

ORDER BELOW EXH.05 IN REG.CIVIL SUIT NO.92/2013**[Date - 21-06-2014]**

01. The present application is filed by the plaintiffs against defendants restraining them from constructing toilet over suit property under O.39 R.1-[C] of Code of Civil Procedure.

02. Plaintiffs contend that, suit property is Gat No.1928 , an area admeasuring 00 Hector 30 R, situated at village Sarud, Tal. Shahuwadi, Dist.Kolhapur.[Suit property is 'B' as mentioned in the plaint]. Suit property is ancestral property of plaintiffs. Defendants have no concern to the suit property. A house situated in Gat No.1928 was given to the defendant No.1 for residing purpose for four months without consideration by the plaintiffs in the year 2005, but defendant No.1 has not vacated the said house. On 26-08-2013 defendants had tried to encroach upon the land and tried to dig out foundation for constructing toilet. Therefore, plaintiffs are constrained to file this application.

03. On the other hand, defendants have filed their say and W.S., below Exh.16. Defendants have denied all allegations of the plaintiffs. Defendants specifically contend that, suit property was originally belonged to their forefathers and old survey number of it, was 445/446. Suit property is locally known as a 'Mangancha

Mal'. There were adjacent lands of Balu Ananda Kumbhar Hari Mang and Kundlik Bhiva Kumbhar. Forefathers of the plaintiffs namely Vithu Laxman Patil had encroached in the land of Kundlik Bhiva Kumbhar.

04. Due to ignorance of defendants, plaintiffs got recorded their name on the 7/12 extract, but defendants have been residing over the suit property for last 45 to 50 years and they have house over it, bearing No.1307 and for that house, defendants have started to construct toilet as per the instruction of State government in the Government land and this land does not belong to plaintiffs. Defendants have also electricity connection for their house and which was taken in the year 1997-98. This house has old No.1128 and present number is 1307. Suit property has been in the possession of Mang and Kumbhar for several years, therefore, plaintiffs do not have concern to the suit property. Therefore, application of the plaintiffs may be rejected.

05. The following points arises for determination of this application and I have recorded my findings thereon alongwith reasons :-

| Sr. No. | Points | Findings |
|----------------|--|---------------------|
| 1. | Whether plaintiffs have made out prima facie case ? | .. No .. |
| 2. | Whether balance of convenience lies in favour of plaintiffs ? | .. No .. |
| 3. | Whether plaintiffs will suffer irreparable loss if injunction is not granted ? | .. No .. |
| 4. | What order ? | As per final order. |

REASONS

As to point Nos.1 to 3 :

06. Considering nature of the contentions, all points required to be considered together.

07. It is settled law that while passing an interim order of injunction under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908, the Court is required to consider three basis principles, namely a] Prima-facie case, b] balance of convenience and inconvenience and c] irreparable loss and injury. In addition to the above mentioned three basis principles, a Court, while granting injunction must also take into consideration the conduct of the parties. It is also established law that the Court should not interfere only because the property is a very valuable one. Grant or

refusal of injunction has serious consequences depending upon the nature thereof and in dealing with such matters the Court must make all endeavours to protect the interest of the parties.

08. With the above principles, let us consider the claim of both the parties.

09. It is the contention of plaintiffs that, they have title and possession of the suit property. On the other hand, defendants have also claimed title and possession of the suit property.

10. Having considered submission of both the sides and upon perusal of 7/12 extract of suit property it has found that name of the plaintiffs No.1 and 2 is recorded as owner and possessor of the suit property.

11. It is the case of the plaintiffs that, defendants are encroaching upon the suit property and thereby trying to construct a toilet on it. It is the story of plaintiffs that, they had given an house to the defendants for the purpose of residing for four months, but plaintiffs have failed to mention house number of the house which had been given to the defendants. I must mention here that, defendants also claim that, they have been residing over the suit property for several years and they have house bearing

No.1307 and old No.1128. Defendants have also produced number of documents on record which show that they have house over the suit property. Defendants have produced tax assessment extract of the suit property, bearing No.1307 which is in the name of defendant No.1. Defendants have also produced light bill on record which shows it is in the name of family members of the defendants though it does not specify house number. Defendants have produced several tax receipts on record, which show that taxes have been paid by the defendants though these tax extracts don't carry same house number. I must mention here that, it is general practice that, house numbers in Grampanchayat area do change time to time. Therefore, if defendants come with specific case by showing house number and boundaries, plaintiffs should have showed its house number. Therefore, whether plaintiffs have house on the suit property or not, it has not come specifically on record. Moreover, it is pertinent to note here that, plaintiffs have not mentioned boundaries of suit property either in the plaint or application below Exh.05. Plaintiffs have mentioned boundaries of house property in his plaint, but it is not the subject matter of the present application. Open place mentioned in the suit property-'B' as mentioned in the plaint and application below Exh.05 is subject matter of the present application. It is crystal position of law that the party who seeks relief of injunction should give description of

suit property. Herein, I may take recourse to the ratio laid down in the case of, **M/s. Nari Shrinagar Big Bazar & Anr. Vs. M/s.Pantaloon Retailing [India] Ltd. & Anr., reported in 2008[4] ALL MR 394.** In this case it has been held by Hon'ble High Court that, where immovable property subject matter of the suit, plaintiff is expected to give description of property sufficient to identify it.”

