

Order below Exhibit 5 in Regular Civil Suit No. 61/2012.

1. This is an application filed by the plaintiffs Under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure to restrain defendants from making any type of construction upon the suit land in question i.e. area as shown by the letters E,F,G,H in the hand sketch map annexed with the plaint and changing its nature.

2. Read application and reply filed by the defendant No.1 and 2 at Ex.15 and 16. Perused documents on record. Heard learned advocate Shri. S.S. Kot on behalf of plaintiffs and Shri. Y.R. Sulebhavi for defendant no.1 and 2 at length. On considering facts and evidence on record, following points arise for my determination and I have recorded my findings against each of them for the reasons thereon.

Points.**Findings.**

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|---|------------------------|
| 1) Are plaintiffs prove prima-facie case for grant of temporary injunction as prayed? | -- In the affirmative. |
| 2) Is balance of convenience lies with plaintiffs? | -- In the affirmative. |
| 3) Whether plaintiffs will suffer an irreparable loss if temporary injunction is not granted in favour of them? | -- In the affirmative. |
| 4) What order? | -- As per final order. |

REASONS**AS TO PONT NO. 1 TO 3**

3. It is contention of plaintiffs that, suit land is described in para 1 of the application. The suit land is part of R.S.No. 63/3 which was an ancestral property of the plaintiffs and defendants father which was initially recorded in the name of grand mother of the parties namely Bhagubai Appi Gawada. The names of the father of plaintiffs, defendants and their uncles were shown in the ROR of land G.No. 63/3. The plaintiffs are sons of Annappa Appaji Patil whereas defendants are issues of eldest uncles of the plaintiffs. So name of the defendant No. 1 was entered in the ROR of suit land. Being ancestral property ½ part in suit land was given to the father of the plaintiffs. It is further contention of the plaintiffs that, the father of the plaintiffs had

instituted a suit for partition and separate possession of all joint family properties bearing it's R.C.S.No. 52/1984 in this court. After hot contest suit is compromised and accordingly decree was drawn in R.C.S.No. 52/1984 on 12/3/1991. As per decree $\frac{1}{2}$ share was allotted to the father of the plaintiffs and $\frac{1}{2}$ area was allotted to the defendant No. 2. Being a sister defendant No. 2 had given his $\frac{1}{2}$ area to the defendant No. 1. Thus, father of plaintiffs was in possession of suit land in question and had erected hut mate in it and now plaintiffs are in occupation of it as owner. However, as per decree mutation is not effected due to ignorance of law and nothing else.

4. It is further contention of plaintiffs that, they have planted fruit plants like Mangos, Tamarind, Sisam, Jamoon etc. in the suit land and were harvesting its fruits. Thus, the plaintiffs are lawful occupants of the suit land. That the defendants have no concern what-so-ever with the land in question. However, on the strength of the revenue record the defendants are obstructing with plaintiff's possession of land in question and threatening the plaintiffs with dire consequences. This being state of affairs the defendant No. 1 on 1/3/2012, by taking law in their hands has started to dig foundation upon suit land, shown by letters 'E', F, G, H unauthorisedly, invaliding plaintiffs right. The defendants have no legal right to dig foundation for construction of building upon the land in question. But with malafide intention defendant No.1 is doing illegal activities by which plaintiffs possession in suit land would come in danger. The defendants planned to erect structure upon disputed site shown by letter 'E,F,G,H' fastly. The plaintiffs requested the defendants not indulge in such illegal activities, but the defendants are not in a position to listen to the plaintiffs requests. If the unauthorised acts of the defendants are not restrained by an order of perpetual injunction from this Hon'ble court, then there is eminent danger to the land in question and plaintiffs will be put to heavy, irreparable loss. Also there will be multiplicity of judicial proceeding. Hence, the plaintiffs have been constrained to file present application.

5. Per contra, the defendants contended that, they are absolute owner and in possession of the suit land and the plaintiffs have no concerned what-so-ever in

respect of suit land in question. On dated 9/2/1977 suit land is purchased by this defendants from a erstwhile lawful owner from Nagoji Appaji Patil of Kadalge kh. for valuable consideration. Accordingly from the date of purchase this defendants are actual possession and enjoyment as an absolute owner and M.E No. 556 is certified and name of this defendant is appeared in record of right of ownership as well as cultivation column of suit land till today.

