



(Order on counter-claimant's application for temporary injunction)

ORDER BELOW EXH.22

This is an application by counter claimant (original defendants) under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908. The suit is for declaration and permanent injunction in which defendants have instituted counter-claim for the relief of declaration of ownership by adverse possession and permanent injunction.

02. **Description of counter-claim property :**

Property No.	Ad-measuring area	Village
Gat no. 375	0H 37.7 R	Kunorli, Tal-Igatpuri, Dist- Nashik.

Aforementioned property is herein after referred as
‘counter-claim property’.

Counter-claimant’s (Original defendants) case in short:

03. Counter claimants great grand father deceased Yesu was in possession and cultivation of counter-claim property. After his death, counter-claimant’s grand father deceased Ananda and Yesu’s son inherited the possession and after their death, counter-claimant’s father Baban inherited possession and now counter claimant’s are in possession of suit property. Therefore, counter-claimants are in possession of counter-claim property since 68 years. They are taking crops by

cultivation in counter-claim property. Original plaintiff and his vendor had knowledge of counter-claimants and their ancestors possession over counter-claim property. Original plaintiff is taking disadvantage of revenue entries in his name, as attempting to dispossess counter-claimants. Therefor, counter-claimants has filed the present application for temporary injunction to restrain the original plaintiff from obstructing counter-claimants peaceful possession and cultivation over counter-claim property.

Defence of Original Plaintiff in short:

04. Original plaintiff filed say **Exh. 24** and resisted the contents of application. It is stated that, the counterclaim and the present application is not maintainable. Neither counter-claimant nor their ancestor's were in possession of counterclaim property after its sale vide register sale deed 395/58. Counter-claimant, their father and grand father did not inherit any right in the counterclaim property as deceased Yesu had sold it during his life time. Sale deed executed by deceased Yesu and consequent revenue entries are unchallenged. Therefore, temporary injunction cannot be granted. Accordingly, prayed for rejection of application.

05. **Argument by Ld. Advocate Shri. O. V. Bharindwal for counter-claimants:-**

Learned Advocate for counter-claimants (original defendants) submitted that, counter-claimants are in possession of counter-claim property since their ancestor. He further submitted that, prima facie case lies in their favour as entries in the 7/12 extract of the

counter-claim property are contrary to mutation entry 644. He submitted that, when Shivram and Kashinath has sold counter-claim property to Waman Jadhav, original plaintiff cannot acquire right over counterclaim property. He submitted that, original plaintiff is claiming right only on the basis of documents showing his ownership. Therefore, long standing possession of counter-claimant in counter claim property needs to be protected by grant of temporary injunction. Original plaintiff is obstructing counter-claimants peaceful possession over counter-claim property. Accordingly, prayed for allowing the application.

06. **Argument by Learned Advocate Shri. B. N. Waje for the original plaintiff:-**

Learned Advocate for the original plaintiff submitted that, counter-claimants had no have prima facie case in their favour as in the year 1958 ownership and possession of counter claim property has been transferred by deceased Yesu to Shivram and Kashinath by registered deed. Therefore, nothing remained with deceased Yesu during his lifetime. Hence, Yesu's heirs cannot inherit any right over counter claim property. On the contrary, counter-claim property is owned and possessed by original plaintiff by registered sale deed no.574/83. If injunction is granted original plaintiff will suffer irreparable loss and will be deprived of his property. Accordingly, prayed for rejecting the application.

07. On hearing both the sides, following points arise for my determination and I have recorded my findings thereupon as follows:-

Sr. No.	Points for determination	Findings
1.	Whether prima-facie case lies in favour of counter claimants ?	No.
2.	Whether balance of convenience tilts in favour of counter claimants ?	No.
3.	Whether counter claimants will suffer irreparable loss if injunction is not granted ?	No.
4.	Whether counter claimants are entitled for the relief of temporary injunction as prayed ?	No.
5.	What Order ?	Application is rejected.

REASONS

AS TO POINT NO. 1: ***(Prima-facie Case)***

08. It is settled principle of law that while deciding application for temporary injunction, mini trial should not be conducted. Three cardinal principles to be assessed while deciding this application are prima-facie case, balance of convenience and irreparable loss.

09. It is important to note here that, suit property and counter claim property are same. Defendants have instituted counter claim against the original plaintiff. To prove prima facie case, counter claimants have relied upon two documents and affidavit of adjoining land holders. I have carefully considered the mutation entry extract ME 644 and 847 filed by counter – claimant. It shows that, counter claim property has been sold to

Waman Shivram Jadhav by Shivram Hari Gavali and Kashinath Hari Gavali in the year 1960. Furthermore, the affidavit of Shri. Samadhan Ghotekar Exh.27 and Balu Joshi Exh. 28 shows that, they are owner of gat no. 376 and 377 respectively and they have witnessed counter-claimants possession over counter claim property since long. Their affidavit also states that, original plaintiff's never had possession or cultivation over counter claim property.

10. To counter the case of counter-claimants, original plaintiff relied upon sale deed and revenue records of counter-claim property. It is for the counter claimants to prima facie prove their possession over suit property. The mutation entry extract 644 filed by the counter claim itself shows that counter claimants admits that the counter claim property is not in their ownership and possession. The mutation entry extract of ME no. 847 shows that, Waman Jadhav has obtained loan from Kunorli cooperative society and charge of the society has been kept over the suit property.

