

ORDER BELOW EXH. 5 IN REGULAR CIVIL SUIT NO.102/2014

01. This is an application for temporary injunction filed under Order 39 Rule 1 and 2 for protecting plaintiff's possession over the suit property, till the decision of the suit.

02. The case of plaintiff in short is as follows :

That the plaintiff's have filed suit for specific performance of an agreement and permanent injunction against the defendants. Plaintiff's are claiming injunction that the defendants should not to disturb or interfere with the physical possession of the plaintiff's over the suit property. The plaintiff No.1 is Manager of the plaintiff company. Plaintiff no.2 is Promoter of the company. The defendant No.1 to 4 are the legal heirs of Mr. Dudha Dagadu Patil and Mr. Kashinath Dagadu Patil who executed the agreement. Both were the original tenants of the suit land. The defendants have executed an agreement of sale on 15/11/1992 in favour of plaintiff no. 2 Chief Director of Plaintiff no.1. The agreement is binding on all defendants. The defendants has to bring the sale permission required for executing sale deed. In pursuant to the agreement the plaintiff No.1 came into possession of the suit land. On 22/07/2014 defendants illegally entered and braked the Wall Compound by means of J.C.B. Machine. They threatened the plaintiff to take forcible possession of the suit land. Hence this application.

03. The defendants No.1 to 4 resisted the application vide their detailed

say Ex.26. The Suit is proceeded ex-parte against the defendants no. 5 and 6. The defendant no. 7 has adopted the say of defendants no. 1 to 4. The defendants have come with the case of total denial of execution of an agreement, handing over possession of the suit land to the plaintiff's. According to the defendants the agreement is suspicious. There is no preivity of contract. No possession is delivered by the predecessor's of defendants. The entire construction in defendants land is illegal. The defendants are in possession of the suit land. Plaintiff's had filed R.C.S. no. 40/2013 and filed interim application for temporary injunction. The same was rejected. That decision has attained finality. In that suit it was observed that plaintiff's are not in possession of the suit land. Thereafter plaintiff's unconditionally withdrawn the suit. The finding as to possession has attained finality. The plaintiff's can not file suit again against the defendants, on same grounds. The suit and claim in respect of possession of suit property is barred under Order 23 Rule (1)(4)(B) of Code of Civil Procedure. Plaintiff's have not come with clean hands and suppressed material facts. Accordingly prayed for rejecting the same.

04. Heard Advocate V. K. Naik for plaintiff's. Heard Advocate V. M. Namjoshi for the defendant No.1 to 4. Heard Advocate D. N. Shetye for the defendant No.7.

05. In view of Order 39 Rule 1 and 2 of Code of Civil Procedure, following points arose for my determination and I have recorded findings with reasons there to as follows :-

	<u>POINTS</u>		<u>FINDINGS</u>
1	Whether plaintiff's prove prima-facie case in their favour ?		In the Negative.
2	Whether plaintiff's prove balance of convenience in their favour ?		In the Negative.
3	Who will suffer irreparable loss if application is allowed ?		Defendants
4	What order ?		Application is rejected.

REASONS

AS TO POINT NO.1 :-

06. The Ld. counsel for plaintiff vehemently submitted that they are in possession of the suit land by virtue of an agreement of sale, alleged to be executed by the predecessor in title of the defendant No.1 to 4, since 1992. They are in settle possession of the suit land. They are running company in the suit land. The wall compound is for protection of the company and as such they shall be protected from the illegal disturbance, obstruction and damaging the company property by the defendants. As against this the Ld.counsel for defendant No.1 to 4 submitted that plaintiff's have not established prima-facie case. Plaintiff's have no legal right to file suit again on same grounds when the earlier suit is unconditionally withdrawn without reserving right to file suit in future. The

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agreement of which plaintiff's are claiming specific performance, is suspicious. There is nothing on record to show the legal possession of the plaintiff's in the suit property. The Ld. counsel for defendant No.7 also submitted in the same line as of defendant No.1 to 4.

07. Now for determining the question of prima-facie case, it will have to be seen whether plaintiff's have established accrual of right to sue on same grounds again when the earlier suit is filed on similar facts and question of law? coupled with the aspect of legal and lawful possession of the suit property. So far as the right to sue on same grounds is concerned, the earlier civil suit R.C.S.No. 40/2013 was simplicitor suit for injunction, and relief was claimed on account of execution of agreement of sale in dispute. The suit is unconditionally withdrawn by the plaintiff's. The withdrawal being unconditional now plaintiff's are estopped from filling second suit again on the same subject matter.(Estoppel By Conduct and Law) Therefore in view of Order 23 Rule (1)(4)(B), the Code of Civil Procedure the main suit and other reliefs itself are questionable and in doubt. This sole aspect has struck the plaintiff's claim about making out strong prima facie case on different cause of action.

08. Secondly, the execution of alleged agreement of sale is denied by the defendants. On perusal of copy of an agreement of sale, it nowhere shows exact date of its execution. The title of agreement clearly speaks for agreement without possession of the suit property. No doubt, undated agreement bears thumb impression and signatures of Dudha Dagadu Patil and Kashinath Dagadu Patil along with signature of consent of original landlord. However the part of

execution and endorsing the signatures is a part to be decided by virtue of evidence of both parties. Prima facie the execution of agreement clearly appears suspicious.

