

**R.C.S.No. 104/2020**

Yashwant Shikhare etc. Vs. Gundu Shikhare etc.

CNR - MHKO130007942020**ORDER PASSED BELOW EXH.05****(Dt. 11/10/2022)**

1. This application is filed by the plaintiffs' against defendant no. 3, under Order 39 Rule 1 and 2 of the Code of Civil Procedure (in short 'CPC').
2. According to the plaintiffs', property Gat no. 488 admeasuring area of 1 H. 40 R., Pot Kharab 0 H. 02 R. out of 0 H. 70 R. situated at Mouje Benikre, Tal. Kagal, Dist. Kolhapur bounded and well described in the plaint is subject matter of suit. (Hereinafter referred as "suit property".) The gist of application is to restrain the defendants from causing disturbance to the peaceful possession of plaintiffs' upon suit property.
3. Defendant no. 3 filed heir W.S./say at Exh.30 by denying the contents of Exh.5.
4. To avoid repetition of facts, brief facts of application and written say are referred in the argument of learned advocates of respective parties.
5. Heard Shri. G.V.Chougale learned advocate appearing on behalf of Plaintiffs' and Shri. S.K.Patil learned advocate appearing on behalf of Defendant No. 3. Form the pleading and arguments of learned Advocates of parties with documents on record, following points arise for determination, and this Court, recorded the reasons

with finding as stated below : -

| | <u>POINTS</u> | | <u>FINDINGS</u> |
|----|--|----|------------------------|
| 1. | Whether prima facie case lies in favour of plaintiffs' ? | :- | ...Yes. |
| 2. | Whether balance of convenience lies in favour of plaintiffs' ? | :- | ...Yes. |
| 3. | Whether plaintiffs' would suffer irreparable loss if injunction is refused ? | :- | ...Yes. |
| 4. | What order? | :- | Injunction Allowed. |

:- DOCUMENTS :-

6. The plaintiffs' relied on following documents filed at Exh.3 & 39.

| | |
|----|---|
| 1. | Certified copy of 7/12 extract of Gat No. 488 situated at Benikre, Tal. Kagal. |
| 2. | Certified copy of registered sale deed no. 491/2020 dated 26/02/2020. |
| 3. | Certified copy of Judgment delivered in R.C.S.No. 91/2005 dated 01/02/2011 |
| 4. | Certified copy of Decree in R.C.S.No. 91/2005 dated 01/02/2011. |
| 5. | Certified copy of Judgment delivered in RTS/Appeal No. 61/2020 of Sub-Divisional Officer, Radhanagari-Kagal, Sub-Division, Kolhapur dated 22/09/2022. |

7. The defendant no. 3 relied on sale deed executed on 26/02/2020 vide registered deed no. 491/2020.

Facts and Arguments of the Plaintiffs':-

8. Learned advocate for the plaintiff relying on the

documents filed below Exh. 3 and 39 submitted that, the above suit property is ancestral property of Krushna Shikhare and his LR's. It is averred that, between LR's of Krushna partition was effected vide R.C.S.No.91/2005. The said suit was decreed on merit. Accordingly, the court has granted 1/4th share to LR's of Krushna, i.e. Dadu, Ratanappa and Maruti. However, though the Gundu was LR's of Krushna, share was not allotted to him as he has sold his share to plaintiffs'. Therefore, in R.C.S.No.91/2005 except Gundu share was allotted to other LR's of deceased Krushna. Further, the Judgment passed in R.C.S.No.91/2005 is unchallenged and LR's of Gundu never agitated the Judgment in R.C.S.No.91/2005. As this fact though within the knowledge of LR's of Gundu, even then, in the year-2018 they have entered their name in 7/12 extract of suit property. According to plaintiffs', only these plaintiffs' and defendant no. 2 are owner and possessor of the suit property. It is averred that, by taking disadvantage of non execution of decree passed in R.C.S.No.91/2005, LR's of Gundu entered their name in 7/12 extract of suit property.

9. According to plaintiffs', defendant no. 3 on 03/03/2020 entered in the suit property and threatened the plaintiffs' that he has purchased the suit property from the LR's of Gundu. At that time, the plaintiffs' replied to the defendant no. 3 that, the LR's of Gundu has no share in the suit property. Then the defendant no. 3 answered that, he has purchased the suit property vide deed no. 491/2020 on 26/02/2020. Thus, this plaintiffs' acknowledged that, false and bogus sale deed executed by LR's of Gundu in favour of defendant no. 3. According to plaintiffs', the said sale deed is not binding upon share of this plaintiffs'. According to plaintiffs', they are in settled possession of the suit property since year-2005. Therefore, the

defendant no. 3 did not get any right of title by way of sale deed.