11. It is the contention of counter-claimant's that entries in 7/12 extract and hollow entries and moreover, it does not create title. Ld. Adv. for counter-claimants relied upon various judgments to substantiate the contention.

12. The learned Advocate for counter-claimants has relied upon the judgment of Hon'ble Supreme Court in **Rame Gowda Vs M. Varadappa Naidu 2003 CJ(SC)891**, wherein it is held that,

“It is settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions”.

13. The learned Advocate for counter-claimants has relied upon the judgment of Hon’ble High Court of Kerala in ***Karthiyayani Amma V/s Govindan ,1980 CJ (Ker)88***, wherein it is held that, *“A person in possession can be evicted only in due process of law. Even the rightful owner cannot eject him with force. If he cannot be evicted with force, he continues to be in possession and he can resist invasion of his possession by everyone including the rightful owner. If the rightful owner threatens his peaceful possession, he can approach Courts of Law and pray for the equitable relief of injunction to protect his possession”.*

14. The learned Advocate for the counter-claimants has relied upon judgment of Hon’ble Bombay High Court in ***Govindbhai Ramjibhai Chauhan Vs. Gokulchand Juthalal Agrawal and another, 1994 CJ(Bom)218***, wherein it is held that, ***“The law is well settled that, even a settled trespasser can seek temporary injunction to protect his possession till he is dispossessed in accordance with law”.***

15. I have carefully read the judgments relied by Ld. Advocate for counter - claimant. In all the above cited case it is

held that a person in possession of property cannot be evicted without due procedure of law. With great respect to the cited cases, the facts of present case is different from cited case. In the present case, counter-claimants has not prima-facie shown their possession over counter-claim property. Therefore, further question of its dispossession does not arise.

16. It is the contention of counter-claimants that affidavits of adjoining land holders at Exh. 27 and 28 shows that the original plaintiff is not in possession of counter-claim property. However, mere affidavits cannot rebut the presumption raised by entries in record of rights in favour of the original plaintiff. It is pertinent to note that, the registered sale deed 574/83 shows that the counter-claim property has been sold to the original plaintiff and its possession has been delivered at the time of sale deed. Therefore, prima facie the documents on record does not show that, the entries in the revenue record are hollow entries.

17. In this context Judgment *of Hon'ble Bombay High Court in Shri. Gramdeo Laxmi Narayana Devalaya Vs. Shali Datta Devdas & ors. 1996 SCC Online Bom 288*, assumes importance, wherein it is held that, *"The entry in the Record of Right clearly raises a presumption that, the suit property is in occupation of the appellant. There is absolutely no material placed on record to rebut the said presumption except for two affidavits and as already held by this court in number of matters the affidavitory evidence cannot rebut the presumption arising*

from the entries in the Record of Rights”.

18. None of the documents on records shows counter claimants possession over counter claim property. On the contrary, the document filed by original plaintiff prima facie shows their possession over counter claim property. Therefore, counter-claimants has failed to prove prima facie case in their favour. Hence, I answer point no.1 in ***negative***.

19. **AS TO POINT NO. 2 and 3 :**

Balance of convenience & irreparable loss

Sale deed 395/58 executed by deceased Yesu and sale deed 574/83 executed in favour of original plaintiff has not been challenged. Furthermore, none of the revenue entries in the name of original plaintiff over counter claim property have been challenged either by deceased by Yesu during his lifetime or his heirs thereafter. If injunction is granted inconvenience will be caused to the original plaintiff. Hence, balance of convenience tilts in favour of original plaintiff. No irreparable loss will be caused to counter-claim in event of rejection of application.

20. In this context Judgment of Hon'ble Bombay High Court in ***Bhavna Vs. Navneet reported in 2015(3)MH LJ 472*** assumes importance. In para 8 therein, his Lordships has observed that, ***“Once the prima facie is not established, the further aspects as to balance convenience and irreparable loss are immaterial and they need not be considered”***. As discussed above, original plaintiff's will suffer irreparable loss if injunction is granted. No

irreparable loss would be caused the counter claimants, if temporary injunction is not granted. Balance of convenience tilts in favour of the original plaintiff. Accordingly, I answer point no. 2 and 3 in ***negative***.

AS TO POINT NO. 4 :-

Entitlement of Temporary Injunction

21. Counter claimants failed to prove entitlement for the equitable relief of temporary injunction. It is essential principle of equity that, party suppressing material fact is disentitled from the equitable relief. Counter claimants have suppressed material fact of execution of sale deed 395/58 by their great grand father Yesu. Moreover, counter claimants have failed to prove essential elements of prima facie case, balance of convenience in their favour. Therefore, counter-claimants are not entitled for the equitable relief of temporary injunction. Accordingly, I answer point no.4 in ***negative***.

As to Point no.5:-

22. In view of reasons discussed above and in answer to point no.5, I pass following order.

ORDER

01. Application **Exh.22** is rejected.
02. No order as to costs.

(R. N. Khan)

Date -01.10.2019.

Civil Judge Jr. Division,Igatpuri.

CERTIFICATE

I affirms that the contents of this P. D. F. file Judgment are same word for word as per original Judgment.

Name of the Court :- R.N.Khan
Judicial Magistrate First Class, Igatpuri

Name of the Steno :- N. S. Sable.

Date :- 01/10/2019

Judgment signed by
presiding officer :- 01/10/2019
Judgment uploaded on :- 01/10/2019