

MHKO110000362019



Reg.Civil Suit No.5/2019
(CNR No.MHKO110000362019)

ORDER BELOW EXH.5

1. This application is filed by the plaintiffs under Order 39 Rule 1 and 2 and Section 151 of The Code of Civil Procedure.

Suit property –

C.S.No. 483, admeasuring area 183 square meter having Grampanchayat Property No. 483 admeasuring area 183 square meter and building in it situated at village Kasaba Aalate, Tal. Hatkanangale, Dist. Kolhapur having following four boundaries -

Towards East - C.S.No. 484 of Chandrakant Bankar
Towards West - Road
Towards South - Road
Towards North - Property of Anil Bankar

(Hereinafter referred as '**Suit property**')

Plaintiff's case in short is as under -

2. The plaintiffs submitted that, the plaintiffs are brothers of defendant No.2 and 3. The defendant No.1 is third party purchaser of the suit property. The suit property is owned and possessed by the plaintiffs. It was originally owned by deceased - Balwant Hande, who has purchased the suit property vide registered Sale Deed bearing No.1481/62 dated 05/06/1962 for total consideration amount of Rs.2,000/-. Therefore it is self acquired property of Balwant Hande. The said suit property was

given in the name of Gajanan Hande by Balwant Hande vide registered Will bearing No. 3-1867/1975 dated 02/10/1975. Gajanan Hande died on 07/04/1998. The defendant No.2 and 3 are married and residing in their matrimonial house and therefore they are not having their possession over the suit property. The suit property is residential premises and therefore plaintiffs were and are residing in the suit property.

3. The plaintiffs further submitted that, during lifetime Gajanan Hande executed Partition Deed No.2040/89 dated 07/09/1989 as to all his properties. Except the suit property, partition was effected with respect to all the other properties between the plaintiffs. Therefore plaintiffs are having possession over the other properties as per said Partition Deed. The suit property was kept with Gajanan Hande. Accordingly after demise of Gajanan, name of all his heirs entered on the property record. The defendant No.2 and 3 were married and residing at their matrimonial house, therefore the plaintiffs are having their possession over the suit property after demise of Gajanan.

4. The plaintiffs further submitted that, daughters of plaintiff No.1 have filed R.C.S.No.14/2018 for partition, in which present defendant No.2 and 3 are also made parties i.e. defendant No.7 and 8. After receipt of notice of R.C.S.No.14/2018, plaintiff No.1 started collecting all the documents, where he found Will was executed by Late Gajanan, which is in Modi Script. The said Will was executed on 12/03/1998, which came across to plaintiff No.1 in the year 2018.

5. The plaintiffs further submitted that, by way of the said Will, plaintiffs became owners of the suit property. On the basis of said Will, the plaintiffs decided to make entry on revenue records. However, defendant No.2 and 3 in hurry executed registered Sale Deed bearing No. 7790/2018 in favour of defendant No.1. The said Sale Deed is null and

void. Hence they prayed for cancellation of the Sale Deed. On the basis of said Sale Deed, the defendant No.1 is trying to put fencing and also trying to construct the suit property. Hence plaintiffs prayed to restrict or obstruct the defendants from causing obstruction to the possession of plaintiffs over the suit property and moreover to restrict the defendants from alienating and causing obstruction to the suit property.

6. The defendant No.1 has filed his written statement and say at **Exh.30** and denied the contentions made in the application and plaint. The defendant No.2 and 3 have filed their written statement and say at **Exh.31** and denied the contentions made in the application and plaint. They submitted that, since year 2006, names of defendant No.2 and 3 are existing as owners and possessors of the suit property on revenue record. The plaintiffs have not raised any objections against said revenue entries.

7. The defendants further submitted that, defendant No.2 and 3 were having rights and shares as per provisions of Hindu Succession Act. Therefore they had executed registered Sale Deed bearing No.7790/2018 dated 11/12/2018 for total consideration of Rs.4,30,000/-. Therefore defendant No.1 is bonafide purchaser for value without notice and bonafide purchaser for valuable consideration. The possession of the suit property was handed over to defendant No.1. The plaintiffs are not having possession over the suit property. The plaintiffs are not having right, title and interest. Hence they are not entitled for perpetual injunction. The plaintiffs are not came with clean hands. Hence they are not entitled for equitable relief.

8. The defendants further submitted that, before purchasing the suit property, the defendant No.1 had given public notice in Daily Navsandesha, to which no one has raised the objection. Hence defendant No.1 is bonafide purchaser for value without notice. Hence they prayed

that, the plaintiffs are not having prima facie case, as they have not acted upon the alleged Will. Hence balance of convenience does not lies in their favour. In such circumstances, the defendant No.1 suffer irreparable loss, if temporary injunction is granted. Hence they prayed to reject the application.

