

MHPU240000262023 	<u>Reg.Civil. Suit No.3/2023</u> Prakash Mohare V/s. Bhagawant Mohare and others.
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ORDER BELOW EXH.NO.5

(Passed on 16/03/2023)

This is an application filed under Order 39 Rule 1 & 2 of the Code of Civil Procedure for granting injunction for restraining the defendant no.1 from carrying construction over the suit property through himself or any other person on his behalf.

02. It is submitted by the plaintiffs that, the unauthorized construction carried out after demolishing the house property no.63, area admeasuring 71.54 (770 sq.ft.) from Gat No. 330/14 and in the open space of Gat no.330/14 from village Moharewadi (hereinafter referred as “the suit property”) is the ancestral property of plaintiff and defendant no.2 to 6. Suit property is in the possession of plaintiff. The name of plaintiffs deceased father, deceased uncle Bhika, Lakshman and Sakharam and uncle Govind, Soma Mohare in the Gram Panchayat records of suit property. Suit property is 40 years old and though defendant no.1 has no right over suit property he has started the construction over suit property after demolition of the said house. The house of defendant no.1 is at the western side of suit property. As plaintiff and other co-sharers are residing out of village, defendant no.1 is taking disadvantage and started construction in suit property. When the plaintiff has asked about the same to defendant no.1, he denied to stop the construction and threaten to

plaintiff. Thereupon plaintiff complained to respectable persons of village, but defendant no.1 threatened to plaintiff. Even plaintiff has sent notice to defendant no.1 through his advocate but defendant no.1 has not stopped the construction. Therefore, plaintiff has constrained to file the suit and application. Through this application he prayed for restraining the defendant no.1 from making construction over the suit property.

03. Defendant no.1 filed his written statement and say and contended that, the suit property is their ancestral property and he is co sharer in the suit property. He was not having house to reside, therefore other co sharers namely Govind Tukaram Mohare and Sakharam Tukaram Mohare, Soma Tukaram Mohare, Lakshman Tukaram Mohare executed affidavit and gave consent for entering the name of defendant no.1 to the suit property. Accordingly, his name was entered to the Gram Panchayat Milakat no.63 i.e., suit property. He has started construction in 2022 and plaintiff is having knowledge of same. Even he has taken electric connection in suit property. But, the plaintiff gave application to Gram Panchayat for deleting the entry of name of defendant no.1 from Gram Panchayat Milakat no.63 and thereby his name is deleted from the Gram Panchayat Milkat no.63. Though the plaintiff has filed this application against him for relief of temporary injunction restraining him from carrying out construction in suit property, but plaintiff is having knowledge that the defendant no.1 has completed major part of construction of house. But plaintiff has filed the suit and present application only to harass him. Hence, prayed for rejection of present suit.

04. I heard learned advocates for the both sides. Perused record. Following points arise for my determination to which I have recording my finding for reasoning their below.

SR. NO.	POINTS	FINDINGS
1	Whether prima-facie case made out in favour of plaintiff?	No
2	Whether plaintiff shows that balance of convenience lies in his favour?	No
3	Whether plaintiff proves that irreparable loss would be cause to him in case of rejection of application filed for interim relief?	No
4	What order?	Application is rejected.

REASONS

AS TO POINT NOS. 1 TO 3 :-

These points are interlinked to each-other and so, I have taken them together for discussion.

05. Order 39 Rule 1 of the C.P.C. deals with cases in which temporary injunction may be granted and inter alia provides that where in any suit it is proved by affidavit or otherwise –

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree,
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

The Court may, by order, grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit until the disposal of the suit or until further orders. It is the duty of plaintiff to prove that his property is in danger being damaged by bringing prima-facia material i.e., either in the form of affidavit or otherwise on record. Keeping this principle in mind, I proceed to decide the application in hand.

06. The plaintiff is claiming his ownership and possession over the suit property and defendant no.1 has started construction over suit property without any legal right. Therefore, he has to prima-facie establish it by bringing sufficient material.

08. In order to support the claim, plaintiff has filed on record affidavit, revenue record including 7/12 extracts of Gat No.330/14, assessment extract of Milakat no.63, photographs of construction in suit property, copy of notice send by plaintiff to defendant no.1. Defendant no.1 has relied on 7/12 extract of Gat no.330/14, Assessment extract of Gram Panchayat Milkat No. 63, application for electricity connection, copy of consent deed, electricity bill of suit property, photographs of constructed house.

07. Plaintiff contended that, the suit property is the ancestral property of himself and defendants no.2 to 6, and defendant no.1 is not having any right over suit property. But, defendant no.1 has started construction in suit property without any right. In support of contention, he has filed the 7/12 extract of Gat no.330/14. On perusal of same it seems that name of plaintiff and defendants are in the ownership column. Plaintiff has also filed the assessment extract of suit property. On perusal of same it seems that names of plaintiff and defendant no.2, defendant no.3, father of defendant no.4, 5 and 6 are mentioned in ownership column. Therefore, plaintiff is having ownership of suit property along with other co-sharers.

