

MHKO110003002022**Reg.Civil Suit No.38/2022**

(CNR No.MHKO110003002022)

ORDER BELOW EXH.5

01. The plaintiff has filed this application for temporary injunction under Order XXXIX Rule 1 and 2 of The Code of Civil Procedure, 1908.

02. The Plaintiff submitted that, an area of 0 H 7 R out of total area of 0 H 28 R, Block No.421, situated at Village Sambhapur, Tal. Hatkanangale, Dist. Kolhapur is the subject matter of the suit.

(For the sake of brevity the above mentioned property is hereinafter referred as '**Suit property**')

03. The plaintiff contended that, defendants are children of his deceased brother Jaywant. The suit property is ancestral property of plaintiff and defendants. There was no partition effected amongst the plaintiff and defendants by metes and bounds. He is having ½ share in the suit property. Therefore on 01/02/2022 asked defendants for partition of the suit property by metes and bound. Defendants refused to effect partition as to the suit property. Defendants without obtaining requisite permission of Grampanchayat illegally carrying out the construction over the suit property. They have completed the work of plinth. If the defendants are not restrained from carrying out the construction, then they will illegally complete the construction over the suit property and thereafter they will sell, transfer or alienate the suit property or will create third party interest over the suit property, they will create encumbrances

over it. He further submitted that, he is having common possession in the suit property. He is having prima facie case, balance of convenience lies in his favour and hence he prayed to grant temporary injunction against the defendants.

04. The defendant No.3 and 4 appeared, however they failed to file their say and written statement, hence the suit is proceeded further without their say and written statement. The defendant No.1 and 2 have filed their written statement and say at **Exh.21** and denied all the contentions of plaintiff. They have accepted their relationship with the plaintiff. They have admitted the description of the suit property. They have admitted the nature of suit property as ancestral. However they submitted that, there was partition effected between the plaintiff and predecessor of defendants long back. They refused that, on 01/02/2022 the plaintiff asked them to effect partition as to the suit property. They denied that, they are illegally constructing the suit property.

05. Defendants submitted that, besides the suit property R.S.No.630/80 situated at Kasarwadi was also ancestral property. It was belonged to the grandfather of plaintiff and defendants i.e. Ganpati Vithu Zirange. He died leaving behind deceased Eknath, deceased Jaywant, plaintiff - Shashikant, Laxmibai Govind Randive and Bebitai Rajaram Shinde. There was partition effected as to the ancestral properties and accordingly the suit property came into the share of plaintiff and predecessor of defendants. The defendants are having tin shed and residential building in the suit property. Except plaintiff, other heirs have relinquished their share in favour of defendants. The defendants are carrying out the construction in their share in the suit property.

06. Defendants further submitted that, the plaintiff is not having prima facie case, balance of convenience does not lie in favour of plaintiff. In such circumstances, if temporary injunction is granted against them,

they would suffer irreparable loss. Hence, they prayed to reject the application with costs.

07. Heard Ld. Counsels for both sides at length. From the rival contentions, following points arose for my determination and I have recorded my findings with reasons hereinafter:-

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

REASONS

AS TO POINT NO.1 TO 3 -

08. The point No.1 to 3 are co-related to each other, hence I have taken them together for discussion.

09. Considering rival submissions of both sides, it is necessary to see relevant provisions under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908.

- 1. Cases in which temporary injunction may be granted -**
Where in any suit it is proved by affidavit or otherwise –
 - (a) *That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or*

- (b) *That the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,*
- (c) *[That the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]*

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach –

- (1) *In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury, complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.*
- (2) *The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.*

10. In the present case, both parties have claimed their possession over the suit property. Both parties have filed numerous documents on record, which will be taken into consideration, whenever required for discussion hereinafter.

11. On perusal of record, it reveals that, the relationship of plaintiff and defendants is admitted to each other. It is also admitted that, the suit property alongwith R.S.No.630/80 situated at village Kasarwadi are ancestral properties of deceased Ganpati Vithu Zirange. Plaintiff came with the case that, the suit property is ancestral property and partition as to the suit property is not effected by metes and bounds amongst the plaintiff and defendants. Further the plaintiff has claimed his common possession over the suit property. Defendant No.1 and 2 in their written statement and say have submitted that, oral partition was effected amongst the heirs of deceased Ganpati Vithu Zirange and accordingly the suit property came in to the share of plaintiff and predecessor defendants. Further orally it was decided between them that, the suit property be kept with the defendants and they are having tin shed and residential building in the suit property. The defendants have not filed any supporting documents to show that, there was oral partition effected as to the suit property. They failed to mention the date, month or year in which the said partition was effected. Further plaintiff has filed 7/12 extract of the suit property on record, which prima facie shows common possession and ownership of plaintiff and defendant over the suit property. The 7/12 extract of the suit property does not show allotment of separate share of plaintiff and defendants.

12. The plaintiff submitted that, he is having common possession over the suit property. Defendant No.1 and 2 have accepted that, the suit property was given to the plaintiff and predecessor of defendants. Defendants have submitted that, they are having tin shed and residential building over the suit property. The plaintiff has filed photographs on record, which prima facie shows that, one residential building and tin shed

is situated in the suit property. However there is no document filed on record which can show that, defendant No.1 and 2 are having possession over entire suit property.

13. Defendant No.1 and 2 submitted that, except plaintiff, other heirs have relinquished their share in favour of defendants at the time of oral partition. However they have not filed any Relinquish Deed or any other document on record. Therefore there is no prima facie document on record to show that, who have relinquished share in the suit property in favour of defendants and to what extent shares were relinquished. Further it is pertinent to note that, as per say of defendants their one residential building and tin shed exist in the suit property, which can be seen in the photos filed in the suit. Despite of that, the defendant No.1 and 2 are carrying out the construction besides the said residential building and tin shed.

14. Prima facie it reveals that, partition is not effected amongst the plaintiff and defendants by metes and bounds. In such circumstances, if defendants are not restrained from carrying out the construction over the suit property, then ultimately the rights of plaintiff in the suit property will be affected and he will suffer irreparable loss.

15. Considering all above reasons, it prima facie reveals that, the plaintiff is having prima facie case. Balance of convenience lies in his favour. If temporary injunction is not granted against defendants, then irreparable loss will be caused to him. Hence, I answer issue No.1 to 3 in affirmative.

AS TO POINT NO.4 -

16. Considering the findings of point No.1 to 3, the application deserves to be allowed with costs. Hence in order to answer issue No.4, I pass the following order -

ORDER

- 1] The application is hereby allowed with costs.
- 2] The defendants are hereby temporarily restrained from carrying out any construction over the suit property till the final decision of the present suit.
- 3] The defendants are hereby temporary restrained from creating third party interest or any encumbrances over the suit property till the final decision of the present suit.

Date : 06/05/2022

(J. S. Gaikwad)
Civil Judge Junior Division,
Peth-Vadgaon