

MHOS150007332019



ORDER BELOW EXH. 23

1) This is an application preferred by the plaintiff in counter-claim under Order 39 Rule 1 and 2 of the Code of Civil Procedure (hereinafter to be referred as “the Code” for short). Perused the supporting documents filed by both the parties. Heard Learned Advocate Shri. A. S. Jagtap, for the plaintiff and learned advocate Shri. N. S. Madhekar for the defendant at length.

2) It is contended by the Learned Advocate for the plaintiff that he and defendant are real brothers and they had two more brothers viz. Nagnath and Anil. Out of which, Anil is deceased prior to 5 to 6 years. It is further contended that the plaintiff, defendant, other brothers and their father owned and possessed lands bearing block numbers 44, 42, 52 and 28. The aforesaid lands were partitioned by their father in the year 2007. As per partition, the defendant received share admeasuring 68R from southern side and he received share admeasuring 48R from northern side in block no. 44. The plaintiff also received share in block no. 42 admeasuring 20R. He submitted that when the partition took place, *smaran tipan/patra* dated 01/10/2007 with regard to it was executed. On the same date another *smaran patra* was also executed with regard to well, pipeline and electric connection which is the subject matter

of counter-claim.

3) It is further contended that another *smaran patra* with regard to well, pipeline and electric connection shows that the plaintiff as well as defendant have jointly owns and possess it. According to said *smaran patra* both the parties have right to use water of the said well for their respective fields. The said *smaran patra* also shows that other brothers of plaintiff and defendant (i.e.) Anil and Nagnath do not have any right to use well, pipeline and electric connection as their share are given to them in partition and therefore, the defendant alone does not become an owner of well, pipeline and electric connection and infact, the plaintiff has 1/2 share in it. But as the said well come within the field belonging to the defendant, he has been restrianing the plaintiff to use water of it. The plaintiff also stated that the defendant has merely given application to record his name in revenue record on the basis of *smaran patra* with regard to partition. However, he had neither given the other *smaran patra* with regard to well, pipeline and electric connection to revenue authority to record their names nor he stated about it in the application which he had filed before revenue authority.

4) It is averred by the plaintiff that after partition he has been cultivating his field with help of water of said well and pipeline. But as the entry with regard to it had not taken in revenue record

and as the said well situated within the field belonging to the defendant, he has been refraining him from using the water of the well. Also, the defendant by digging pit in his field closed the pipeline which went through his field to the field of the plaintiff and thereby preventing him from using water from the said well and pipeline. He further stated that in order to use water of the well, the plaintiff moved an application before Tahsildar for putting pipeline through the field belonging defendant till his field which was granted subject to payment of compensation. But despite this, the defendant is restraining the plaintiff from using the water of the said well. In such circumstances, possibility of causing loss to the plaintiff cannot be ruled out and therefore, till decision of the suit, the plaintiff be temporarily permitted to use the water of said well and pipeline and if the said relief is not granted, it will cause hardship and prejudice to the plaintiff and thus, he preferred instant application.

5) Per contra, Learned Advocate for the defendant vehemently opposed the said application by filing reply below Exh. No. 26 and denied the adverse contentions made in the application. The other brothers also got their respective shares in blocks no. 28 and 52 and accordingly they executed "*Smaran tipan/patra*" dated 01/10/2007 with regard to land blocks no. 44, 42 and 52. On the same date itself, the plaintiff and other brother viz. Nagnath went to Talathi and applied for recording their names in revenue record. Thereafter, on 19/11/2007, names of plaintiff and defendant were

recorded vide entries bearing no. 391 and 392.

6) It is further stated that father of the defendant procured an electric connection from Electricity Board by paying demand and the same had been given to him. At present, the defendant has been using the said electric connection only and paying its bills. It is also stated that as per *smaran patra* with regard to partition, nothing has been specified about well in it. The said fact clearly shows that there was no well when the partition was taken place in the year 2007. Similarly, electricity bills are also not produced on record showing that the plaintiff was using pipeline or electric connection. After receiving the share in partition, the plaintiff has carried out work like levelling etc. in his field and thereby made it useful for cultivating crops. It is further stated that the defendant had dug out well and last year (i.e.) 2018 he put an independent pipeline over it by procuring bank loan.

