


<u>MHKO190004712024</u> 	<p style="text-align: center;"><u>ORDER PASSED BELOW EXH.5</u> IN <u>R.C.S No.190/2024</u> <u>Namdev Dattatraya (Dattu) Patil Vs. Masu Dattatraya</u> <u>(Dattu) Patil</u> (Date: 17 /10/2024)</p>
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The plaintiff has filed the present application under Order - XXXIX Rule 1 and 2 of the Civil Procedure Code, for grant temporary injunction against defendant No.1.

Description of property :-

2. C.S. No.661 admeasuring 77.5 square meter (Grampanchayat Property No.1254) situated at village Sarawade, Tal. Radhanagari, Dist. Kolhapur, out of which 38.75 square meter i.e half ($\frac{1}{2}$) share of the plaintiff is the subject matter of the present application. (For the sake of brevity herein after referred as the 'suit property').

3. The plaintiff contended in this application that, defendant No.1 is his brother, defendant Nos.2 to 5 are his sisters and defendant No.2(A) to 2(e) are L.Rs of deceased defendant No.2. The suit property is their ancestral property. After the death of their grand-father namely Vithu, names of his three sons namely Tukaram, Dattu and Krushna were recorded to the Grampanchayat property Nos.198, 199 and 200 respectively. The Grampanchayat property No.199 was standing in the name of their father Dattu (Dattatray) Patil. Dattu (Dattatray) Patil died on 22/06/1962. Thereafter name of defendant No.1 was recorded to the assessment of suit property. The plaintiff and defendant Nos.1, 3 to 5 alongwith their mother were residing in the said property.

4. It is further contention of the plaintiff that in the year 1977 at

the time of City Survey, the defendant No.1 recorded his name to the suit property and the suit property was numbered as C.S.No.661. The plaintiff and defendant No.1 were residing in the suit property separately. Defendant Nos.2 to 4 have relinquished their right orally in favour of the plaintiff and defendant No.1. Therefore, the plaintiff and defendant No.1 are having 1/2 (half) share each in the suit property. The plaintiff was residing in the house situated at southern side's half portion of the suit property. As the said house was in dilapidated condition, the plaintiff shifted at his own house situated at Malwadi and defendant No.1 also shifted at Malwadi in his newly constructed house at Malwadi. The plaintiff and defendant No.1 are in possession of the suit property to the extent of their half share each. Defendant No.1 is having possession of Northern side's half portion and the plaintiff is having possession of Southern side's half portion of the suit property.

5. The plaintiff further contented that on 03/07/2024 defendant No.1 has made encroachment of 1 X 45 feet portion over the suit property and started to dig ditch in the suit property for the construction of house. The plaintiff requested defendant No.1 to get measured the suit property and then start the construction of his house. However, defendant No.1 threatened to the plaintiff that whole suit property is in his name and he will construct his house by committing encroachment. Defendant No.1 started illegal construction over the suit property. Therefore, the plaintiff has filed the present suit seeking relief of partition and perpetual injunction. It will take time to decide the suit upon merits. Therefore, plaintiff has filed present temporary injunction application. If the temporary injunction is not granted, then irreparable loss would be caused to him. Prima facie case and balance of convenience lies in his favour. Hence, the plaintiff prayed that present application may kindly be allowed and defendant No.1 may kindly be restrained from causing obstruction to

his possession over the suit property by illegally raising construction over the suit property.

6. Defendant No.1 filed his say at Exh.22 and denied most of the contentions in the present application. He strongly opposed the application. It is contended that present application is false, frivolous and not tenable in the eyes of law. Defendant No.1 further contended that two house properties out of which one house situated in the suit property and another house situated at Malwadi were given to him in partition. Alternatively, two ancestral house properties situated at Malwadi were given to the plaintiff in partition. Already the suit property, agricultural properties and house properties were partitioned between them. The plaintiff and defendant No.1 are in separate possession of their share in the properties as per the said partition.

