

ORDER BELOW EXH. 05

(Order passed on 10th day of December, 2018)

[01] This is an application filed by the plaintiff under Order 39 Rule 1 and 2 R/w. Sec.151 of the Code of Civil Procedure, for the relief of temporary injunction i.e. for restraining the defendants from causing any sort of obstruction to the peaceful possession of plaintiff over disputed 0.50 H.R. land out of 2.18 H.R. of field survey no.674 situated at mauza Bela, P.H.No.28, Tah. Umred, Dist. Nagpur. ***(This property would here-in-after be referred to as the suit field)***. The plaintiff also prayed for restraining the defendant no.2 from aliniating or creating third party interest over the suit field.

[02] Perused the application and say given by the defendant no.1. Despite of the appearance, defendant no.2 failed to submit his written statement and hence vide order below Exh.1 suit proceeded without written statement against defendant no.2. Heard Ld. Counsel Shri. G.R. Hunge for the plaintiff and Shri. S.N. Athargade for defendant no.1 at considerable length. On the other hand none appear to argue the side of defendant no.2. Hence, the argument of defendant no.2 is treated to be heard.

[03] On the basis of facts and documentary material placed on record following points arise for my determination to which I have recorded my findings for the reasons to follow.

Sr.No	Points	Findings
1	Whether prima-facie case lies in favour of plaitniff ?	In the Negative
2	Whether balance of convenience lies in favour of plaitniff ?	In the Negative
3	Whether irreparable injury would occassion to plaintiff, if temporary injunction is not granted ?	In the Negative
4	What order ?	Application is Rejected.

REASONS.

As to point no.1 to 4 :-

[04] The above points are interlinked to each other, hence are taken for discussion and determination at once. In order to entitle for injunction it is incumbent upon the plaintiff to show that she has prima facie case and further also to show that the balance of convenience lies in grant of the temporary injunction application. Again the plaintiff is duty bound to show that if the temporary injunction is not granted then irreparable injury would occasion to her. Prima facie case means a case that there is serious question to be tried in the suit and that on the facts before the court, there is possibility of the plaintiff being entitled to the relief ask by her. Likewise it must be shown that the courts interference is necessary to protect the plaintiff from that species of injury which the court feels irreparable.

[05] Considering the ingredients necessary for granting the relief of

T.I. if we goes through the pleading as well as documentary material supplied by both plaintiff and defendants, according to the plaintiff she is the owner and possessor of the suit field by way of adverse possession. According to the plaintiff one Usha Babanrao Kothe i.e. the mother of defendant no.1 was owner and possessor of whole field survey no.674, area 2.18 H.R. land. It is averred that out of said land the mother of defendant no.1 was used to cultivate only 1.50 H.R. and remaining 0.68 H.R. land was kept barren. It is averred that as the plaintiffs field was situated adjacent to the land field survey no.674 owned and possessed by Usha Babanrao Kothe, the plaintiff started to cultivate the suit field i.e. 0.50 H.R. land belongs to Usha the mother of defendant no.1. It is averred when Usha came to know that the plaintiff is cultivating her some portion of land, she started to quarrel with the plaintiff for handing over said portion.

[06] It is further averred that as plaintiff didn't handover the possession, the mother of defendant no.1 i.e. Usha Babanrao Kothe applied for measurement of her whole field survey no.674, area 2.18 H.R. land. During measurement dt.15.01.2004 conducted by the office bearers of Deputy Superintendent of Land Records, Umred, it is found that the mother of defendant no.1 i.e. Usha Babanrao Kothe is in actual possession of 1.50 H.R. land. During said measurement it was observed that present plaintiff being owner and possessor of land survey no.675 has committed an encroachment over 0.50 H.R. land of field survey no.674 belongs to the mother of defendant no.1. During said measurement it was further observed that the owner of another field survey no.678 i.e. Agricultural Produce Market committee has encroached over 0.18 H.R. land of field

survey no.674 belongs to Usha Babanrao Kothe the mother of defendant no.1.

[07] It is further averred that thereafter Usha Babanrao Kothe the mother of defendant no.1 issued one legal notice dt.07.07.2004 and thereby called upon the plaintiff to hand over the vacant possession of suit field i.e. 0.50 H.R. land of field survey no.674. It is averred that even though the plaintiff didn't hand over the possession as per the notice dt.07.07.2004 the mother of defendant no.1 didn't initiate any legal proceeding for recovery of possession. Thereafter the mother of defendant no.1 alienated the land which was in her actual possession i.e. 1.50 H.R. land from field survey no.674 to one Sushil Vijaykumar Duggad. It is averred that after alienation of 1.50 H.R. land the mother of defendant no.1 was not in cultivating possession of any land from survey no.674 as it was encroached by the plaintiff and the Agricultural Produce Market Committee.

[08] Thus, according to the plaintiff since before the year 2004 she was in cultivating possession of the suit field i.e. 0.50 H.R. land of field survey no.674. After alienation of 1.50 H.R. land even though the revenue record of 0.68 H.R. land was remained in the name of mother of defendant no.1, however, she was not in actual possession of the same. After demise of mother the name of defendant no.1 has been mutated in ownership column of 0.68 H.R. i.e. remaining land of field survey no.674, which was renumbered as 674/1. The defendant no.1 by taking the advantage of said revenue record has sold out said 0.68 H.R. land in favour of the defendant

no.2. The defendant no.2 with the help of registered sale deed dt.14.06.2016 is trying to disturb the plaintiff from her long standing possession. According to the plaintiff she has acquired title over the suit field i.e. 0.50 H.R. land by way of adverse possession and she has every right to protect her possession. Thus, plaintiff prayed for granting the relief of T.I.

