

Vitthal Motiram Bachhav V/s.
Prabhavati @ Vithabai Kailaas Bachhav
R.C.S. No.83/2017

Order Below Exhibit 5

The present application is filed by the plaintiffs seeking temporary injunction under order XXXIX Rule 1 of Code of Civil Procedure restraining the defendants from causing obstruction to them from fetching water of the suit well till final disposal of the suit.

2. The plaintiffs contend that the present suit is filed by them seeking declaration and perpetual injunction in which the present application for temporary injunction is filed. Genealogy of the plaintiffs is as follows :

Motiram Ramji Bachhav

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T	T	T	T	T	T
Vitthal	Vaman	Kailas @ Kalu	Shantabai	Sushilabai	Bebibai
(Plaintiff	(Plaintiff	(Deceased)	(Defendant	(Defendant	(Defendant
No.1)	No.2)	T Prabhavati	No. 6)	No. 7)	No. 8)
		(Defendant No. 1)			

T

T	T	T	T
Sanjay	Rajendra	Janardan	Manisha
(Defendant	(Defendant	(Defendant	(Defendant
No. 2)	No. 3)	No. 4)	No. 5)

3. Late Motiram Ramji Bachhav was original owner of Gat No. 447 (new Gat no. 450 (1) to 450(4)) situated at village Juni Bej, Tal. Kalwan, Dist.

Nashik (hereinafter referred to as “the suit land”). In the year 1986, partition was effected between Motiram Bachhav and his sons i.e. the plaintiffs and late Kailas @ Kalu in respect of the suit land and accordingly mutation entry no. 1483 was effected. By way of the said partition, Gat No. 450(1) (Earlier Gat No. 447(1)) admeasuring about 0H 97R came to the share of plaintiff no. 1, Gat No. 450(3) (Earlier Gat No. 447(3)) admeasuring about 0H 51R came to the share of plaintiff no. 2 , Gat No. 450(2) (Earlier Gat No. 447(2)) admeasuring about 0H 51R came to the share of late Kailas @ Kalu and Gat No. 450(4) (Earlier Gat No. 447(4)) admeasuring about 0H 66R was fallen to the share of Motiram Bachhav and after his demise it is jointly owned by the plaintiffs and the defendants.

4. The plaintiffs further contend that there is a well in Gat No. 447 (hereinafter referred to as “the suit well”) and the plaintiffs as well as the defendants have common right to fetch water from the said common well. The plaintiffs and the defendants have been using the said common well from the date of the partition. Hence, the plaintiffs filed an application before Talathi, Bej, to make an entry in the other rights column of the suit land regarding the common use of the suit well. However, defendant no. 4 raised an objection for recording the said mutation entry no. 2884. Said objection was rejected and mutation entry no. 2884 was confirmed. Appeal filed by defendant no. 4 against the said mutation entry was dismissed by S.D.O., Kalwan and also by Additional Collector, Nashik. Further, R.T.S. Revision Application regarding mutation entry no. 2884 filed by defendant no. 4 before Additional Commissioner, Nashik was allowed on 29/9/2017. Since then, defendant no. 4 started causing obstruction to the plaintiffs from fetching water from the suit well. Hence, the plaintiffs prayed that the present application be allowed and the defendants be restrained from causing obstruction to them from fetching water of the suit well till final disposal of the suit.

5. Defendant no. 3 failed to file his say despite giving sufficient opportunity. Hence, no say order was passed against him below Exh. no. 1 by my

predecessor. Defendants nos. 6 to 8 filed adoption Pursis at Exh.21 admitting the entire claim of the plaintiffs. Defendant no. 1, 2, 4 and 5 resisted the present application vide their say at Exh. 31. They admitted the relationship with the plaintiffs and the fact of partition. However, they denied that the partition was effected as per their consent. They contended that the plaintiffs were not given a common right to use the suit well which is situated in Gat No. 450(2). The plaintiffs have never used the suit well. The plaintiffs have independent wells in their Gat Numbers. The suit well belongs to the defendants alone. The plaintiffs are not in possession of the suit well and they have never affixed electric motor on the said well. Hence, the plaintiffs have no right to claim injunction in respect of the suit well. Hence, the defendants prayed that the application be rejected.

