

MHPU240005132021

**Reg. Civil Suit No.103/2021**

Mathurabai Khedkar

V/s.

Prashant V. Abhang and others.

ORDER BELOW EXH. NO. 05

(Passed on 22/12/2022)

This is an application filed by plaintiff under Order (XXXIX Rule 1 and 2 of The Code of Civil Procedure, 1908 (for Short 'C.P.C.)) for temporary injunction restraining defendant nos.1 to 3 from causing obstruction to plaintiff's possession in suit property and from carrying out any construction in suit property till final decision of the suit.

2. It is the case of plaintiff that the suit property mentioned in plaint para no. 2 was originally owned and possessed by Bhikaji Savleram Abhang i.e., father of defendant no.2 and 3. In February 1990 Bhikaji Abhang decided to sale suit property for economical need of his family and to repay the loans taken from the other persons for household expenses. Said fact came to the knowledge of plaintiff and she was also in need of land adjacent to the road for construction of the house. Therefore, after discussion Bhikaji Abhang and defendant nos.2 and 3 decided to sale suit property to plaintiff for consideration of Rs.5000/- (Rupees five thousand only). On 02.03.1990 Bhikaji Abhang accepted an amount of Rs.3,000/- as an advance from plaintiff and also executed an agreement for sell bearing registration No.538/1990. Suit property was of new grant

therefore it was decided that after taking permission from Collector thereafter within one month period Bhikaji has to intimate plaintiff and execute the sale deed in favor of plaintiff. All the expenses and responsibility of regrant was totally on Bhikaji and it was mentioned in the said agreement. As per the agreement the application has been filed for getting regrant of suit property before Sub Divisional Officer, Khed. But, more period was required for regrant and the plaintiff was in very need to construct the house. During the period Bhikaji Abhang died.

3. After death of Bhikaji Abhang, defendant nos.2 and 3 being the heirs of Bhikaji executed affidavit on 09/06/2006 before the Tahashildar, Ambegaon and thereby gave consent to the son of plaintiff Dattaram Khedkar to construct house in suit property and they also handover possession of suit property to plaintiff. Accordingly, plaintiff has taken permission for construction of house on suit property on 14/09/2006 from Grampanchayat, Avasari Budruk and has completed the construction of R.C.C. house having area of 600 Sq.Feet. by keeping area for road as per the rules. Plaintiff has also constructed toilet tank at the north-west corner. She also planted flower plants and coconut trees on suit property. Entry of said house is also recorded in Grampanchayat records bearing Milkat No.3159 in the name of plaintiff as owner. Thus, the plaintiff is having legal possession on the suit property from 2006 and she is having settled possession on the suit property.

4. It is also contended that, after construction of house the plaintiff is residing in the said house and enjoying the suit property. As such, when the plaintiff enquired about the

completion of regrant to defendant nos.2 and 3 then they have told that the same is in process and they will not go against the word given by their father. However, defendant nos.2 and 3 in collusion with defendant no.1 and defendant nos.4 to 9 have executed the sale deed of Gat no.89/6 alongwith the suit property on 21/11/2017 bearing registration no. ABG/3697/2017. Thereafter, defendants tried to record name of defendant no.1 to 7/12 extract of gat no.89/6 on the basis of sale deed by mutation no.22812, but plaintiff took objection to said ferfar. After considering the application of plaintiff, the Circle Officer has given direction to record name of defendant no.1 for the area admeasuring 19 R of gat no.89/6 and name of defendant nos.2 and 3 for remaining area admeasuring 0.03 R from the possession of plaintiff. Defendants have not challenged the said order.

5. Previously plaintiff had filed injunction suit against defendant nos.2 and 3, but it was dismissed for want of prosecution. Plaintiff is going to file restoration application. Defendants are causing obstructions to the possession of plaintiff after they got knowledge about the dismissal of suit. On 30/11/2020 defendant nos.3, 4 and 6 came in the suit property and assaulted and abused to plaintiff and gave threats to kill her. Therefore, plaintiff has filed complaint against them in Manchar Police Station. Thereafter, on 20/05/2021 defendant no.1 forcibly brought construction material in suit property and started digging for construction in suit property. Plaintiff obstructed for the same. But, defendant no.1 to 3 have abused to plaintiff and threatened to dispossess her from suit property. Hence, plaintiff has filed complaint against them in Manchar Police Station. But, they did

not take any action against defendants. Therefore, to obstruct defendants from carrying out illegal construction in suit property, plaintiff constrained to file the present suit. Through this application plaintiff is praying an interim relief of injunction against defendant nos.1 to 3 and / or through their agents, persons not to obstruct the peaceful possession of the plaintiff and not to carry out any type of construction in the suit property.