10. It is argued that, prima facie case, balance of convenience lies in their favour and if injunction is refused then irreparable loss will be caused to the plaintiffs'. Learned advocate of plaintiffs' argued that, the sale deed executed by LR's of Gundu is upon false mutation. Therefore, that mutation is also challenged before revenue office. Further, the plaintiffs' also succeeded in that revenue appeal and mutation which was carried in the name of defendant no. 3 was canceled by RTS Appeal No. 61/2020 passed on 09/05/2022. According to learned advocate of plaintiffs, the sale deed is hollow one. Moreover, the Gundu did not acquired any share in the suit property by way of Judgment passed in R.C.S.No.91/2005. It is added that, proposed share of Gundu was allotted to these plaintiffs' and the Judgment in R.C.S.No. 91/2005 is not challenged by LR's of Gundu. Therefore, suit property is in possession of plaintiffs' and defendant no. 2. Thus, sale deed executed by defendant no. 1(a) to 1(d) is not binding. According to plaintiffs', they are in possession of suit property. Hence, prima facie case balance of convenience is in favour of plaintiffs', and they may suffer irreparable loss if injunction refused. Accordingly, it is argued to allow the application.

Facts and Argument on behalf of Defendant no. 3:-

11. Contrary say filed on behalf of the defendant no. 3 is filed at Exh.30. The learned advocate of defendant no. 3 argued that, the defendant no. 1(a) to 1(d) being successor of Gundu have right to execute sale deed. He has purchased the suit property by way of registered sale deed. Further, the LR's of Gundu i.e. defendant no. 1(a)

to 1(d) also avail the loan facility upon suit property. It is pleaded that, he is in possession of suit property and since purchased he is reaping various crops in the suit property. It is averred that, there are contrary statement of plaintiffs' in the pleading itself. According to defendant no. 3, he has purchased the suit property after due inquiry for consideration of Rs.4,00,000/-. Now, the prima facie case, balance of convenience lies in favour of defendant no. 3 and if the injunction is granted the defendant no. 3 may suffer irreparable loss. Hence, being bonafide purchaser his rights are required to be protect. Accordingly, argued to reject the application.

-: REASONS :-

As to Points No. 1 to 3 :-

12. Perused the record. Heard the learned advocate of the both the parties. Points no. 1 to 3 are interrelated with each other, thus, to skip repetition they are discussed together.

13. Admittedly, in this matter R.C.S.No. 91/2005 decided between the LR's of Krushna Shikhare. In that suit, the court has not allotted any share to Gundu rather his share was allotted to plaintiffs'. The said Judgment is under challenge vide Misc. Civil Application No. 47/2021 and there appears the delay for filing appeal against the Judgment and same is pending. Beside that, there is no stay in that application. Therefore, at this stage the Judgment passed in R.C.S.No. 91/2005 is yet in existence. One another fact is required to be looked into that, mutation is carried in the name of defendant no. 3 vide mutation entry no. 2913, is set aside by order passed in RTS Appeal No. 61/2020 on 09/05/2022. In that appeal also it is held that share was not allotted to the Gundu and the name of

Gundu was wrongly inserted in the 7/12 extract. This fact Prima facie indicate that, the name of Gundu remained upon 7/12 extract, though he had received no share in the suit property and just because of that entry defendant no. 1(a) to 1(d) executed the sale deed in favour of defendant no. 3.

14. As stated above the decision in R.C.S.No. 91/2005 is yet not stayed in appeal or in Misc. Civil Application No. 47/2021. It is admitted from the record that, in that R.C.S.No. 91/2005 no share was allotted to Gundu. Therefore, the fact as to disposal rights of defendant no. 1(a) to 1(d) are itself in question. Thus, transaction which was executed between defendant no. 1 and defendant no. 3 can not be said to be authenticated or bonafide in view of Judgment passed in R.C.S.No. 91/2005 at this prima facie stage. Now, considering the application be lately filed against Judgment of R.C.S.No. 91/2005, the stay will take its owned time. Moreover, they are no orders in the Misc. Civil Application No. 47/2021 to stay the operation of order passed in R.C.S.No. 91/2005. Thus, at this stage the rights which are conferred by the plaintiffs' by way of Judgment and decree in R.C.S.No. 91/2005 only that are required to be considered at this stage.

15. Prima facie case means case of injury. Admittedly the record of mutation, 7/12 extracts previous litigation and deed executed, filed on behalf of plaintiffs' demonstrates the possession of the plaintiffs' prima facie in nature. Thus, considering the Judgment in R.C.S.No. 91/2005 and order passed in RTS Appeal no. 61/2020, prima facie case, balance of convenience lies in favour of plaintiffs'. Though the defendant no. 3 came with theory of bonafide purchaser same can not be look in to, as the disposal rights of defendant

no.1(a) to 1(d) is itself in question. Moreover, though the injunction is passed in favour of plaintiffs', no irreparable loss will be cause to the defendant no. 3 as he can availed efficacious remedy against the defendant no. 1(a) to 1(d). Therefore, point no. 1 to 3 are answered in the affirmative and for point no. 4 following order is passed.

ORDER

1. The application (Exh.5) is allowed.
2. Defendant no. 3 or any person on behalf of him is, temporarily restrained from causing disturbance, obstruction or interference to the peaceful possession of plaintiffs' over suit property till disposal of suit.
3. No order as to costs.

Kagal.
Date:- 11/10/2022.

(B. D. Gore)
Civil Judge Junior Division,
Kagal.