

MHKO070002982021



Liyakat Salauddin Pathan
V/s.
Imtiyaz Salauddin Pathan and others

ORDER PASSED BELOW EXH. 5

1] By way of present application. Plaintiff is seeking injunction against defendants as per provisions of Order 39 Rule 1 and 2 r/w. Sec.151 of Code of Civil Procedure, restraining defendants or anybody acting on their behalf from obstructing plaintiff's peaceful possession over the disputed property as well from alienating it or making any kind of change in nature or structure of it, till final disposal of suit.

2] The house property bearing No. 145 having total area of 1600 sq.ft. in CTS No. 145 of village Aalas referred as property No. 'A' in para No. 1 of plaint as well instant application is hereinafter referred as 'suit property A' for the sake of convenience.

3] Out of total area of 1600 sq.ft. Area from above suit property, an half area of 800 sq.ft., consisting of one hall, kitchen,

bed room, toilet and bathroom with separate water tap and electricity connection is bounded by four sides as referred in detail in para No. 2 of instant application and plaint and is hereinafter referred as "suit property B" for the sake of convenience.

4] According to plaintiff, suit property 'A' was owned by their deceased father Salauddin Pathan. He died on 23/04/2017. He left behind him defendant, as well other heirs which are not parties to the suit.

5] According to plaintiff he is Civil Engineer. He married on 28/5/2005. Defendant No.1 is in service in a Village Development Society and is in active politics of village. Defendant No.1 married in 2001. Their sister Shahina Parvin married in 1993 and is residing with her husband at Jaysingpur. According to plaintiff, defendant No.1 is residing towards Eastern side of suit property 'B' alongwith his family and their mother Mehernigar.

6] Plaintiff since his marriage, is residing separately from defendant No.1 in suit property 'B'. The property towards Eastern side of suit property 'B', is constructed for defendant No.1's residence. It is in defendant No.1's possession since its construction. It is having separate front door for its independent use. The suit map is annexed with the plaint, which shows that, it is equally divided area in green colour and red color portions respectively. Plaintiff is residing in

green color portion and defendant is in red color portion.

7] Thus, plaintiff is exclusive owner and in possession of suit property as shown in, green color portion of suit map, since prior 2016. Electricity and water bills of same are paid by plaintiff. Defendant No.1 is in possession of red color portion, existing towards Eastern side of suit property B. The suit property 'A' is yet not partitioned. Thus, the entry of defendant No.1's name taken place to city survey record on the basis of Hibba (gift) alleged to be executed by their father in favour of defendant No.1 is illegal one. Hence it being illegal, required to be canceled.

8] According to plaintiff, defendant No.1, on the basis of false Hibba (gift) dtd. 13/09/2016, which is alleged to be executed by their deceased father, in his favour, has taken entry as owner and possessor of entire "suit property A". On the date of alleged Hibba, his father Salauddin was paralyzed so mentally and physically so not fit to execute any Hibba.

9] No such Hibba was ever executed. The witness on alleged Hibbanama are false and memorandum of it is fabricated. Defendant No.1, in collusion with defendant No.2, has taken entry of his name to city survey record. These entries are false.

10] The memorandum of Hibbanama does not bear his fathers signature. Notice about Mutation Entry No. 1221 as per Section 150(2) of Maharashtra Land Revenue Code, 1966 was never received by his father. The signature prior to effecting mutation entry, on backside page of Namuna-9, dt. 15/02/2017, does not belong to his father. Thus, the mutation entry on the basis of same is illegal one and be canceled accordingly by declaring it void.

11] According to plaintiff, defendant No.1, on the basis of such illegal mutation entry, obstructing plaintiffs peaceful possession on suit property, without any right. Defendant No.1 by taking aid of gundas on 5/2/2021 made an attempt of plaintiffs forcible eviction from suit property. Hence this application be allowed and status of suit property be preserved as it is, till disposal of suit.

12] Defendant No.1, by way of his say and written statement at Exh.27, resisted the application of plaintiff. He submitted that, suit is hit by provisions of Section 158 of MLR Code, and Section 80 of C.P.C. It is also not tenable as plaintiffs mother and sister are not joined parties to suit, they are necessary parties. According to him the entire C.T.S. No. 145 is a single property. The description of suit property is not properly mentioned. According to him, gift dtd. 13/09/2016, is voluntarily given by donor (father) in favour of donee (defendant No.1). It was accepted by defendant No.1. It was given in presence of two witnesses, alongwith delivery of possession

of suit property.

13] According to defendant No.1, memorandum of said gift was notarized before Advocate Bairagi on 30/01/2017. The witnesses signed on it alongwith defendant No.1, before said notary. Since 2017, defendant No.1's name is entered in C.T.S. record of suit property. The municipal taxes of suit property are paid by defendant No.1.