6. Defendant further submits that after purchase of the suit land they constructed a mud tiled house in the R.S.No. 63/3B and residing with their family members, accordingly their name is appeared in the Gram panchayat extract in ownership column and Bhogavatdar column and Grampanchayat Kadalge Kh. allotted Gram Panchayat Number as G.P.No. 79. So, under the circumstances, this defendants are in actual physical possession of the suit land. Defendants are residing in the suit land after constructing a mud house along-with their family members and tethering the cattle. Therefore, their names is enumerated in the voters list also and Govt. has issued a ration card and electricity consumer meter reading No. 256900117048 in the name of this defendants. It will goes to shows that, this defendants are in possession of the suit land. The house in the suit land is very old house and it became dilapidated condition, so defendants pull down the house property, in the month of January 2012 so as construct new house, and applied for building permission to the Gram Panchayat Kadalge Kh. Taluka Chandgad, so also collected building materials and started construction work and due to order of this hon'ble court stop construction work. The plaintiffs have no prima facie case and if temporary injunction is granted, then these defendants would be put to irreparable loss which cannot be compensated in terms of money. Lastly, they prayed to dismiss this application with costs.

7. Plaintiffs have relied following documents i.e. 7/12 extract of suit land for the year 2001-02 to 2011-12, 7/12 extract of suit land for the year 1941-42 to 1949-50, 7/12 extract of Gat No. 63/3/B for the year 1989-90, copy of decree in R.C.S.No. 52/1984 , 9(3) 9(4) extract of suit land, mutation diary No.170, map of suit land, letter of police chowki kowad, mutation diary No. 192, mutation diary No. 412, affidavit of

Janba Patil, Surekha Patil, photos of suit land and its receipt. Defendants also relied on copy of mutation no. 556, 7/12 extract of suit land for the year 1979-80 to 1989-90, 7/12 extract of suit land for the year 2001-02 to 2011-12, certified copy of khata extract No. 23, copy of assessment list of Milkat No. 79 for the year 1996-97, copy of assessment list of Milkat No. 79 for the year 1985-86 to 1988-89, copy of assessment list of Milkat No. 79 for the year 2010-2011, electricity bills of G.PNo. 79.

8. It is settled principle that grant of injunction is discretionary relief. The exercise thereof is subject to the Court satisfying firstly that there is serious disputed question to be tried in the suit and that an act, on the facts before Court, there is probability of his being entitled to the relief asked for by the applicant. Secondly, the Court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial, and thirdly, the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. Therefore, the burden is on plaintiffs by evidence aliunde by affidavit or otherwise that there is "a prima-facie case", in their favour, which needs adjudication at the trial. The existence of the prima-facie right and infraction of enjoyment of property or the right is condition to the grant of temporary injunction.

9. In the light of above principle of law, I have paid thoughtful consideration to the submissions made by learned advocate for the both parties and scrutinized the various documents, affidavit of persons filed on record by carefully. It is well settled principle of law regarding entries in the 7/12 extract that, the mutation entries are entries in the record of rights are made only for fiscal purpose of recovering revenue such entries by themselves cannot confer title on the holder of the property in favour of person in whose name the entries are made. However, there is presumption in favour of correctness of entries in the record of rights. Such entries are and evidence of fact but are not conclusive.

10. Now, in the light of above facts and principles it is seen that, 7/12 extracts of the suit land which is filed by the both parties which goes to show that, name of defendant No. 1 is appearing as owner and in column of possession since 1979 to till today as per registered sale deed dated 9/2/1977 and as per mutation entry no. 556. Certified copy of khata extract No. 23 also shows that suit land stands in the name of defendant no. 1. But, as per compromise decree in R.C.S.No.52/84 suit land ½ area was allotted to the father of the plaintiffs and ½ area was allotted to the defendant no.2. After careful perusal of entire decree it reveals that defendant no.2 Appaji is party to that suit as defendant no.1 and defendant no.1 Gangubai as defendant no.3 i.e. Janabai. After perusal of genealogy in that decree it is also seen that defendant no.1 is sister of defendant no.2 and her father name is Nagoji. Defendants in present matter neither denied that name of their father is Nagoji nor name of defendant no.1 is mentioned in plaint as well as in present application appears to be wrong one. In plaint as well as in present application name of defendant no. 1 is mentioned as Gangubai Bhima Patil and maidenhood name as Janabai Nagoji Patil. Hence, it appears no force in contention of defendants that they are not parties to R.C.S.No.52/84. Thus, it is clear that suit land is an ancestral and joint family property of plaintiffs and defendants and according to decree in R.C.S.No.52/84 ½ area was allotted to the father of the plaintiffs and ½ area was allotted to the defendant no.2. However, as per that decree mutation is not effected and nothing else.