6. Ld. Adv. for the plaintiff shri. A.V. Junnare argued that the plaintiffs have filed on record mutation entry no. 1483 wherein it has been mentioned that the suit well is for the common use of the parties. The defendants never challenged mutation entry no. 1483 before any competent authority. The plaintiffs have also filed on record copy of the Complaint Register wherein Late Motiram Bachhav and defendant no. 4 Janardan Kailas Bachhav have given their statements stating that the suit well was for the common use of the plaintiffs and the defendants. R.T.S. Revision Application filed by defendant no. 4 before Additional Commissioner, Nashik was allowed on mere technical grounds and it was observed therein that rights of the parties in the suit well can be determined only by the Civil Court. Thus the plaintiffs have prima-facie case. Balance of convenience lies in favour of the plaintiffs. If the application is rejected, the plaintiffs will be unable to fetch water from the suit well for their crops and thus they would suffer irreparable loss. Hence, the present application be allowed.

7. Per contra ld. Adv. for the defendants Shri. N. P. Chandratre argued that as per mutation entry no. 1483, the suit well falls under Gat No. 447/2 which had come to the share of late Kailas i.e. father of defendant no. 1 to 4. During partition, the plaintiffs were not given any right in the suit well. The

plaintiffs filed application for recording mutation entry no. 2884 on 1/9/2002 and not in the year 1986 when partition was effected. Mutation entry no. 2884 has been cancelled by the appropriate authority. In the 7x12 extract of the suit land, the suit well has not been mentioned in the irrigation column. 7x12 extract of the suit land mentions that the crops which yield on the suit land are grown on rain water. The plaintiffs have failed to show that they have been using water of the suit well. Unless the plaintiffs prove that they have share in the suit well, the present application cannot be allowed in their favour. The plaintiffs have filed photocopy of the Order of Tahasildar dated 17/2/1987 and not the certified copy and the said photocopy is forged by the plaintiffs. From the statement given by defendant no. 4 in the complaint register, it appears that the plaintiffs have not used water of the suit well since 2002. The plaintiffs have not filed on record bills of the electric motor or any other document to show that presently they are using water of the well. Thus the plaintiffs have failed to prove the prima-facie case. Hence, he prayed that the present application be rejected.

8. Perused the application, say and other documents on record. Heard ld. Adv. for the plaintiffs and ld. Adv. for defendants. On the perusal of the application, say and other documents on record, following points arose for my determination, its findings with reasons thereof are as under:

Sr. No.	Points	Findings
1	Whether the plaintiffs prove the prima-facie case?	Affirmative.
2	Whether the plaintiffs prove that balance of convenience lies in their favour?	Affirmative.
3	Whether the plaintiffs prove that irreparable loss will be caused to them if the injunction is not granted as prayed?	Affirmative.
4	What order?	The application is allowed.

REASONS

As to point no. 1

9. In support of their application, the plaintiffs have filed on record along with the List of Documents at Exh. 3, certified copies of 7/12 extracts of Gat No. 450/1, Gat no. 450/2, Gat no. 450/3 and Gat no. 450/4, certified copy of mutation entry no. 1483, photocopy of Order of Tahasildar dated 17/2/1987, certified copy of map of Gat no. 450, certified copy of complaint register of mutation entry no. 2884, certified copy of Judgment of S.D.O., Kalwan in RTS Appeal No. 1/2003, photocopy of Judgment of Additional collector Nashik in RTS Appeal No. 252/2004, certified copy of Judgment of Additional Commissioner Nashik in RTS Revision No. 350/2016 and affidavit of adjacent land owner Bhikubai Shivaji Valikar at Exh. 33. As against this, the defendants have not filed any evidence on record.