08. Defendant is claiming that suit property is the ancestral property of plaintiff and all defendants and the names of all the co-sharers are to the 7/12 extract of Gat no.330/14 and Gram Panchayat Milakat no.63 is in the Gat no.330/14. Therefore, suit property is their ancestral property and till date there is no partition between the plaintiff, defendants and other co-sharers. But as he is not having any house to reside, co-sharers namely Govind Tukaram Mohare and Sakharam Tukaram Mohare, Soma Tukaram Mohare, Lakshman Tukaram Mohare executed affidavit and gave consent for entering the name of defendant no.1 to the suit property. Accordingly, his name was entered to the Gram Panchayat Milakat no.63 i.e., suit property. He has started construction in 2022 and plaintiff is having knowledge of same. Even he has taken electric connection in suit property. But, the plaintiff gave application to Gram Panchayat for deleting the entry of name of defendant no.1

from Gram Panchayat Milakat no.63 and thereby his name is deleted from the Gram Panchayat Milkat no.63. In support of the contention, he has filed the copy of the consent affidavit executed before executive magistrate. On perusal of same, it seems that the above mentioned co-sharers gave consent for recording the name of defendant no.1 to the assessment extract of suit property. Also, on perusal of assessment extract of suit property for year 2021-22, it seems that accordingly his name was recorded to the suit property. But after the objection taken by the plaintiff, name of defendant no.1 was deleted from the assessment extract of suit property. Therefore plaintiff has prima-facie ownership right of suit property.

09. As per the contention of plaintiff defendant no.1 has started the construction of house in suit property without any right. Plaintiff has filed the copy of notice sent by him before filing of suit i.e., on 21.11.2019. On perusal of same, it seems that it is the contention of plaintiff that the defendant no.1 has started the construction over his remaining open area adjacent to his house. But plaintiff has not mentioned any specific date when defendant no.1 has started construction in suit property. But as per the contention of plaintiff in suit, he has contended that the defendant no.1 has demolished the old house of plaintiff and started the construction of house. Per contra, defendant no.1 has contended that when the other co-sharers gave him consent for recording his name to suit property, after that he has started construction in suit property i.e. 25.02.2022. He has also taken the electricity connection in suit property. In support of his claim he has filed the copy of application given by him for electricity connection and the

copy of electricity bill for month December 2022. On perusal of same, it seems that the electricity bill of suit property is on the name of defendant no.1.

10. Though the plaintiff is claiming that the defendant no.1 has started construction in suit property but he has not mentioned that when defendant no. 1 has started construction. But on perusal of photographs filed by both the parties, it seems that defendant no.1 has completed the major part of construction. So, it is bounden duty of plaintiff to prove that the defendants are carrying construction over the suit plot. In support respective contention of both parties, they filed alleged photographs of suit plot. It is seen from the photographs annexed with list at Exh.3, which are filed by the plaintiff, that the construction is going on. However, it is seen from the photographs annexed with list at Exh. 17 and 21, which are filed by defendants that the construction is almost completed. However, all aforesaid photos have not bears any date or time of its captured. Further, both the parties have not filed any affidavit of photograph in support of date of its captured so exact current position of the suit property does not come on record. Therefore, the plaintiff failed to bring exact position of the suit property, which is his duty. Therefore, though the plaintiff prove his prima-facie right in the suit property but, he failed to bring cogent evidence or sufficient evidence to show that, the construction over the suit property is going on. Therefore, the prima-facie case to restrain the defendants from carrying construction is not seen.

11. This is admitted fact that the plaintiff and defendant no.1 are having joint ownership and having names to the 7/12

extract of suit property. But the ownership of suit property is disputed, which is in the Gat no.330/14. If it is proved on the conclusion of trial that, the suit property is the ancestral property of himself and not of the defendant no1, the plaintiff will get relief by final decree. Therefore, if injunction is not granted in favour of plaintiff, it will not going to cause irreparable loss. Therefore, the balance of convenience is also not in his favour. Hence, point No. 1 to 3 answered in the negative.

AS TO POINT NO. 4 :-

12. As already discussed above, it becomes clear that, plaintiff failed to prove prima-facie case, balance of convenience and irreparable loss in his favour. So, he is not entitled to injunction to restrain the defendant no.1 from carrying out construction. Hence, in answered point No. 4, following order is passed.

ORDER

1. Application is rejected.
2. Costs in cause.

Ghodegaon
Date:- 16/03/2023.

(M.S.Mali)
Jt. C.J.J.D., Ghodegaon.