



ORDER PASSED BELOW EXH.5

1. The plaintiff has filed this application under Order XXXIX Rule 1 of the Code of Civil Procedure. In this application, the plaintiff has claimed temporary Injunction against defendant restraining him from causing obstruction or disturbance in the possession of plaintiff over the suit property and further the plaintiff has requested the court to stay Regular Darkhast no. 11 of 2015 till disposal of present suit. I have perused the application, say and written arguments and all the documents filed on record. I have also heard learned counsels of the parties.

2. In short, it is alleged by the plaintiff that he has instituted the suit for specific performance of contract on the basis of agreement to sell with perpetual Injunction. The plaintiff submits that the suit property is received by the defendant in the family partition. Earlier the suit property was taken on rent basis. The suit property was firstly in possession of Shamsherbhai and then in possession of her widow i.e. Roshanbi and after her death the suit property was in possession of the plaintiff. The plaintiff submits that he had instituted a Regular Civil Suit no. 154 of 1994, in which it was directed to deliver possession. However, present plaintiff had preferred a Civil Appeal no. 311 of 2001 in

the Hon'ble District Court at Pune, in which the Hon'ble District Court dismissed the said appeal. After this decision, the plaintiff and defendant entered into an agreement to sell dated 5.5.2004. The sale consideration of the property was fixed at Rs.75,000/- between plaintiff and defendant. Therefore, the plaintiff further submits that the Judgements passed in aforesaid Suit and Appeal are merged into the said agreement to sell and they do not exist. It is further alleged by the plaintiff that the defendant took Rs.19,800/- from time to time from him and the plaintiff is still ready and willing to pay remaining sale consideration to the defendant. It is alleged by the plaintiff that the defendant has suppressed material information from the court and instituted a Regular Darkhast no.11 of 2015 in the court, which is required to be stayed till disposal of the suit. Hence this application is instituted.

3. The defendant has filed his written statement/say at Exh.15. The defendant has denied all the allegations made by the plaintiff. It is submitted by the defendant, in short, that the suit is beyond limitation as the alleged agreement to sell is dated 5.5.2004. The defendant further submits that, a compromise decree was passed in Regular Civil Suit no. 30 of 1997. However, that compromise decree has been set aside by the Hon'ble District Court in Regular Civil Appeal no. 238 of 2005. As such there is no partition among the heirs of Gajanan, therefore the theory of plaintiff that the suit property is received by the defendant in

family partition is concocted. The defendant also submits that, the alleged agreement to sell is unregistered. The defendant specifically denies execution of said agreement to sell dated 5.5.2004. He submits that as the heirs of Gajanan also have right in the property, therefore he alone cannot execute alleged agreement to sell, etc. In the last, defendant prayed to dismiss the application.

4. On the basis of pleadings of parties I have framed following issues for determination of this application, which I answer them along with my reasons and findings thereon, as follows:

Sr. No.	I s s u e s	Findings
01.	Whether prima facie case is made out by plaintiff?	.. Partly yes.
02.	Whether balance of convenience lies with plaintiff?	.. Partly yes.
03.	Whether plaintiff is going to suffer inconvenience or irreparable loss or injury in case application for temporary injunction is disallowed?	.. Partly yes.
04.	What order ?	.. Application partly allowed.

REASONS

5. AS TO ISSUE Nos. 1 TO 3

Before I start my discussion, I want to mention here that relief of Injunction is an equitable relief. Therefore, in an application for temporary Injunction, there are few cardinal principles of law under which such type of application must be decided. Those principles are—prima facie case, balance of convenience and irreparable loss/injury. Apart from such basic principles, there are other parameters also while deciding like application such as, a party must come not only with clean hand but with clean heart and clean mind, a party should not suppress material facts from the notice of the court and the party who is seeking equitable relief must not present his/her conduct which may disentitle him/her to claim such relief. Now, taking note of these principles, I am going to decide present applications on the basis of material placed on record by the parties.