9. Heard Ld. Counsels for both sides at length. From the rival pleadings, following points arise for my determination and I have recorded my findings thereon for the reasons stated below.

Sr. No.	Points	Findings
1	Whether plaintiffs are having prima facie case ?	<i>In Partly Affirmative</i>
2	Whether balance of convenience lies in favour of the plaintiffs ?	<i>In Partly Affirmative</i>
3	Whether plaintiffs will suffer irreparable loss if injunction is not granted as prayed ?	<i>In Partly Affirmative</i>
4	What order ?	<i>Application is Partly Allowed with Costs.</i>

REASONS

AS TO POINT NO.1 TO 3 -

10. The point No.1 to 3 are co-related to each other, hence I have taken up them together for discussion. Both parties have filed voluminous documents on record, which will be considered whenever it is necessary.

11. The Ld. Counsel for the plaintiffs has argued that, by way of Will executed by deceased - Gajanan, the plaintiffs become the owner of the suit property and they are in the possession of the suit property.

Therefore the plaintiffs have made out prima facie case against the defendants, balance of convenience lies in their favour. Hence they prayed to grant temporary injunction against the defendants.

12. In support of his arguments and the case of the plaintiffs, the Ld. Advocate for the plaintiffs has relied upon ***Rita Premchand another v/s. State of Maharashtra others [2002 (1) ALLMR 461]*** wherein it is observed by the Hon'ble Supreme Court that,

Question of title – The entries in the Revenue Record are not dis-positive or conclusive on the question of title, since the revenue entry, do not create any title. Therefore no direction could be issued for taking possession only on the basis of such entries.

13. The Ld. Advocate for the plaintiffs has also relied upon ***Budh Ram & Ors. v/s. Bansi & Ors. [2010 ALLSCR 2479]*** wherein it is observed by the Hon'ble Supreme Court that,

(B) Co-owners - Co-owner cannot be held as fractional owner of property unless partition has taken place. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of other co-owners. Therefore, in theory, every co-owner has an interest in every infinitesimal portion of the subject matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. A co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place.

14. The Ld. Advocate for the plaintiffs has also relied upon **Ramdas v/s. Sitabai & Ors. [2009 (5) AIR (Bom) (R) 124]** wherein it is observed by the Hon'ble Supreme Court that,

1. Suit for partition and for delivery of possession was filed by plaintiff respondent herein in the instant case of her share in suit property. Plaintiff claimed to be a co-sharer to the extent of half share in the said suit property for reason that plaintiff and defendant No.1 – were the only legal heirs of deceased original owner.

15. The Ld. Advocate for the plaintiffs has also relied upon **State of Himachal Pradesh v/s. Keshav Ram & Ors. [1997 (0) AIR (SC) 2181]** wherein it is observed by the Hon'ble Supreme Court that,

TITLE SUIT - Suit decreed by Courts below only on basis of order made by Assistant Settlement Officer directing correction of record of right – Original suit land stood recorded in the name of Raja Sahib – Thereafter State was recorded to be owner in the year 1949-50-Order of Assistant Settlement Officer not on record – Entry in Revenue papers could not be said formed basis for declaration of title-Courts below committed serious error of law in declaring plaintiff's title.

16. The Ld. Advocate for the plaintiffs has also relied upon **M.V.S. Manikayala Rao v/s. M. Narasimhaswami and others, [1966 (0) AIR (SC) 470]** wherein it is observed by the Hon'ble Supreme Court that,

DECREE FOR DELIVERY OF JOINT POSSESSION – ORDER FOR DELIVERY OF SYMBOLIC POSSESSION OF UNDIVIDED

SHARE IN COPARCENARY PROPERTY – THERE BEING NO LEGAL, COMPLETE OR EFFECTIVE DELIVERY OF POSSESSION – DELIVERY OF FORMAL POSSESSION.

17. On the other hand, the Ld. Counsel for defendant No.1 has argued that, defendant No.2 and 3 being the daughters are having their shares in the suit property and they have sold out their share to the extent of 91.50 square meter area to the defendant No.1 and at the time of execution of Sale Deed, the possession of the said area of 91.50 square meter was handed over to the defendant No.1. Therefore defendant No.1 is the bonafide purchaser for value without notice and consideration. Hence the defendant No.1 is entitled to protect her possession. The plaintiffs are not having prima facie case, balance of convenience does not lies in their favour. In such circumstances, if temporary injunction would have been granted against the defendant No.1, she will suffer irreparable loss. Hence he prayed to reject the application.