12. While considering above ratio and facts of present case, it has found that, plaintiffs have not given description of suit property sufficient to identify it.

13. Plaintiffs have produced certificate dated 14-03-2014 on record issued by Gramvikas Adhikari of Grampanchayat, Sarud which reads that, defendants have not given permission to construct toilet in gat No.1928 or adjacent to Sarud-Sagaon road. This certificate further reads that, Grampanchayat doesn't have jurisdiction to grant such a permission as present place is in the gat number. While considering this certificate, I must mention here that, this certificate itself shows that, they have no jurisdiction to grant such a permission. Therefore, this certificate cannot be considered as it is irrelevant at this stage.

14. It is the story of the defendants that, gat No.1928 had

old survey No.445 and 446 and it is belonged to forefathers of defendants and it was locally known 'Mangacha Mal'. Upon perusal of 7/12 extracts of survey number 445 and 446, it has found that, name of the Hari Mang as recorded as a owner. Therefore, possibility can be drawn that, this suit property may be locally known 'Mangacha Mal'.

15. Defendants have produced several old assessment extracts paid by them, by which, inference can be drawn that defendants have possession over house property No.1307. Defendants have also produced notices issued by Grampanchayat for constructing toilet and regarding its subsidy. While considering this aspects, I am inclined to infer that, defendants have possession over the house property No.1307.

16. It is pertinent to note here that, plaintiffs have not pleaded how they came in to suit property. Pleading regarding to that effect is necessary to consider present application. Herein, I may take recourse to the ratio laid down in the case of, **Ganesh D.Daivajna Vs. Prakash S. Salkar, reported in 2000 [3] Mh.L.J.347** that, "Possession ought to be lawful to enable party to seek protection from a Court by way of equitable relief. The question of possession presupposes lawful possession and for adjudication of that

question whether finally or interlocutory stage, the inquiry in to title, right, interest or status of plaintiff is not foreign to the subject matter.”

17. In present case, both parties are claiming possession of the suit property, but plaintiffs have not mentioned boundaries of the suit property in order to identify it. On the contrary, defendants have mentioned their house property number and its boundaries. Moreover, defendants have produced several tax receipts on record for showing that they have been paying tax of the house. Herein, I may take recourse to the ratio laid down in the case of, **Rame Gowda[D] by L.Rs., V. M. Varadappa Naidu[D] by L.Rs. An another, reported in AIR 2004 SUPREME COURT 4609.** It is held by the Hon'ble Supreme Court that, “ Restraining defendant from interfering with peaceful possession of plaintiff, failure by either party to prove title. Plaintiff in settled possession, it entitles him to protect his possession, grant of injunction proper.

18. While considering above ratio, it has cleared that, the party who is in settled possession of the property is required to be protected irrespective of the title. In present case, I find defendants are in settle possession of the suit property. Therefore, interest of defendants is required to be protected at this stage.

19. Therefore, in my opinion, defendants have prima-facie case and balance of convenience in their favour at this stage. If, interim relief is not granted to the defendants, defendants would suffer irreparable loss or injury, which cannot be compensated later on. Hence, I answer all the points in favour of defendants.

As to Point No.4 :

20. While considering the above discussion, application is required to be rejected. Hence, following order.

ORDER

- [1] Application for temporary injunction below Exh.05 is rejected.
- [2] Costs in cause.

Date :- 21-06-2014

Sd/-
(S.M.Sarode)
Civil Judge Junior Division
Malkapur-Shahuwadi.

CERTIFICATE

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

Name of the Stenographer : Sunil Anna Shinde
Court : Civil Court Junior Division, Malkapur-
Shahuwadi.
Date : 21 / 06 / 2014
Order signed by the Presiding officer : 21 / 06 / 2014
Order uploaded on : 21 / 06 / 2014

It has been held by the Hon'ble Bombay High Court, in the case of **Shekoji Bhimrao and Ors. Vs. Motiram Maruti Maratha and others, reported in 2007[1] Mh.L.J.747** that, “ Plaintiff has to prove his possession over the suit property and inquiry regarding ownership or lawful right is incidental thereto.”

It has been held by the Hon'ble Apex Court in the case of **Bant Singh & Anr Vs. Niranjan Singh [D] by Lrs., & Anr, reported in**

2008 ALL SCR 721 that, “ An entry in the revenue records may not be decisive as regards the status of the parties but a presumption in regard to possession can be raised on the basis thereof.”

Gorakh Mahadev Survase and others Vs. Narayan Balu Dhombe, since deceased through his Lrs, and others, reported in 2012[2] Mh.L.J. 215. In this case it is held by the Hon'ble High Court that, “ Parties must substantiate their case of possession by corroborative material which is the most vital aspect in so far as the grant of injunction is concerned.”

Herein I take recourse to the ratio laid down in the case of,