6. The arguments of the parties are in line of their respective pleadings. May it be so, the plaintiff has made two prayers in the present application. One prayer is regarding temporary Injunction restraining defendant from causing obstruction or disturbance in his possession. The second prayer is regarding staying the Regular Darkhast no.11 of 2015 till disposal of the suit. However, so far as the second prayer is concerned, I

would like to mention here that the plaintiff has filed present application at Exh.5 under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure. If the provisions of Order XXXIX Rule 1 and 2 of CPC are perused then it appears that there is no such provisions in these Rules to stay the Regular Darkhast. As such, the present application so far as second prayer is concerned is hit by the provisions of Order XXXIX Rule 1 and 2 of the CPC. On the contrary, if the provisions of Section 10 of the CPC are perused then also it is clear that Section 10 of the CPC is also not attracted in this case. It is to be noted that the plaintiff has referred provisions of Order XXI Rule 29 of the Civil Procedure Code in his written arguments at Exh.38 for the purpose of present application. I think this reference to Order XXI Rule 29 of the CPC is mis-conceived, because this reference has been made by the plaintiff while deciding an application for temporary Injunction, which is not sustainable in the eye of law and also looking to the fact that this is not an execution application but a suit lodged by the plaintiff himself. Hence, I am of the considered view that the provisions of Order XXI Rule 29 of the CPC are also not attracted for the sake of present application.

7. If the file of this suit is searched then it appears that one citation in the case of **Balasaheb Gulabrao Salunke Vs. Anil Raosaheb Deshmukh, arising out of Writ Petition no. 11991 of 2015 decided on 5.4.2017 by the Hon'ble High Court of Bombay** is also appended. I have perused this citation. However, the issue

involved in that citation was under which circumstances the execution of the decree can be stayed by invoking Order XXI Rule 29 of the Code of Civil Procedure was involved. In the present case, this is not an execution petition but a suit for specific performance of contract, etc. So facts of this citation are different with the facts of present case. Hence, with respect, I say that this citation is not applicable to the present case.

8. From this file I also find that there is one citation filed in the case which is in the case of **Anop Chand Vs. Hirachand, reported in AIR 1962 Raj 223.** I have perused this citation. The facts in the citation are different with the facts of present case. This is a suit and not an execution petition. It is not satisfied to this court as to how the citation is applicable in the facts of present case. So, with respect, I say that this citation is also not applicable to present case.

9. I have also perused citation in the case of **Ramkumari Debi Vs. Tarkeshwar Nath Pandey, reported in AIR 1975 Pat 110; Subhash Kumar Singh Vs. Sheo Balak Singh, reported in AIR 1975 Pat 307; and citation in the case of Shaukat Hussain Alias Ali Akram Vs. Smt. Bhuneshwari Devi, reported in 1973 AIR 528.** I have perused all these citations. The plaintiff in the present case is asking for stay of the execution petition in a suit for specific performance of contract. Therefore, the facts of all these citations are different with the facts of present case.

Therefore, with respect, I say that these citations are not applicable to the present case. However, the learned counsel for the defendant at this juncture referred citation in the case of *Aniket Anant Lale Vs. Prakash Balu Lale, reported in 2018 (2) Mh.L.J. 828.* I have carefully perused this citation. The facts in the citation are different with the facts of present case as the petitioners therein were the legal representatives of Mr Anant Lale who was a judgement debtor. I have already concluded herein above that the provisions of Order 21 Rule 29 CPC are not attracted in the present application.