18. In support of contentions of defendants, the Ld. Counsel for the defendant No.1 has relied upon, the Ld. Advocate for defendant No.1 has relied upon *Kashi Math Samsthan & Anr. v/s. Srimad Sudhindra Thirtha Swamy & Anr.* [AIR 2010 SUPREME COURT 296] wherein it is observed by the Hon'ble Supreme Court that,

(A) Civil P.C. (5 of 1908), O.39, R.1 – Injunction – Grant of – Party unable to prove prima facie case – Injunction cannot be granted even if such party makes out case of balance of convenience and irreparable injury.

13. *It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for*

trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted.

19. The Ld. Advocate for defendant No.1 has also relied upon ***Mulji Umershi Shah and etc. v/s. Paradisia Builders Pvt. Ltd. Mumbai and others [AIR 1998 BOMBAY 87]*** wherein it is observed by the Hon'ble Bombay High Court that,

(A) Civil P.C. (5 of 1908), O.39, R.1 – Suit for injunction based on possession – Enquiry into title is not excluded.

The contention that, in a suit for injunction based primarily on possession, question of title cannot be gone into and therefore while considering the application for temporary injunction the only consideration before the Court was possession and not the title of plaintiff is neither impressive nor sound. In the suit for perpetual injunction the Court may be called upon to hold inquiry in title, right, interest or status, as the case may be, of the plaintiff to find out whether plaintiff is entitled to protection of his possession by decree of injunction. The same consideration, prima facie, is required to be seen while considering an application for temporary

injunction. The question of possession presupposes lawful possession and for adjudication of that question whether finally or an interlocutory stage, the inquiry into title, right, interest or status of plaintiff is not foreign to the subject matter.

20. The Ld. Advocate for defendant No.1 has also relied upon ***Delhi Development Authority v/s. Mrs. Vijaya C. Gurshaney and Anr. [III (2003) CLT 165 (SC)]*** wherein it is observed by the Hon'ble Supreme Court that,

(I) SUCCESSION : Will : Probate/Letters of Administration : Grant of probate/Letters of administration not confer title to property but merely enable administration of estate of deceased.

21. The Ld. Advocate for defendant No.1 has also relied upon ***Himachal Steel Rerollers and Fabricators v/s. The Union of India and others [AIR 1988 ALLAHABAD 191]*** wherein it is observed by the Hon'ble High Court that,

(A) Civil P.C. (5 of 1908), O. 39, Rr. 1 and 2 – Grant of temporary injunction – Essential ingredients, prima facie case, balance of convenience and likelihood of irreparable injury – Absence of – Injunction cannot be granted.

5. *The plaintiff did not file any documentary evidence in support of its case except for an affidavit with an annexure containing the terms subject to which plaintiff's tender had been accepted. On a consideration of the plaint allegations and what has been asserted in the affidavit, we are not at all*

satisfied that, the plaintiff had succeeded in establishing a prima facie case. None of the three prerequisites for grant of an interim injunction has been established. It is well settled that no temporary injunction should be granted unless the plaintiff establishes a prima facie case, balance of convenience and likelihood of irreparable injury. Absence of any of these three ingredients must entail rejection of the application.

22. The Ld. Advocate for defendant No.1 has also relied upon **OSWALDLAWRENCEJOHNSERRON & ANR v/s. ANTHONY D. ABREO and ANR. [I (2003) CLT 573]** wherein it is observed by the Hon'ble Bombay High Court that,

Indian Succession Act, 1925 – Section 213 – Probate of Will : Person Claiming to be Owner of Property by Virtue of Will, Cannot have Right Over Said Property which can be Established in Any Court of Justice Unless Court of Competent Jurisdiction Granted Probate of Will to him – When appellant wanted to oust respondents, it was necessary for him to establish by legal evidence that he was in lawful possession of suit property : No Complaint Lodged Against Respondent No.1 by Appellant when Respondent Contended he was Living in Suit Premises Right from his Birth and as of Right : No Question of Granting any Relief to Appellant.

9. *If a person claims to be owner of the property by virtue of a Will, he cannot have the right over the said property which can be established in any Court of Justice unless a Court of competent jurisdiction in India has granted probate of the Will to him.*

23. Considering the citations relied upon by both parties it is clear that, in case of temporary injunction, the party who is seeking the temporary injunction has to prove that, it has prima facie case, balance of convenience lies in it's favour and it will suffer irreparable loss if the temporary injunction is not granted in it's favour. Moreover it is clear that, every co-sharer has right of possession and enjoyment of each and every part of the property to that of every co-sharer. Therefore the citations filed by both parties are partly supporting to the plaintiffs and defendants.