[09] On the other hand defendant no.1 by way of her written statement Exh.24 has resisted the suit claim. It has been specifically denied that the plaintiff by way of adverse possession has acquired her title over the suit field. It is specifically denied that the plaintiff is in long standing possession of the suit field. It has been averred that after demise of the mother, defendant no.1 has acquired ownership and possession over 0.68 H.R. land of field survey no.674/1. The defendant no.1 even though sold out the said 0.68 H.R. land in favour of defendant no.2, however, defendant no.2 has not paid the whole consideration amount mentioned in the sale deed. It is averred that the cheques issued by the defendant no.2 have been dishonored. The plaintiff has no legal right to claim the declaration and injunction as prayed. Thus, defendant no.1 prayed for rejection of the application of T.I.

[10] During argument the Ld. Counsel for the plaintiff Shri. G.R. Hunge vehemently argued that here in case at hand the copy of measurement map dt.15.01.2004 and the copy of legal notice dt.07.07.2004 are the crucial documents to show that the plaintiff is in cultivating possession of 0.50 H.R. land belongs to late Usha Babanrao

Kothe, the mother of defendant no.1. He further argued that as per available documents on record the plaintiff has applied to mutate her name in 7-B record of suit field. He further argued that the adjacent land holders vide their sworn statement have specifically stated on oath that the plaintiff is in long standing possession of suit field. Thus, it has been argued on behalf of the plaintiff that the material supplied by plaintiff is more than sufficient to hold that the plaintiff has established her title by way of adverse possession over the suit field. Considering the argument advanced by the Ld. Counsel for the plaintiff, if we perused the material on record as submitted by the plaintiff during measurement dt.15.01.2004, it has been observed that the owner of field survey no.675 i.e. Plaintiff has committed an encroachment over the 0.50 H.R. land of field survey no.674 belongs to Usha Babanrao Kothe. Likewise as submitted by the plaintiff the legal notice dt.07.07.2004 is seen to have been issued by late Usha Babanrao Kothe for recovery possession of suit field from the plaintiff.

[11] According to the plaintiff even though she is an encroacher, however, neither late Usha Babanrao Kothe the original owner nor present defendants the subsequent owners have taken any lawful measure to recover the possession of suit field within stipulated period of limitation. Considering the submissions put forth by the side of plaintiff if we go through the principles laid down for attracting the provision of adverse possession, here in case at hand admittedly plaintiff has approached the court for claiming the relief of declaration. The substantive relief claimed by the plaintiff is for declaration. Considering the substantive relief claimed by plaintiff now the question arises whether the prayer for declaration of

ownership by way of adverse possession can be made by institution of the suit.

[12] In Gurudwara Sahib Vs.Gram Panchayat Village Sirthala & Anr., Civil Appeal no.8244/2013, the Hon'ble Apex court has specifically observed that the plea of adverse possession cannot be used as a sword and same can be used as a shield only. Thus, in view of the guidelines given by the Hon'ble Apex Court a declaration on the basis of adverse possession cannot be sought and the plea of adverse possession is available only as a defense to the defendant. In this authority it has been observed that even if the plaintiff is found to be in adverse possession he cannot seek a declaration to the effect that such adverse possession has matured into ownership and only if proceeding is filed against him and if he is arrid as defendant, in that case he can use adverse possession as a shield/defense.

[13] Here in case at hand the substantive relief claimed by the plaintiff is regarding the declaration of ownership by way of adverse possession. As discussed above as per the law laid down by Hon'ble Apex Court such kind of declaration cannot be claimed by instituting the suit as plaintiff. No doubt the plaintiff also claimed the relief of permanent injunction, however said relief is of ancillary nature. When plaintiff is not entitled for substantive relief she cannot prayed for the relief of ancillary nature. Moreover, the relief of T.I. is of a discretionary nature. Admittedly plaintiff is an encroacher. She has not proved her lawful possession over the suit field. Thus, considering the discussion given supra no prima facie case is seen to be lies in favour of the plaintiff.

Prima facie case follows balance of convenience. So far as irreparable injury is concern as the plaintiff is not legally entitled to institute the suit for claiming his declartion as an onwer by way of adverse possession, merely on the ground of irreperable injury the plaintiff is not seen to be entitled to claim the relief of T.I. Hence, considering the discussion given supra, I answer point no.1 to 3 in the negative and in answer to point no.4 I proceed to pass the following order.

ORDER.

- [01] The application (Exh.05) for temporary injunction is hereby rejected.
- [02] Costs in cause.
- [03] Dictated and pronounced in open court.

Umrer.
Date : 10/12/2018

(S. K. Fokmare)
Civil Judge Senior Division,
Umrer.

Certificate

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

Name of Stenographer : **Mr. Mahendranath D. Nagpure.**
Stenographer (Lr.Gr.)
Court Name : Civil Judge Senior Division, Umrer
Order dictated on : 10/12/2018
Transcription ready on : 10/12/2018
Order checked and signed on : 10/12/2018

/home/ubuntu/1-C.J.S.D./ORDERS/2-ORDER BELOW EXH.5/2-SPL. CIVIL
SUITS/

DISTRICT COURT
NAGPUR