

**Order below Exhibit 5 in Regular Civil Suit No.37/2017**

This is an application moved by the plaintiff under Order 39, Rule 1 and 2 of the Code of Civil Procedure, 1908.

2) Heard learned Advocate Shri. A.S. Kamble for the plaintiff and learned advocate Shri. V.G. Desai for the defendant No.3.

3) Plaintiff has moved this application against all defendants. But the notice was served to the defendant No.3 only. He appeared and contested the application by filing his objections vide Exh.10. The learned advocate for the plaintiff submitted at Bar that though notice of the application was not served to the defendant No.1 and 2, but he has urgency. Hence, this application may be proceeded against defendant No.3 only. Hence, taking into consideration the submission of learned advocate for the plaintiff, I consider this application only against defendant No.3.

**Description of the suit property :**

4) Grampanchayat Property No.225 (Old G.P.No.191/A and 274) admeasuring 34' X 34' situated at village Date, Taluka-Chandgad, District-Kolhapur is the subject-matter of the suit. (For the sake of brevity this property is hereinafter referred as "suit property"). The plaintiff has specifically described boundary marks of the suit property in para No.1 of the application.

**Facts of the plaintiff's claim in brief are as under :**

5) Plaintiff contended that plaintiff and defendants are cousin brothers. Defendant No.1 to 3 are real brothers. The suit property is the ancestral property of the family of plaintiff and defendants. The father of defendants named Bhagwant

Deshpande was the manager of the joint family of the family of plaintiff and defendants. Hence, the name of Bhagwant Deshpande got entered on the assessment extract of the suit property as owner. Thereafter, as per the oral partition has been taken place between the father of plaintiff and defendants, the suit property was allotted to the share of father of plaintiff named Yeshwant Deshpande. Since then till date, the plaintiff is in possession of the suit property. There was house built with mud in the suit property. As the said house suit was in dilapidated condition, hence it was collapsed. Hence, the suit property became “Dry land” (पडसर जमीन). The defendants by taking advantage of suit property is “Dry land” (पडसर जमीन) started digging pits for making construction over the suit property.

6) Plaintiff further contended that as the plaintiff has instituted Regular Civil Suit No.65/2006 for the relief of partition and separate possession of his share, defendants got angry and started construction over the suit property. Hence, the defendants are intended to make illegal construction over the suit property. Hence, plaintiff has issued registered post acknowledgement due notice to the police inspector, Chandgad to take action against the defendants. But police has not taken any action against the defendants. Hence, plaintiff was constrained to file this suit and application.

7) The defendant No.3 appeared before the Court and contested the application by filing his objections vide Exh.10. The defendant denied the averments made in the application. Defendant contended that plaintiff has not annexed survey map along with application to show the four boundaries of the suit

property. Hence, the boundaries of the suit property cannot be relied upon. Defendant further contended that plaintiff has not produced resolution of the Grampanchayat, Date to show that previously suit property bears Grampanchayat Property No.191/A and 274.

8) Defendant further contended that from the perusal of assessment extract of the suit property it revealed that the father of defendants named Bhagwant Waman Deshpande is the owner and occupant of the suit property. Defendant further contended that right from beginning father of defendant named Yeshwant Deshpande was the owner and occupant of the suit property till date. Hence, the plaintiff has no right to make claim over the suit property. Hence, application is liable to be rejected.

9) After taking into consideration the rival pleadings and submissions of both the parties, the following points arose for my determination. I gave my findings with reasons thereon as under :

| <b><u>Points.</u></b>                                                            | <b><u>Findings.</u></b> |
|----------------------------------------------------------------------------------|-------------------------|
| 1) Whether plaintiff has made out prima-facie case ?                             | Yes.                    |
| 2) Whether balance of convenience lies in favour of the plaintiff ?              | Yes.                    |
| 3) Whether plaintiff would suffer irreparable loss if application is rejected ?. | Yes.                    |
| 4) What order ?                                                                  | Application is allowed. |

### REASONS

10) In order to substantiate his claim, plaintiff has filed assessment extracts of the suit property of the year 2015-16 to 2018-19, 1985-86 and 1999-2000 to 2003-04 vide Exh.3/1 to 3/3.

11) On the contrary, defendant No.3 has also filed assessment extracts of G.PNos.83, 87, 37 and of suit property of the year 200-01 to 2011-12 vide Exh.15/1 to 15/6.

#### AS TO POINT NO. 1 :

12) Plaintiff has contended that plaintiff and defendants are cousin brothers. Defendant No.3 has not disputed the same. Plaintiff has further contended that the suit property was the ancestral joint property of the father of plaintiff and defendants. Plaintiff has further contended that the father of defendants named Bhagwant was the manager of the joint family. Plaintiff has further contended that oral partition took place amongst the plaintiff and defendants father and in said partition the suit property was allotted to the share of the plaintiff. Admittedly, plaintiff has not filed any record which would reveal that the father of defendants named Bhagwant was the manager of the joint family of plaintiff and defendants.

