereby stands rejected.
- 2) Parties to bear their own costs.

Ichalkaranji
Date: 05/12/2022

(S. A. Ingley)
2nd Jt. Civil Judge Jr. Dn.,
Ichalkaranji

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

Name of stenographer	R. D. Jadhav.
Name of Court	S. A. Ingley. 2 nd Jt. Civil Judge, Jr. Dn. & Judicial Magistrate F.C. Ichalkaranji.
Date of Dictation	05/12/2022
Judgment/order signed by P.O. on	05/12/2022
Judgment/order uploaded on	05/12/2022