11. It is also clear that both plaintiffs and defendant no.1 are became owner to the extent of ½ area each in suit land as per decree passed in R.C.S.No.52/84. Even though, the compromise decree is drawn the effect as per such allotment of share was remained to be taken on the record of rights of suit land. Therefore, name of plaintiffs are not appeared in 7/12 extract of suit land does not mean that, they are not owners and not in possession of ½ area of suit land after death of their father. Thus, the entries in the revenue record pertaining to suit land in question is not helpful to defendants. Only denial of possession of plaintiffs in ½ area of suit land is easy to defendants but to prove the same as false is not so easy. There is nothing on record produced by the defendants that decree passed in R.C.S.No.52/84 is set aside and against the law.

Plaintiffs also have filed affidavit of some persons in their behalf regarding they are in possession of $\frac{1}{2}$ area of suit land which also shows that, they are in possession of $\frac{1}{2}$ area of suit land. Therefore, after considering the material brought on record I have no hesitation in my mind to hold that, as per decree in R.C.S.No.52/84 plaintiffs are in possession of $\frac{1}{2}$ area of suit land as owner at the time of filling of the suit and defendant no.2 is in possession of remaining portion of suit land.

12. Now, question in hand is whether defendants can be restrained for erecting construction upon the $\frac{1}{2}$ portion in suit land which is in possession of plaintiffs and allotted to their father as per decree passed in R.C.S.No.52/84. After careful perusal of photographs which has been filed by plaintiffs on record, clearly goes to show that, defendants are started dig a foundation for construction of building upon the suit land. It is to be noted that defendants also have not filed permission letter of grampanchayat which shows that grampanchayat have given permission to raise construction in the suit land. Thus, that thing itself shows that the said construction is not legal one. Defendants have not clarified that, why they have not filed permission letter of grampanchayat and kept mum on this point. It is clear that plaintiffs are in possession of $\frac{1}{2}$ area of suit land and defendants are in possession of remaining $\frac{1}{2}$ area of suit land. So defendants have no right to raise construction over the area as shown by the letters E,F,G,H in the hand sketch map annexed with the plaint i.e. land in question. Said particular area is not coming with the half portion of the suit land as allotted to the defendant no.2, it is coming in the entire suit land. In such circumstances, defendants have no any legal right to claim entire share in the suit land when compromise decree of partition has been passed as per R.C.S.No.52/84 and denying right of plaintiffs $\frac{1}{2}$ share in suit land.

13. To sum up the plaintiffs have succeeded in proving prima-facie case in their favour. The defence taken by the defendants are not trustworthy. Therefore, balance of convenience also tilts in favour of plaintiffs. If temporary injunction as prayed by the plaintiffs in respect of suit land over the area as shown by the letters E,F,G,H in the hand sketch map annexed with the plaint is not granted, possession of

plaintiffs in ½ area of suit land is ousted and defendants further raising the construction without consent of plaintiffs or without any legal right in ½ area which is already allotted to the plaintiffs, it will create multiplicity of proceeding and it will suffer irreparable loss to the plaintiffs which cannot be compensated in terms of money. On the other hand no harm or prejudice will be caused to defendants because they also have in possession of remaining ½ area of suit land. Therefore, I am inclined to grant this application as prayed by plaintiffs. Accordingly, I answer point No. 1 to 3 in the affirmative and proceed to pass the following order.

ORDER

- 1 The application Exh. 5 is allowed
2. The defendants, their agent, servants or anybody else acting on their behalf are hereby restrained temporarily from making any type of construction upon the suit land in question i.e. area as shown by the letters E,F,G,H in the hand sketch map annexed with the plaint and changing its nature in any manner what so ever till final disposal of this suit.
3. The costs will be cost in the cause.

(Pronounced in Open Court)

Date: 06/08/2013.

Sd/-
(P. M. Patil)
Civil Judge, Junior Division,
Chandgad.