7) According to the defendant, the plaintiff has been trying to take undue advantage of demand which is in the name of father and thereby trying to show that well is jointly own and possess by him and the defendant. The plaintiff also threatening to take water to his field from the said well by means of putting pipeline and thereby trying to encroach by digging well near the well belonging to the defendant. The said well has water in large quantity and therefore, possibility of digging another well by the plaintiff with

intend to cause loss to the defendant with the help of revenue authority cannot be ruled out. At the time of partition, the plaintiff had not shown any place to dig out the well in his field. The defendant also had not given any permission to use his well, pipeline and electric connection. It is also stated that on 20/03/2019, the plaintiff came illegally to field belonging to defendant and threatened him that he would take water from the well by putting pipeline over it and through the suit land. Thus, he prayed that the plaintiff has filed misleading application and therefore, same is liable to be rejected.

8) Considering the rival pleadings of the parties following points arise for my determination and I have recorded my findings thereon with reasons stated thereunder.

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
(1)	Whether the plaintiff prove prima facie-case in his favour?	...Yes
(2)	Whether balance of convenience lies in his favour?	...Yes
(3)	Whether irreparable loss will cause to the plaintiff, if application is rejected?	...Yes
(4)	What order?	As per final order

REASONS

As to points No. 1 to 3:

9) As all the above three points are interlinked with each

other and in order to avoid repetition they are being discussed together.

10) To support the contentions the plaintiff has placed on records *smaran patra* with regard to well, pipeline and electric connection dated 01/10/2007, copy of order of Tahsildar dated 12/07/2021, map of field block no. 42 and 44 and electricity bill. Whereas, the defendant relied upon 7/12 extract of field block no. 44, mutation entries bearing no. 391 and 392, application dated 01/10/2007 moved by the plaintiff before Talathi, *smaran patra* with regard to partition dated 01/10/2007, notice of namuna 9, receipt of depositing amount to government dated 26/03/2019, demand receipt, affidavits of plaintiff, his father, brother Nagnath, sister-in-law Surekha, affidavits of one Kalyan Ramchandra Ghalke and Rajendra Vinayak Deshmukh, letter to Sub-registrar dated 15/05/2018, copy of bills, letter to Talathi dated 16/05/2018 and copy of no dues certificate dated 06/04/2018.

11) From the pleadings it is clear that the relation between the parties is not disputed. Also, the fact of partition in the year 2007 between plaintiff, defendant and their other two brothers with regards to lands bearing nos. 44, 42, 52 and 28 is not in dispute. Similarly, as per partition, 68R land of field block no. 44 came to the possession of the defendant and remaining 48R land of it and 20R land of field block no. 42 went to the share of the plaintiff is also not

disputed. Accordingly, *smaran patra* dated 01/10/2007 with regard to it was executed is not in dispute.

12) According to the plaintiff, after partiton in the year 2007, two *smaran patras* were executed. One *smaran patra* was with regard to partition and the other with regard to well, pipeline and electric connection. The defendant has not denied about *smaran patra* with regard to partition and on the basis of it name of defendant and other brothers were recorded in revenue record. In so far as other *smaran patra* with regard to well, pipeline and electric connection is concerned, according to the defendant, the said *smaran patra* is bogus and manipulated one. It is stated by him that had the two *smaran patras* were executed on the same date, both the stamp papers would have purchased on the same date and they had been attested from the same witnesses. But the same has not been the case. The *smaran patra* with regard to well, pipeline and electric connection was purchased by the plaintiff on 01/06/2007 and the same had been utilised by the plaintiff for his own purpose. Even signatures and thumb impressions of the defendant and other brothers are bogus and therefore, said *smaran patra* cannot be considered.