14] According to defendant No.1, the city survey as well Grampanchayat record of suit property is having in name of defendant No.1. Plaintiff has not sought declaration. The claim is not tenable. Plaintiff has not come with clean hands. He has suppressed material facts from court so not entitled for injunction. Hence, application is sought to be rejected.

15] Defendant No.2, also opposed plaintiffs application by filing their say vide Exh. 21. According to them, as per notary Hibbanama mutation No. 1221/17 dtd. 15/2/2017 notices in namuna No.9 were served on donor and donee of said Hibba. The statement of panch or witnesses on Hibba were also recorded before City Survey Official, Aalas. Thus, the mutation on that basis, in favour of defendant No.1 (donee) has been taken place by following all procedure prescribed by law. Thus, plaintiff's suit without seeking declaration about mutation in dispute seeking mandatory and

perpetual injunction is not maintainable. He can not seek any direction in the form of mandatory injunction against defendant No.1, for entering to city survey record, plaintiffs name as owner of suit property in place of defendant No.1. According to defendant No.2 such rights are not vested with Civil Courts. So on all above grounds, application of plaintiff for injunction is sought to be rejected.

16] Heard both sides, gone through record and proceedings. Following points arise for my determination to which I have recorded my findings thereon along with detail reasons to follow.

Sr.No	Points	Findings
1.	Whether plaintiffs have made out prima facie case in their favour ?	... In the Negative.
2.	Whether balance of convenience lies in favour of plaintiffs ?	... In the Negative.
3.	Whether plaintiff will suffer irreparable loss, if injunction is not granted in their favour ?	... In the Negative.
4.	What order?	...As per final order.

REASONS

AS TO POINT NOS. 1 TO 3

17] In order to establish their contentions both parties relied

on documents as well affidavits of witness. Plaintiff at Exh. 40 and 41 relied on affidavits of witness, one Rais Mujawar and Zakirhusain Patil, who are adjacent residents of suit property. They say that since the life time of plaintiffs father, plaintiff and defendant No.1 are occupying their separate half portion of property. They both occupy it independently. However, defendant No.1 and his family members are harassing plaintiff by soaking their washed cloths on block situated on terrace side of plaintiffs front door by keeping stones over them etc.

18] While plaintiff filed affidavit of witness Sharad Pandhare, Uday Bhoi, Kuber Kakamare, Firoz Awati, Ibrahim Gani Baig at Exh. 45, 46, 47, 38, 37. These witness too are residing near the suit property so they have occasion to know about defendant No.1's possession over there. According to them, defendant no.1 is in entire possession of suit property. It is on the basis of Hibbanama dtd. 13/09/2016, since date of it's execution in his favour.

19] The affidavits at Exh. 38 and 39 are of witness to Hibbanama. They stated on oath that, father of defendant No.1 had gifted suit property in entire, to defendant No.1, by gift on relevant date in their presence. They further stated on oath about execution and correctness of their statements before notary on memorandum of Hibba as well statement before City Survey Official about validity of

Hibba given by donor Salauddin in favour of defendant No.1.

20] The contention of plaintiff through above affidavits as well through entire documents at Exh. 3, 23, 29, 44, 49 etc. is that 'Hibba' in question is not valid. So possession of defendant No.1 is only valid towards half portion of eastern side, towards suit property 'B'. According to plaintiff, defendant No.1, inspite of above facts, is trying to harass plaintiff, and dispossess from portion of suit property 'B'.

21] Plaintiff, in order to show, defendant No.1's harassment or apprehension for his dispossession has relied on number of photographs showing cloths kept for soaking on the upper side of plaintiffs gallery. In my opinion those photographs can not be used to establish any harassment of plaintiff for his dispossession unless proved in accordance with law during trial.

22] In order to establish his entitlement for injunction, at this stage plaintiff has to show apprehension at the hands of defendant No.1 and his prima facie case. For such purpose he has to establish his valid possession over alleged portion of suit property.

23] The documents at Exh.3(6 to 10), Exh. 7(1,2) shows that, on 17/3/2017, mutation entry No. 1221 has taken place in city

survey record and defendant No.1's name is entered as owner and possessor of suit property(A) as per Hibba dtd. 30/01/2017, given by his father in his favour. The documents filed by defendant No.1, at Exh. 36 i.e. assessment extract of suit property at (Sr.No.1), Grampanchayat tax receipt of suit property for year 2020-2021 (Sr.No.2), water cess receipts from 2015-16 to 2020-21 (Sr.No.3), Grampanchayat tax and fee receipt of suit property for 2022-2021 (Sr.No.4), special water tax cess receipt for 2022-2023 (Sr.No.5) shows that, entire area of suit property which is mentioned as suit property 'A' admeasuring 1600 sq.ft. is in legal possession of defendant No.1.