7. It is further contention of defendant No.1 that the plaintiff has stated false about incident of 03/07/2024. The defendant No.1 has started construction of his house in the suit property from the month of May,2024. The plaintiff is having knowledge of the said fact. The construction work of the house of the defendant No.1 is at first slab level. However, the plaintiff has not taken any objection for the same till the filing of present suit. Therefore, the date and incident stated by the plaintiff is totally false. The plaintiff has no right in the suit property. The plaintiff and defendant No.1 are residing separately since,1994. Due to increase in valuation of the suit property, the plaintiff is claiming his right over the suit property only to grab the same. The plaintiff has no way concern with the suit property. The plaintiff has not come with clean hand before the Court. Hence, defendant No.1 prayed for rejection of the application.

8. Heard Ld. Advocate for the plaintiff and Ld. Advocate for

defendant No.1 at length.

9. Following points arise for my determination. I have recorded my findings thereon for reasons given below.

Sr. No.	POINTS	FINDINGS
1.	Whether plaintiff proves that there is prima-facie case in his favour?	In the negative.
2.	Whether plaintiff proves that balance of convenience lies in his favour?	In the negative.
3.	Whether plaintiff proves that irreparable loss would cause to him, if temporary injunction not granted in his favour?	In the negative.
4.	What order?	As per final order.

10. The plaintiff and defendant No.1 have filed various documents along with list of documents on record. Those documents are referred in the reasoning part of this order.

SUBMISSION:-

11. The Ld. Advocate for the plaintiff submitted that suit property is the ancestral joint family property of the plaintiff and defendants. After the death of father of the plaintiff and defendants, the name of defendant No.1 recorded to the assessment of the suit property. However, the plaintiff and defendants along with their mother were residing in the suit property. Defendant Nos.2 to 4 have relinquished their right orally in favour of the plaintiff and defendant No.1. The plaintiff and defendant No.1 are having 1/2 (half) share each in the suit property. However, by taking disadvantage of assessment record, defendant No.1 trying to obstruct the possession of the plaintiff. The defendant No.1 made encroachment over the share of the plaintiff and started illegal construction over the suit property. The plaintiff

has filed hand sketch on record showing the encroached portion over the suit property. The plaintiff is having prima-facie case. The balance of convenience lies in favour of the plaintiff. If the temporary injunction is not granted, then irreparable loss would be caused to the plaintiff. Hence, he prayed that the temporary injunction application may kindly be allowed.

12. Per contra, the Ld. Advocate for defendant No.1 submitted that the plaintiff and defendant No.1 are residing separately since,1994. The partition of all ancestral properties has been effected between them. In the said partition suit property was given in share of the defendant No.1. Alternatively, two house properties situated at Malwadi were given in the share of the plaintiff. Therefore, plaintiff is having no right in the suit property. Defendant No.1 raised construction over the suit property at first slab level. The plaintiff was having knowledge of the said construction. However, he has not raised any objection for the same till the construction of first slab. Therefore, the plaintiff is not entitled to temporary injunction. Hence, he prayed for rejection of the application.

-: REASONS :-

AS TO POINT NOS.1 AND 2 :-

13. These points are interlinked with each other; therefore, they are taken for common discussion.

14. Plaintiff has come with the case that; C.S.No.661 is in common possession of himself and defendant No.1. It is submitted that, plaintiff is having ½ (half) share in the C.S.No.661. To show that, he is in possession of suit property, plaintiff has filed several documents on record. Plaintiff has filed property extract of C.S.No.661 i.e suit property on record. On perusal of the same, it appears that name of defendant No.1 has been recorded to the extract. On perusal of the same, it appears that, defendant

No.1 has received the suit property during partition of the ancestral properties between brothers. Name of defendant No.1 has been recorded to C.S.No.661 in the year 1977. This document prima facie shows that, already partition between plaintiff and defendants has taken place.