13) However, bare perusal of *smaran patra* with regard to well, pipeline and electric connection it discloses that there is pipeline fixed on the southern side of the suit property over the well

near river. It also discloses that electric connection is in the name of their father and is in working condition with the pipeline having cocks opened in field blocks no. 44 and 42. It further discloses that pipeline goes through the field of the plaintiff to the field of defendant and they both jointly owns and possess well and pipeline. The said *smaran patra* also shows that other brothers of plaintiff and defendant (i.e.) Anil and Nagnath do not have any right to use well, pipeline and electric connection as their share are given to them.

14) The defendant stated that he procured an electric connection from Electricity Board by paying demand and presently, he has been using the said electric connection only and paying its bills. It is also averred that after partition, he had dug out well and last year (i.e.) in the year 2018, he put an independent pipeline over it by procuring bank loan. It is averred that the defendant has been trying to take undue advantage of demand which is in the name of father and thereby trying to show that well is jointly own and possess by both of them.

15) In this regard the defendant has placed on record two letters dated 15/05/2018 and 16/05/2018 by Manager, Kalyansagar Urban Co-operative Bank Limited, Paranda. The former dated letter written to Sub-registrar, Paranda for mortgaging papers and later one written to Talathi for taking entry of loan on 7/12 extract. The aforesaid two letters shows that he procured loan in the year 2018.

The plaintiff has also produced on record various copies of bills showing he purchased pipeline and its materials from the amount of loan. Thus, according to the plaintiff, he put pipeline over the well in the year 2018 and till date there is no pipeline over it.

16) The submission of the defendant with regard to bogus and manipulated *smaran patra* by the plaintiff is concerned, it is to be noted that till date the defendant has not filed any complaint against the plaintiff with regard to preparing false and bogus document to any competent authority and secondly, whether or not the said *smaran patra* is bogus or not cannot be decided at this stage as the same could be decided after full fledged trial and for that purpose both the parties are required to adduce their evidence on record and therefore, I do not find any force in the said submission advanced by the defendant.

17) It is to be noted that the written statement does not state as to when the well was dug by the defendant. The defendant is contending that he put pipeline over the well by procuring loan in the year 2018. No doubt, the defendant has produced on record copies of procuring loan and bills pertaining pipeline and purchase of materials it does not mean that those pipeline and materials were used for the purpose of putting it over the well and same had been used for that particular field which had come to his share. It is also to be noted that the *smaran patra* with regard to well, pipeline and

electric connection clearly discloses that well and pipeline are jointly owns and possess by the plaintiff as well as defendant. Similarly, the electric connection is in the name of their father. In such circumstances, the plaintiff has every right to use water of the said well by means of pipeline which is already there since the time of partition for the cultivation of his field.

18) From the pleadings and documents on record it is transpired that well, pipeline and electric connection were already there in existence since the year 2007 and prima-facie it is being clear that the same is owns and possess jointly by the plaintiff and defendant. Thus, there exists prima-facie case in favour of the plaintiff. As there is prima-facie case in favour of the plaintiff, balance of convenience also lies in his favor and if he is not permitted to use till the decision of suit, hardship would be caused to him. So far as irreparable loss is concerned, no loss would be caused to the defendant as he is already using well, pipeline and electric connection. To the contrary, if the defendant is permitted to restrain the plaintiff from using water of the said well for cultivation of his field till the final disposal of the suit, irreparable loss would be caused to the him which cannot be compensated in terms of money.

19) Having regard to the present facts and circumstances, I concur submissions advanced by Learned Counsel for the plaintiff and answer points No. 1 to 3 in **positive**. In the result, application

deserves to be allowed. With this, in terms of point no. 4, I proceed to pass the following order.

ORDER

- 1) Application is allowed.
- 2) The defendant, his servants/labours, agents, relatives, friends, or any other person claiming on his behalf are hereby not to restrain the plaintiff from using water of the well, pipeline and electric connection till the final disposal of the suit.
- 3) Parties to bear their own costs.

Date: 18/05/2023

(P. S. Thakare)
Jt. Civil Judge Junior Division,
Paranda.