24. It is admitted fact that, suit property was belonged to Gajanan Balwant Hande. It is also admitted fact that, after the death of Gajanan Balwant Hande, names of his heirs i.e. his widow - Saraswati, plaintiffs and defendant No.2 and 3 were entered on revenue record of suit property vide Mutation Entry No.452. After the death of Saraswati, vide Mutation Entry No.1720, the names of plaintiffs and defendant No.2 and 3 entered on City Survey Record of suit property. Therefore defendant No.2 and 3 are owners and possessors of their share in the suit property. Accordingly they had executed Sale Deed registration No.7790/2018 dated 11/12/2018 for total consideration of Rs.4,30,000/-. The defendant No.2 and 3 have transferred their share in favour of defendant No.1 vide said Sale Deed. On perusal of the said Sale Deed dated 11/12/2018, it reveals that, the defendant No.1 had purchased an area of 91.50 square meter out of suit property for total consideration of Rs.4,30,000/-. On the day of execution of said Sale Deed, the possession of an area of 91.50 square meter was handed over to the defendant No.1.

25. As per the contentions of plaintiffs, deceased Gajanan Balwant Hande had executed Will in favour of plaintiffs as to the suit property. In support of said contentions, the plaintiffs have filed the Will

executed by the deceased - Gajanan Hande, which was written in Modi Script. The plaintiffs have also filed translation of the said Will on record. It is pertinent to note that, the document of Will, which is filed on record is not duly registered. The defendants have denied the execution of said Will in favour of plaintiffs. Therefore whether deceased - Gajanan during his life time executed the Will as to the suit property in favour of plaintiffs or not, that can be decided at the time of final adjudication and only after the proof of the Will and evidence to that effect. At this stage, it prima facie reveals that, the suit property was not partitioned between the plaintiffs and defendants. The names of plaintiffs and defendants were entered on the records of the suit property. It further reveals that, as per the contentions of the defendant No.2 and 3, they have sold out an area of 91.50 square meter, which they would get as per the provisions of Hindu Succession Act. If it is presumed for sake of argument that, the suit property was not partitioned by metes and bounds, in that case, even though as per Hindu Succession Act, daughters and sons are equally entitled for their share in the properties. Then in case of suit property, it was not decided between the plaintiffs and defendant No.2 and 3 by metes and bounds that, which part of property would come into the share of plaintiffs and defendant No.2 and 3. Therefore without partition, the defendant No.2 and 3 have sold out an area of 91.50 square meter to the defendant No.1. As per Sale Deed, the possession of an area of 91.50 square meter was handed over to the defendant No.1 at the time of execution of Sale Deed.

26. In the present suit, whether Gajanan has executed the Will, can be decided at the time of final hearing. Moreover whether defendant No.2 and 3 are jointly having their share to the extent of 91.50 square meter in the suit property, this can also be decided only after the evidence of both sides. At this stage it prima facie reveals that, defendant No.1 has purchased an area of 91.50 square meter and she is in the possession of

the said area. In such circumstances, if any charge or encumbrances is created or the property is alienated or third party interest is created by the defendant No.1 over the suit property, then in that case, multiplicity of proceeding will be created. Therefore so as to avoid the multiplicity of proceedings, it is necessary to grant temporary injunction against the defendant No.1 by restraining her from creating any charge or encumbrances over the suit property. Moreover it is necessary to restrain the defendant No.1 from alienating or creating third party interest over the suit property.

27. Considering the above reasons, the plaintiffs have prima facie case, balance of convenience lies in their favour. Hence in view of above findings, I answer point No. 1 to 3 in partly affirmative.

AS TO POINT NO.4 -

28. Considering the findings of point No. 1 to 3, the application deserves to be partly allowed with costs. Hence I pass the following order

ORDER

- 1) The application is hereby partly allowed with costs.
- 2) The defendant No.1 is hereby temporarily restrained from alienating or creating third party interest or any encumbrances or charge over the suit property till final disposal of the present suit.
- 3) Remaining prayers in the application are hereby rejected.

Date : 14/08/2019

(J. S. Gaikwad)
Jt. Civil Judge Jr.Dn., Peth-Vadgaon

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

Name of the Stenographer	Sou.K.S.Gaikwad
Name of the Court	J. S. Gaikwad, Jt. Civil Judge Junior Division, Peth-Vadgaon
Date of Dictation	14/08/2019
Order signed by the P.O. on	20/08/2019
Order uploaded on	20/08/2019