6. Per contra, defendants appeared in the suit and filed their written statement and say at exh.13. The defendants have opposed the allegations in the suit and in application. The defendants claiming that plaintiff has no locus standi to file the suit. They opposed the application on the ground that, suit property is of new grant which cannot be transferred without permission as per sec.43 of Tenancy Act. Therefore, agreement to sale dated 02nd March 1990 is illegal. Also, it is barred by Consolidation & Fragmentation Act. They also contended that, plaintiff has never asked for execution of sale deed in the lifetime of Bhikaji Abhang. Even she has not filed any suit for specific performance of agreement. Therefore, plaintiff cannot ask for any relief after 21 years on the basis of agreement to sale. They further contended that, defendant nos.2 and 3 had never executed any affidavit about giving permission of construction to son of plaintiff in suit property. Therefore, plaintiff cannot claim possession of suit property on the basis of said bogus affidavit.

7. It is further contended by the defendants that, plaintiff was in need of land for construction of house and therefore in the year 2009-2010 she asked the defendant nos.2 and 3 the land for construction of house. Considering the need of plaintiff, defendant

nos.2 and 3 has given the land admeasuring 25 sq.ft. x 24 sq.ft. from eastern side from suit property. Accordingly, plaintiff has constructed house in the area admeasuring 25 sq.ft. x 24 sq.ft. and toilet. Plaintiff is using main road adjacent to the house at east side. Defendant nos.2 and 3 are cultivating the remaining land from so many years. But, plaintiff is trying to harass defendants for taking possession of suit property as now the valuation of lands are increasing.

8. Defendants further contended that, defendants nos.2 and 3 were in economical need and therefore they have executed sale deed of Gat No.89/6 in favour of defendant no.1 for consideration of Rs.10,00,000/- (Rupees Ten Lakhs only) on 21st November 2017. On same day, defendant nos.2 and 3 have given possession of property to defendant no.1. Thereafter, defendant no.1 has made compound wall of tins to Gat No.89/6 excluding the house property of plaintiff. Since then, defendant no.1 is in possession of said property as an owner. However, the plaintiff with intend to harass defendants used to file false applications against them. Even the Circle Officer has passed incorrect order and wrongly recorded the names of defendant nos.2 and 3 to suit property. By taking disadvantage of said order plaintiff is threatening to take possession of suit property. Defendants further contended that, there is no cause of action to the suit of plaintiff. Plaintiff is illegally trying to take possession of suit property. Plaintiff is not having her name to 7/12 extract of suit property and also not having possession over suit property. If injunction is granted defendants will suffer irreparable loss. Hence, they prayed for rejection of exh.5 application with costs.

9. Considering rival submissions, following points arise for determination of which I have recorded my findings alongwith reason as under-

Sr. No.	Points	Findings
1)	Whether prima facie case made out in favour of plaintiff?	Yes
2)	Whether plaintiff shows that balance of convenience lies in her favour?	Yes
3)	Whether plaintiff proves that irreparable loss would be cause to her in case of rejection of application filed for interim relief?	Yes
4)	What order?	Application is allowed.

REASONS

AS TO POINT NOS.1 to 4 :-

10. These points are interrelated to each other. Hence, in order to avoid repetition, those are taken together for discussion. There is no dispute that land originally belongs to the father of defendant nos.2 and 3. Construction of house by plaintiff in the suit property is also not disputed. Defendants have also admitted the agreement for sell executed by their father in favor of plaintiff. Now the question arises as to whether the plaintiff is in possession of suit property i.e., 0.03 R land from Gat no.89/6? The whole controversy revolves around the possession of suit property on the

basis of agreement for sell between plaintiff and father of defendant no.2 and 3 and possession of defendant no.1 over Gat no.89/6 along with suit property on the basis of sale deed executed between defendants.

11. 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.

12. The plaintiff is claiming his possession over the suit property. Therefore, she has to prima facie establish it by bringing sufficient material.

13. Plaintiff has filed revenue record which shows that suit property was originally belongs to Bhikaji Abhang, father of defendant nos.2 and 3. On the death of Bhikaji Abhang, names of defendant nos. 2 and 3 have been recorded to Gat no. 89/6. Plaintiff has filed the copy of agreement for sell executed by Bhikaji in her favor along with list at exh.3. On perusal of same it seems that Bhikaji has executed agreement for sell of 0.03 R land from Gat no.89/6 i.e., suit property in favor of plaintiff for consideration of Rs.5,000/-. He has received Rs.3000/- on the same date. It was decided that after taking necessary permissions Bhikaji will execute sale deed of suit property after receiving remaining amount of Rs.2000/- from the plaintiff. It seems that the defendant no.2 has signed the said agreement as a witness. In support of the contention in application plaintiff has also filed the affidavit executed by defendant nos.2 and 3 along with list at exh.3. On perusal of same it seems that the defendant nos.2 and 3 have executed affidavit before Executive Magistrate, Ambegaon on 09/06/2006 and thereby gave consent to son of plaintiff for construction of house in suit property. They also handed over the possession of suit property by said affidavit. Defendant nos.2 and 3 have denied the execution of said affidavit. As per the contention of defendants possession of any property cannot be transferred without executing any registered deed. On perusal of the affidavit it seems that it is executed on stamp of Rs.100/- and executed before Executive Magistrate, Ambegaon. Though