10. The defendants have admitted the relationship with the plaintiffs and the fact of partition in respect of the suit land. Hence, the only question to be determined is whether the plaintiffs have common right to fetch water from the suit well. I carefully perused mutation entry no. 1483 dated 23/2/1987 wherein it is mentioned that partition was effected between Motiram Ramji Bachhav and his sons Vitthal Motiram Bachhav, Kalu Motiram Bachhav and Waman Motiram Bachhav in respect of Gat no. 447. The said mutation entry also mentions the respective shares which the parties received during the said partition. The said entry further mentions that everyone has common right in the suit well. The said mutation entry is not cancelled and hence it has presumptive value. Order of the Tahasildar, Kalwan, dated 17/2/1987 has also confirmed the partition between the parties. Ld. Adv. for the defendants have orally argued that the said document is forged, however the defendants have not taken a specific plea in their written statement as regards to the alleged forgery of the said document.

11. I also perused the certified copy of complaint register regarding

mutation entry no. 2884. In the statement of defendant no. 4 Janardan Kailas Bachhav dated 9/10/2002 he has stated that as per the partition effected in respect of Gat No. 447 everyone has common right in the well situated in Gat No. 447. The said well which now falls under Gat No. 450/2 (Previous Gat No. 447/2) is ancestral well and he has not dug the said well. His father, his Uncles and his grandfather are using the said well. In the statement of Motiram Ramji Bachhav dated 9/10/2009 he has mentioned that he has dug the well situated in Gat No. 447/2 (Present Gat No. 450/2) and the same is for the common use. He and his sons have been using the water of the said well and they have been sharing the bills of electric motor fitted on the said well. Thus, from the mutation entry no. 1483 and statement of original owner of Gat No. 447 i.e. Motiram Ramji Bachhav and statement of defendant no. 4 recorded in the complaint register, it prima-facie appears that the plaintiffs and the defendants have common right to use the suit well situated in Gat No. 450/2 (Previous Gat no.447).

12. Although mutation entry no. 2884 has been cancelled by Additional Commissioner, Nashik by his Judgment dated 29/9/2017, he has observed while allowing the said Revision Application that by way of mutation entry no. 2884, no new right has been created. The said mutation entry was recorded only to give effect of mutation entry no. 1483 on 7x12 extract and hence, on this ground the Revision Application was allowed. The said Judgment has nowhere observed that the suit well was not used commonly by the parties. Hence, only because mutation entry no. 2884 is cancelled, it cannot be said that the plaintiffs did not have common right over the suit well.

13. The plaintiffs have also filed on record affidavit of adjacent land owner Bhikubai Shivaji Valikar at Exh. 33 who has stated that her Gat Number is adjacent to Gat No. 450 and the plaintiffs and the defendants have been commonly using the water of the well situated in Gat No. 450/2 for cultivating their respective agricultural lands. Thus, the plaintiffs have prima-facie proved that they have common right to use the suit well situated in Gat No. 450/2 along

with the defendants and they have been commonly using water of the said well. Thus the plaintiffs have prima-facie proved their case. Hence I answer point no. 1 in affirmative.

As to point no. 2 and 3

14. As already discussed, the plaintiffs have prima-facie proved that they have common right to use the suit well situated in Gat No. 450/2. Hence if the application is rejected, the plaintiffs will be unable to fetch water of the said well for cultivating their crops and hence they would suffer irreparable loss. Thus, the plaintiffs would suffer greater hardship if the present application is rejected than the hardship which may be caused to the defendants by allowing the present application. Thus, the balance of convenience lies in favour of the plaintiffs. As already discussed, irreparable loss would be caused to the plaintiffs if the present application is rejected. Hence I answer point no. 2 and 3 in affirmative.

Considering all the above grounds, I pass the following order:

O R D E R

1. The application (Exh. 5) is hereby allowed.
2. The defendants, their legal heirs, servants, executors assignees are hereby temporarily restrained from causing obstruction to the plaintiffs from common use of the suit well situated in Gat no. 450/2 till final disposal of the suit.
3. Costs in cause.

(Dictated and pronounced in open court)

Place : Kalwan
Date : 09.02.2021

(A. C. Joshi)
Jt. Civil Judge, J.D., Kalwan