09. Prima-facie the document of agreement of sale appears suspicious as the stamp paper on which it came to be executed also do not shows any date of purchase. Needless to state that part of consideration amount appears to have been paid by way of cheque payment. Question crops up when the agreement is executed only with plaintiff no.2 in his individual capacity, why the payment is made through the vouchers of Plaintiff no.1. If it was the intention to purchase the suit land for company why the agreement is made in individual capacity of plaintiff no.2. Plaintiff's contentions to that effect are not satisfactory to consider their prima-facie case.

10. Now coming to accruing legal right or interest of the plaintiff's in the suit land. Plaintiff's have come with a case that by virtue of the aforesaid dispute unregistered documents of agreement to sale and possession receipt they are in possession of the suit land from the tenants with the consent of original landlords. It was decided between them to execute a final sale deed after getting the appropriate permissions by the tenants. That means and establishes that the tenants that is predecessor in title of the defendants No.1 to 4 had no legal right in the year 1992 to execute such an agreement and parting possession to the plaintiff's without obtaining the legal ownership of the suit land. Though the agreement seems to be signed by the landlord as a consentor, the possession receipt is not signed by the Landlord.

11. Plaintiff's are claiming legal right on the basis of the two crucial documents that is an agreement of sale and the possession receipt. Both documents nowhere shows exact date of its execution. The documents are unregistered. Therefore in view of Sec. 53 (A) of Transfer of Property Act, the plaintiff's cannot claim protection of their possession in the suit land as of right. In fact needless to state that even if, the tenants might be the permanent tenants, but themselves have not accrued a legal ownership in the suit land. Therefore, they cannot transfer their right of tenancy or interest in the suit land to the plaintiff's for non agriculture purpose. The basic transaction alleged to be, itself prima-facie seems to be illegal and void-ab-initio. Therefore, there is no question of determination of legal right or its accrual to the plaintiff's at a juncture of interim stage of the suit. Plaintiff's have miserably failed to establish prima-facie case in their favour. Hence, I answer point No. 1 in the negative.

AS TO POINT NO.2 :-

12. Much more is argued and tried to be emphasize that plaintiff's are in settled possession, new cause of action is arose, etc. for considering the balance of convenience. Therefore they should not be dispossessed without following due course of law by the defendants. No doubt, it is well settled principle of law that anybody in possession of the disputed part of the property should not be evicted without due course of law. His possession would have to be protected, even if he is trespasser, encroacher or unlawful possessor of the suit land. However, in the case in hand plaintiff's have sought protection of alleged un-lawful possession on the basis of disputed unregistered agreement of sale of which they are claiming

specific performance.

13. If the plaint, pleadings and prayers are seen, it appraises that plaintiff is taking shelter of undated agreement of sale and possession receipt for seeking relief of specific performance and injunction against the defendants. Now so far as plaintiff No.1 is concerned, he is not party to agreement nor agreement seems to be executed for and on behalf of Plaintiff no.1. In fact the reliefs are seems to be claimed by Plaintiff no.1 Company through plaintiff no.2 under the garb of Directorship. So far as balance of convenience is concerned in absence of legal right as well as establishing the lawful and legal possession over the suit property, the plaintiff's cannot claim any protection without strong prima facie case.

14. Plaintiff's are claiming relief of temporary injunction against true owner of the suit land, which cannot be granted, in absence of prima-facie legal right to possess the property. Therefore with due respect to the ratio laid down by Hon'ble Apex Court in Catena of decisions that the party in possession shall not be evicted without following due course of law will not be applicable to the case in hand. Once the basic action is illegal, it is always illegal. An illegality of act of parties can not be cured by taking shelter of provisions of law. Plaintiff's are claiming specific performance of an undated agreement of year 1992 in year 2014. The earlier suit was not for specific performance. Plaintiff's could have claimed the same reliefs in previous suit but the same are not claimed and only suit for permanent injunction alongwith theory of adverse possession was brought. No application in previous suit under Order 2 Rule 2 for reserving right to claim subsequently. In the facts and circumstances, there is reason to believe

that plaintiff's have not come with clean hands. Hence, balance of convenience certainly lies in favour of defendants. Hence, I answer point No.2 in the Negative.

15. **AS TO POINT NO.3 :-**

So far as irreparable loss to the parties is concerned, once thing is illegal it remains illegal till its final fate. So also, plaintiff's have alternative remedy to claim the earnest money and damages caused to them, if they succeeds in proving their case at final hearing. Therefore their would not be any irreparable loss causing to plaintiff's. On the contrary whatever loss causing is to the defendants who are true owners, because plaintiff's seems to be enjoying their land without lawful agreement. In such circumstance, if the interim relief is granted in favour of plaintiff's, without having strong prima-facie case, balance of convenience, it will cause prejudice to the legal rights of the defendants. Therefore I answer the point accordingly in favour of defendants.

16. In view of above discussion and prima-facie evidence on record, I pass the following order.

ORDER

1	Application is rejected.
2	No order as to costs.
3	Dictated and pronounced in open Court.

Dt.02/09/2014.

(M.P.Saraf)
Civil Judge J.D.,Khalapur

Khalapur.

Decided on : 02/09/2014.
Dictated on : 02/09/2014.
Typed on . : 02/09/2014.