defendants are denying the execution of said affidavit but they have admitted the construction of house in suit property by plaintiff. Plaintiff has also filed the assessment extract of Grampanchayat Milkat No.3159. On perusal of same it seems that name of plaintiff is recorded to Grampanchayat Milkat No.3159 admeasuring 600 Sq.Ft. of R.C.C. house on 27/04/2010. Plaintiff has also filed construction permission of Grampanchayat, Avasari Budruk. On perusal of same it seems that, Grampanchayat has given construction permission in Gat No.89/6 to plaintiff on 14/09/2006.

14. Plaintiff has also filed tax receipts of Grampanchayat. On perusal of same, it seems that, plaintiff is paying Grampanchayat tax for Milkat No.3159. She has also filed Electricity Bill of Milkat No.3159. Admittedly, plaintiff has constructed house in suit property. Though defendants are denying the possession of plaintiff on the basis of agreement to sell they contended that, they have given the land to plaintiff admeasuring 25 Sq.Ft. x 24 Sq.Ft. from suit property for construction of house. Also the plaintiff has constructed house in suit property admeasuring 25 Sq.Ft. x 24 Sq.Ft. But as regards to remaining land is concerned though defendants are denying the possession of plaintiff over suit property, documents filed by plaintiff prima facie shows that she is in possession of suit property. As per settled law possession of any immovable property above Rs.100/- can be transferred only by registered document. Plaintiff is claiming that defendant nos.2 and 3 have transferred the possession of suit property by executing the affidavit before executive magistrate. On perusal of same it seems that said

document is executed on stamp of Rs.100/- and is not registered as per the provisions of Indian Registration Act. But it can be considered after recording evidence during trial. Even plaintiff has submitted that the defendants have not challenged the order of Circle Officer before any revenue court nor has filed any suit in court. Defendant no. 2 and 3 have filed their and villagers affidavits contending that on 09/06/2006, defendant no. 2 and 3 have not executed any document in favour of Dattatray Shahaji Khedkar. The document dated 09/06/2006 filed on record is forged and without consideration. They have not given suit property for house construction to Dattatray Shahaji Khedkar. Defendants have also filed copy of appeal filed against the order passed by Circle Officer dated 20/08/2019. From the copy of the appeal it reveals that after final hearing of argument of Exh. 05 in the present suit, on 15/12/2022 only defendant no. 1 has filed said appeal against plaintiff and other defendants. Therefore, it is separate proceeding and will take time to decide the same.

15. As per argument of ld. Advocate of defendant, the plaintiff has not claimed the specific performance of agreement for sell from defendant nos. 2 and 3. As per the argument of ld. Advocate of the plaintiff, plaintiff is in settled possession of suit property. As discussed above, prima facie it seems that plaintiff is in possession of suit property. Therefore, her possession needs to be protected. Therefore, plaintiff has proved prima facie case in her favor. Hence, I answer point no.1 in affirmative.

16. As regards to balance of convenience is concerned it reveals that, plaintiff is claiming the possession of suit property on the basis of agreement to sell executed in the year 1990 and the

affidavit executed by defendant nos.2 and 3 regarding possession of suit property and consent given by defendant no.2 and 3 regarding construction of house in suit property. As discussed above it prima facie appears that the plaintiff is in possession of suit property. Therefore, she is entitled to protect her possession over the suit property. If her possession will not be protected greater hardship and substantive mischief will be caused to her. In such circumstances, plaintiff has balance of convenience in her favour. Therefore, if injunction is not granted to the plaintiff, being an old aged person, plaintiff will suffer irreparable loss. If defendants succeed in proving that plaintiff is not entitled to possession of whole suit property, they will get protection by final decree. In the result, I have answered point nos.2 and 3 in affirmative and while answering point no.4 I pass following order :-

ORDER

1. Application is allowed.
2. The defendants are restrained from interfering peaceful possession of plaintiff in suit property by himself or through their representative.
3. The defendant no. 1 is restrained from doing any construction work in suit property till final disposal of suit by himself or through their representative.
4. Costs in cause.

Dt.22/12/2022
Ghodegaon

(M. S. Mali)
2nd Jt. Civil Judge Junior Division
Ghodegaon