24] According to plaintiff, the above revenue record does not create any title as the "Hibba" is fabricated. The memorandum of Hibba also does not bear his fathers real signature. All these grounds, can be certainly raised during trial but those have to be established. Only on full fledged trial after proving those allegations, plaintiff can get declaration about validity of gifts (Hibba) in question.

25] At this juncture, documents on record prima facie shows that, 'Hibba' or 'gift' in question was in respect of entire suit property 'A' i.e. C.T.S. No. 145 (Grampanchayat House No. 145). There is no reference of suit property 'B' as well its western parts existence mentioned in 'Hibba' or mutation entry taken by city survey authority on its basis. At this juncture, record prima facie shows defendant

No.1's entire possession over suit property 'A'. Defendant No.1 has paid various taxes, revenue of said entire portion with local authority. There is no any reference of suit property 'B' or it's eastern part as alleged by plaintiff, existing with revenue authority.

26] Learned advocate for defendant No.1, submits that, on the basis of above documents, the defendant No.1 is in legal possession of suit property. Those documents are having presumptive value. Thus, plaintiff merely by relying on alleged photographs, can not establish his possession over alleged portion of suit property 'B' and apprehension at the hands of defendant No.1, without establishing prima facie case of own.

27] According defendant No.1, they have established all the requirements of valid gift under Muslim Law, so considering all above fact plaintiffs application be rejected. In support of this contention the learned advocate for defendant No.1 relied on;

(1) **Hafiza Bibi and Ors. V/s. Shaikh Farid (Dead) by Lrs. & Ors. Reported in 2011 AIR (SC) 1695,** wherein Hon'ble Apex Court reiterated three essentials of a gift under Mohammedan Law i.e. declaration of gift by donor (2) acceptance of gift by donee and (3) delivery of possession. It further held that, such gift need not be registered or in writing. No need to register it to give it effect.

(2) They further rely on, Shamrao Ganpat Chintamani V/s. Kakasaheb Laxman Gorde, reported in 2008(3) Mh.L.J. 819, wherein Hon'ble Bombay High Court has observed that, while deciding application of temporary injunction under Order 39 Rule 1 and 2 of C.P.C., court can refer to documents which are produced on record without formal proof. It further dealt with presumption about correctness of entry in record of rights and register of mutations and held that such presumption of entries under Section 157 of Maharashtra Land Revenue Code, 1966 exists there but is rebuttable presumption.

(3) Shri. Mahadeo Kashiba Waghmode V/s. Shri. Kallappa Shidling Waghmode and others, reported in 2016(1) ME 404, wherein Hon'ble Bombay High Court has held that, though entry in revenue record does not create any title in respect of the land in dispute, however it can be relied upon to ascertain as to who was in possession of land in dispute on date when the name of that person had been entered into revenue record.

28] He further relied on case of, Prakash S. Akotkar and others V/s. Mansoorkha Gulabkha and others, reported in AIR 1996 Bom 36, wherein Hon'ble Bombay High Court, while discussing the provisions of Order 39 Rule 1 and 2 of C.P.C. held that, co-owner in possession of property for and on behalf of other co-

owner can not claim injunction against other co-owner restraining them from interfering with his possession and enjoyment of suit property so as to exclude them from exercising their right as co-owners.

29] I have gone through ratio in all above cases, cited by defendant No.1 and facts on record of present case. In my opinion, those are perfectly applicable to present case. In present case too, defendant No.1 has established prima facie case towards execution of oral gift (Hibba) in his favour, then execution of memorandum of said gift before notary and the entries by revenue and city survey authorities (defendant No.2) taken to that effect in their record shows defendant No. 1's name entered in record of rights of entire CTS No. 145 (suit property 'A'). Its certified copy is having presumptive value at least to the extent of defendant No. 1's lawful possession. So plaintiff even in such situation could not seek injunction against defendant No.1, who is in legal possession.

30] For reasons recorded above, I hold that, plaintiff has neither his prima facie case nor balance of convenience lies in his favour. In such situation no question of granting any injunction in his favour arose because if, such injunction will not be granted, no any loss will be caused to him. Hence, I answer point Nos. 1 to 3 in negative and in order to answer point No.4, proceed to pass

following order.

ORDER

1. Application Exh.5 stands rejected.
2. No order as to costs.

Date : 17/10/2022.

(B.A. Gaikwad)
Civil Judge Senior Division,
Jaysingpur.