10. As regards first prayer the plaintiff is claiming temporary Injunction against defendant in respect of the suit property. I have perused the contents of agreement to sell dated 5.5.2004. Prima facie it appears from this agreement to sell that the defendant has delivered possession of the suit property to the plaintiff. It is further prima facie appearing from this agreement to sell that earnest money of Rs.12,000/- is paid in cash to the defendant on the day of this agreement to sell. However, it is quite interesting that this agreement to sell has been executed between plaintiff and defendant after decisions in RCS no. 154 of 1994 and Civil Appeal no.311 of 2001. Therefore, at present I am of the considered view that now the defendant is estopped to make any contrary defence. Why I say so because in the said agreement to sell prima facie it is evident that it was agreed between plaintiff and defendant that defendant will not institute

any suit or appeal in respect of suit property. So also after perusing contents of paragraph no.D of this agreement to sell on page no.5 it appears to me that time was not the essence of contract between the plaintiff and defendant. However, the defendant is denying execution of this document. I am of the considered view that whether the agreement to sell was executed or not is a matter of fact which needs to be decided after evidence is adduced by the parties. However, at present I find that the plaintiff is in possession of the suit property on the basis of this agreement to sell.

11. Apart from above discussion, if the copy of 7/12 extract of gut no.75 for the years 2011-2012 to 2015-2016 is seen it appears that in the column of cultivation apart from name of Shankar and others, name of defendant is also appearing as possessor. However, the name of defendant does not find place as possessor in the 7/12 extract dated 2.11.2023 of gut no.55. So also copy of tax receipt no.1403 of Jejuri Nagar Palika prima facie shows that it is issued in the name of defendant for the year 2015-2016 in respect of some property. However, there are other tax receipts also filed on record in the name of defendant. It is relevant to note that if the copy of cross-examination of present defendant in RCS no. 154 of 1994 is perused then prima facie it appears that he has accepted thereunder on page no.4 on oath that in the year 1993 between him and his brother a written partition on stamp paper has taken place. In his cross examination he

further admitted that Shamsheer Mulani has constructed a Hotel and that the tax is paid by the present plaintiff. From the documents on record it appears to me prima facie that the plaintiff is in possession of the suit property described in paragraph no.1B of the plaint. Apart from this, the plaintiff also produced on record one affidavit of Amin Husen Khan dated 13-12-2017, which if perused reveals that the plaintiff is in possession of the property. The plaintiff also filed another affidavit of one Ibrahimbhai Kadarbhai Kazi dated 25.7.2016 supporting case of plaintiff with respect to possession. This witness has also stated on oath that agreement to sell dated 5.5.2004 was entered into between plaintiff and defendant and it is a notarized document. Therefore, after perusing all the documents on record I came to the conclusion that the plaintiff has made a good prima facie case to the extent of his possession over the suit property described in paragraph no.1B of the plaint. The plaintiff has made out an arguable case and it needs to be enquired into during trial. It is settled law that nobody is authorized to take forceable possession otherwise than by due process of law. Therefore, the possession of the plaintiff is required to be protected by issuing temporary Injunction. Otherwise the plaintiff will suffer irreparable loss. More inconvenience is going to be caused to the plaintiff rather than defendant if this application is partly not allowed. Therefore, I find that the plaintiff has proved issue no.1 to 3 partly in the affirmative and partly in the negative.

12. AS TO ISSUE NO. 4

Relief of Injunction is a discretionary relief. In the facts and circumstances of this case and after considering all the material on record, I find that this application deserves to be partly allowed. In the result I answer issue N.4 accordingly and proceed to pass following order:

ORDER

- I. Application Exh.5 is hereby partly allowed.
- II. Claim of staying execution application is hereby refused.
- III. The defendant is hereby temporarily restrained from causing obstruction or disturbance in the possession of plaintiff over suit property described in paragraph no.1B of the plaint, pending hearing and final disposal of the suit, otherwise than by due process of law.
- IV. Costs in main cause.

Dt. 20.9.2024.

(Md Taher Bilal)
Civil Judge J.D., Saswad.

CERTIFICATE

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

Name of Steno	:	D.T. Kulkarni, Jr. Clerk
Court Name	:	Shri. Md. Taher Bilal Civil Judge Jr. Division, Saswad.
Date of Order	:	20/09/2024
Judgment signed by presiding officer on	:	20/09/2024
Judgment uploaded on	:	20/09/2024