15. Plaintiff has filed on record voters list vide Exh.27 to show that, suit property is in his possession. However, just because address of the suit property is mentioned as address of plaintiff in voters list it cannot be said that, he is in possession of the suit property. Plaintiff has filed form No.17 of Grampanchayat Sarawade vide Exh.27 to show that, he has obtained water supply connection in the suit property. On perusal of the form No.17 it appears that, nowhere it is mentioned that, water supply connection is provided in suit property to plaintiff as alleged by him.

16. Plaintiff has filed on record tax assessment extract of suit property since 1990 to 2009 vide Exh.44, on perusal of which it appears that, name of defendant No.1 is recorded as owner. Plaintiff has also filed tax assessment extract of suit property for period of 1961 to 1966 vide Exh.27, wherein name of Dattoba Vithoba Patil is recorded as owner. He has also filed tax assessment extract of the suit property for period of 1977 -78 vide Exh.27, wherein it appears that, name of defendant No.1 is recorded as owner and possessor of the suit property. This document is in consonance with the extract of C.S.No.661 i.e. suit property filed vide Exh.3 by the plaintiff.

17. Defendant No.1 has submitted that, ancestral agricultural properties and all house properties have already been partitioned between plaintiff and defendants. Extracts of C.S.No.660 and 662 filed by plaintiff vide Exh. 27 also suggest that, there has been partition between plaintiff, defendants and other co-sharers. It is pertinent to note here that, plaintiff

has submitted in plaint that, except suit property all other ancestral agricultural properties and house properties of plaintiff and defendants have already been partitioned between them and accordingly plaintiff and defendant No.1 have received 1/2 (half) share in them. This submission of plaintiff also suggests that, there has been partition of ancestral properties between plaintiff and defendants.

18. Considering the above discussion, prima facie it appears that, suit property is already been partitioned and accordingly name of defendant No.1 is recorded to city survey extract of suit property in the year 1977. It is again important to note here that, though plaintiff has submitted that, all other ancestral agricultural and house properties between plaintiff and defendants have been partitioned, however the date or year in which that partition took place is nowhere mentioned in the plaint.

19. Plaintiff has submitted that, on 03/07/2024 he came to know that, defendant No.1 has started construction in suit property and has encroached upon his share in the suit property. Record shows that, suit has been filed on 02/08/2024, almost one month after the alleged construction started. It shows that, construction was going on for period of one month and after that, plaintiff has approached to this Court. Photographs of the suit property filed by plaintiff vide Exh.3, shows that, foundation of the construction is completed and the steel columns have been raised for further construction. It shows that, plaintiff has not taken any prompt action as soon as defendant No.1 started the alleged construction.

20. Considering the above discussion, I am of opinion that plaintiff failed to show that he is having prima facie case in his favour. As discussed above plaintiff has failed to establish prima facie case in his favour. If the

present application is allowed and defendant No.1 is restrained temporarily from making any construction, he might suffer more loss than the plaintiff if the application is rejected. Therefore, I am of opinion that the balance of convenience is in favour of defendant No.1. Accordingly, I answer point Nos.1 and 2 in the negative.

AS TO POINT NO.3:-

21. On perusal of photographs on record it transpires that defendant No.1 by incurring considerable amount has completed substantial amount of construction. In such circumstances if the defendant No.1 is restrained by an injunction order, he will suffer greater hardship than that of plaintiff. Moreover, on perusal of documents and photographs filed by defendant No.1 vide Exh. 65, it appears that, construction has reached to almost slab level of first floor and lot of construction material can be seen in photographs which is near the alleged construction. Accordingly, point no.3 is answered in the negative.

AS TO POINT NO.4 :-

22. As discussed earlier, the plaintiff has failed to prove material ingredients of temporary injunction i.e. prima-facia case, balance of convenience and irreparable loss. Therefore, his application for temporary injunction is liable to be rejected. Hence, following order is passed : -

- ORDER -

1. The application below Exh.5 is hereby rejected.
2. Costs will be costs in main cause.

Date:17/10/2024

(R. D. Shinde)
Civil Judge Junior Division,
Radhanagari.