13) Plaintiff has filed assessment extracts of the suit property of the year 1985-86 and 1999 to 2004 vide Exh.3/2 and 3/3. The perusal of said extracts revealed that property bearing G.PNo.191/A and 274 was owned by Bhagwant Waman Deshpande i.e. father of defendants ***but possessed by father of plaintiff named Yeshwant***. Admittedly, plaintiff has not filed any record which would reveal

that G.PNo.191/A and 274 were the previous numbers of the suit property.

14) However, the defendant No.3 has filed assessment extracts of suit property of the year 2000 to 2012 vide Exh.15/5 and 15/6. The perusal of said extracts revealed that suit property was mud tiled house. It was owned by Bhagwant Wamant Deshpande **but possessed by the father of plaintiff named Yeshwant**. Therefore, these extracts manifestly clears that the father of plaintiff named Yeshwant was in possession of the suit property since the year 2000 to 2012. However, the perusal of assessment extract vide Exh.15/7 revealed that in the year 2015-16 to 2017-18 the name of father of defendants named Bhagwant got entered in the occupant's column of suit property. Therefore, in my considered view, it is for the defendants to establish that how the name of their father Bhagwant got entered in the occupant's column of suit property ?.

15) Hence, prima facie it appears that the father of plaintiff named Yeshwant is the possessor of the suit property in the year 2000 to 2012. Hence, I held that it is for the defendants to establish that how the name of father of plaintiff named Yeshwant deleted and how the name his father got entered in the occupant's column of the year 2015-16 to 2017-18. Admittedly, defendants have not filed any record which would explain the said fact. Hence the plaintiffs case that his father is in possession of the suit property and thereafter he continued the same is probable one.

16) True it is that plaintiff has not filed the survey map to establish the boundary marks of the suit property. But when the plaintiff has come with specific case that the property described by four boundaries is in his possession, then it is

for the defendants to establish that the boundaries given by the plaintiff are wrong. Admittedly, defendants have not stated different boundaries of the suit property. Hence, in my considered view, at this stage the boundary marks of the suit property given by plaintiffs are accepted as correct.

17) Therefore, I hold that plaintiff has established that his father named Yeshwant is in possession of the suit property in the year 2000 to 2012. Plaintiff has specifically stated his possession over the suit property till date. Therefore, merely on the basis of entry of the name of father of defendant named Yashvant on the assessment extract of the suit property of the year 2015-16 to 2017-18, I cannot hold that father of defendants is in possession of the suit property without any explanation. Admittedly, defendant has not given any explanation that how name of his father got entered on the assessment extract of the suit property in the occupant's column of the year 2015-16 to 2017-18.

18) Thus, taking into consideration the above discussion, I hold that plaintiff has prima facie established his possession over the suit property. Hence, the case of plaintiff is arguable one and needs to be tried. Hence, I answer point No.1 in the affirmative.

**AS TO POINTS NO.2 AND 3 :**

19) As I held in point No.1 that plaintiff has prima facie established his possession over the suit property. Plaintiff contended that defendants took pits over the suit property for making construction. To establish the said fact plaintiff filed the photographs vide Exh.3/4. The perusal of photograph vide Exh.3/4 revealed that pits were taken for making construction over the suit property. Plaintiff has

also filed photograph vide Exh.12/1 to establish that construction in the suit property is going on. The perusal of photograph vide Exh.12/1 revealed that construction in the suit property is going on. Hence, if construction over the suit property is completed, then legal possession of plaintiff over the suit property will be lost. On the contrary, if defendant is restrained from making construction over the suit property, then no harm would be caused to him.

20) Hence, in such circumstances, if defendant No.3 is not restrained from making construction over the suit property, then greater inconvenience and loss would be caused to the plaintiff rather than the defendant No.3. On the contrary, if application is allowed, no prejudice would be caused to the defendant No.3. Therefore, I answer points No.2 and 3 in the affirmative.

**AS TO POINT NO.4:**

21) 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 defendant No.3 or any person on his behalf is hereby restrained from making further construction over the suit property till further order.
3. Costs in main cause.

Dated:- 20/04/2017.

Sd/-  
( M. D. Thombare )  
Civil Judge, Jr. Dn., Chandgad.

**CERTIFICATE**

I affirm that the contents of this P. D. F. file Judgment/Order are same, word to word, as per the original Judgment/Order.

|                                          |                                                                                                          |
|------------------------------------------|----------------------------------------------------------------------------------------------------------|
| Name of the Stenographer                 | Shri. V. L. Tadmok, L. G. Stenographer.                                                                  |
| Name of Court                            | Shri. M. D. Thombare,<br>Civil Judge, Junior Division and Judicial<br>Magistrate, First Class, Chandgad. |
| Date of Dictation                        | 20/04/2017                                                                                               |
| Judgment/Order signed by the<br>P. O. on | 21/04/2017                                                                                               |
| Judgment/Order uploaded on               | 21/04/2017                                                                                               |