

Order passed below Exh.78 in Reg.Civil Suit Suit No. 8/8008

CNR NO.MHKO14-000026-2008

Heard. Perused the application and say vide Ex. 80.

2) Learned advocate for the defendant No. 5 submitted that the plaintiff has instituted the suit for the relief of partition and separate possession. However, plaintiff is making construction in Gat No. 757 and C.S.No. 204 and putting fencing around the suit property. Hence, the plaintiff be restrained from making construction in the suit property and putting fencing in the suit schedule properties till the disposal of the suit. Hence, the application.

3) On the contrary learned advocate Shri. R.P. Bandiwadekar for the plaintiff submitted that plaintiff is making construction over the suit property. The defendant has not filed counter claim, hence application of defendant is not tenable. Hence, the application is liable to be rejected.

4) After taking into consideration the arguments advanced by both the parties and documents on record, the following points arose for my determination. I gave my findings thereon with reasons as under :

	<u>Points.</u>	<u>Findings.</u>
1	Whether the application is maintainable?	.. Yes.
2	Does defendant establish that plaintiff is making construction in Gat No. 757?	.. Yes.

- 3 Whether balance of convenience lies  
in favour of defendant? .. Yes.
- 4 What order? .. As per final order.

REASONS

As to Point No.1:

5) Learned advocate for the plaintiff submitted that as the defendant has not filed counter claim, hence the application is not maintainable. On the contrary, learned advocate for the defendant submitted that as the suit is for partition and separate possession the plaintiff making construction over the suit property, therefore to preserve the nature of suit property application is maintainable under Section 151 of the Code of Civil Procedure. Hence, the application is maintainable.

6) Admittedly the defendant has not filed the counter claim. The suit is for partition and separate possession of the properties of plaintiff and defendant. Hence, in my considered view to preserve the nature of suit property and to protect the joint possession the application is maintainable. Hence, I answer point No. 1 in affirmative.

As to Point No. 2:

7) According to defendant plaintiff is making construction in Gat No. 757 and C.S.No. 204 and putting fencing over the suit property. To establish this fact defendant has filed photographs vide Ex. 79. The

perusal of photographs vide Ex. 79 revealed that the whether in the property the fencing is made in the suit property around the house and therefore admittedly plaintiff has not denied that the possession that the possession shows in the photographs is not at the suit property. Hence, I hold that the suit is partition and separate possession. Hence, to preserve the nature of suit property, the application deserves to be allowed. Hence, I answer point No. 2 in the affirmative.

As to point Nos. 3 and 4:

8) If the application is rejected then plaintiff will complete the construction over the suit property, then the joint possession of plaintiff and defendant will be disturbed and plaintiff will claim his exclusive possession over the constructed area. Hence, the balance of convenience lies in favour of defendant rather than than plaintiff. Likewise that if application is rejected the irreparable loss will be caused to the defendant rather than than plaintiff. Hence, I answer point No. 2 and 3 in the affirmative.

As to point Nos. 4:

9) Hence, in view of my answers as to points No.1 to 3, I hold that the application deserves to be allowed. Hence, in answer to point No.4, I proceed to pass the following order.

**Order**

1. The application is allowed.

2. The plaintiff or any person on their behalf, are hereby restrained from making fencing over the suit property over Gat No. 757and C.S.No. 204 till disposal of the suit.

3. Costs in main cause.

Dated:- 08/02/2018.

( M. D. Thombare )  
Judicial Magistrate, First Class,  
Chandgad.