



### Order below Exh. 5

The present application is filed by plaintiffs for grant of temporary injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908, to restrain defendant nos. 1 and 2 from causing encroachment over, enter into and obstructing possession of the plaintiffs.

2. Facts of case of plaintiffs in brief are as follows :-

This suit is filed for removal of encroachment and injunction. Plaintiffs owned and possessed open place of area 9,000 sq.foot. of which on assessment extract property no. 3/8 and house admeasuring 30 X 50 foot house no. 3/8a and office admeasuring 10 X 10 foot bearing property no. 3/8b. On said property defendant no. 1 caused encroachment by carrying out construction of house bearing property no. 88. Now onwards said property will be called as suit property. Said suit property was initially own by Rajaram Mane and Gajanan More being karta of joint family. From Rajaram Mane and Gajanan More, Mr. Ganesh Panvalkar purchased said property by registered document bearing no. 1136/1971 and 1135/1971. Afterward Uncle of plaintiff purchased said property from Ganesh Panvalkar on 27/09/1976. vide registered documents bearing no. 400/1976. Since then plaintiff have possession over suit property. On 10<sup>th</sup> March 1989 vide partition deed bearing no. 739/1989 two properties were given in the share of plaintiff Mr. Shreedhar Salvi and Pandurang Salvi. Since then plaintiff is owner of said properties. But defendant no. 1 illegally tried to transfer house no. 88 to his daughter Vaishali Jadhav. Now said property is in name of defendant no. 2. For that purpose defendant no. 1 did not given document to support said transfer. Defendant no. 1 have no concern with



the suit property. Without permission from concern authority house no. 88 was constructed. By taking into consideration the nature of the construction carried out by defendant no. 1, it will effect the easementary right of the plaintiff.

3. Ld. Advocate for plaintiffs submitted that, plaintiff has made out the prima facie case in his favour. Balance of convenience lies in favour of plaintiff. If defendant nos 1 and 2 are not restricted then irreparable loss would be caused to plaintiffs. Hence temporary injunction may please be granted against defendants.

4. Defendant no. 1 appeared and filed his say and written statement at exh. 42. By filing pursis at exh. 51 defendant no. 2 adopted say and written statement filed by defendant no. 1. They contended that, father of the plaintiff sold portion mentioned in para 3 of the plaint to Mr. Ganesh Panvalkar. Possession was also transferred to Ganesh Panvalkar. Thereafter Ganesh Panvalkar sold said property to uncle of the plaintiff. But the portion on which construction is carried out was never sold by defendant to plaintiffs. Defendants are in possession of said portion since immemorial period. Foundation of the house was there since 1990. They did not know about the partition between plaintiffs. On 22/02/1989 defendant no. 1 filed an application for construction of house. Accordingly concern authority given permission to construct the house. Defendant no. 1 have right to alienate suit property. Defendant no. 1 is paying tax since 1990. Plaintiffs filed this suit to harass defendants. Plaintiffs not came in the Court with the clean hands. They want to grab the suit property. Suit property was alienate by defendant no. 1 to defendant no. 3 through gift deed dated 11/09/2019. Said document is registered document. Plaintiffs not claim cancellation of said gift deed.



5. Learned advocate for defendant nos. 1 and 2 submitted that, there is no situation to grant temporary injunction. Irreparable loss would be cause to defendant nos. 1 and 2 if temporary injunction will be granted. Hence, application of temporary injunction may please be rejected with cost.

6. Perused an application and say. Perused all the documents filed by parties. Heard learned advocates for both the sides. Following point arose for the determination, I have recorded my findings thereon along with reasons are as under :

Sr. No.	Points		Findings
1.	Whether plaintiffs has made out prima facie case?	..	No
2.	In whose favour the balance of convenience lies?	..	In the favour of defendant
3.	Who will suffer irreparable loss and hardship ?	..	Defendant, if the injunction will granted.
4.	What order?	..	The application is rejected.

### REASONS

#### Point no. 1 :-

7. The learned advocate Mr. V.T. Mhatre for plaintiffs argued that plaintiffs is lawful owner and possessor of the suit property. This suit is filed against trespasser. Plaintiffs have house, office and plaint of fruits over the suit property. Defendants taken permission of construction by making false statement in concern local authority. Now defendant nos. 1 and 2 started construction over the suit property, though plaintiffs are



owner of the suit property. No alternative remedy available to the plaintiff. Initially permission to repair house was granted on 03/01/1990, but permission to construct the house was granted on 03/03/1997. It shows that, defendants taken bogus permission for concern authority. By resolution dated 29/05/2018 alleged house no. 88 was transferred in the name of defendant no. 3. There is a over writing in the assessment entry of said house. Though, defendant no. 1 have no authority to transfer the house still he transfer the house in favour of defendant no. 3. Moreover, though the meeting of local authority was taken place on 30/03/2010 still in the minutes of meeting date of stamp mentioned as 05/05/2010. Suit property is ancestral property of plaintiffs. Still, defendants carrying out construction over the suit property. The act of defendant nos. 1 and 2 changing the nature of suit property. The act of construction causes irreparable loss to plaintiffs. Hence he prayed that prima facie case is in favour of plaintiffs. He relied on -

A. 2007(2)All MR 317 Shri. Sidharam Yanagandul Vs. State of Maharashtra. According to learned advocate of plaintiffs in this case it was held that, mere fact that a structure which is erected without the permission of planning authority and unauthorisedly is subsequently assessed to the property tax by the municipal corporation would not change the unauthorised character of the structure nor would make the structure authorised from the date of assessment.

8. Heard learned advocate Mr. O.S. Chandane for defendant no. 1. Learned advocate for defendant no. 2 adopted said argument. Learned advocate for defendant no. 1 submitted that, suit property was legally owned by defendant no. 1. As per his will and wish he transferred suit property through gift deed to defendant no. 3. In map filed by plaintiff there is no encroachment shown. According to assessment extract of suit property defendant no. 1 is the owner of suit property. Further according to sale deed suit property initially owned by defendant



no. 1. Long back entry in revenue records deems to be valid. Construction over the suit property is already completed. Hence no reason to grant temporary injunction. Plaintiffs failed to prove prima facie case. Hence he prayed to reject the application. He submitted that, ratio of the citation filed by learned advocate for plaintiff is not applicable to this case as entry of name of defendant no. 3 was taken place long back.

9. Perused plaint, application and say. Gone through the submission case law filed by learned advocate. Before deciding application it is necessary to go through the relevant provision of the law. Hence I have gone through the provisions of Order XXXIX Rule 1 of the Code of Civil Procedure which runs as follows -

**Order XXXIX Rule 1. Cases in which temporary injunction may be granted.**—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, or (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, plaintiffs or otherwise cause injury to plaintiffs 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 1[or dispossession of



*plaintiffs, or otherwise causing injury to plaintiffs 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.*

10. After going through above mentioned provision it is clear that the temporary injunction may be granted to secure property in danger.

11. Considering submission and documents on record, it seems that plaintiffs are claiming temporary injunction against defendant nos. 1 and 2 restraining them from carrying out construction over suit property. Both parties claim ownership over the suit property. Entries in the revenue record was taken place before decades of time. Plaintiff failed to show justiciable reason as to why they not approach to this Court earlier. Case law filed by learned advocate for plaintiff would not much more helpful to the plaintiff as while deciding temporary injunction application, there is no need to go in the deep of the matter.

12. Though to decide temporary injunction application the Court have to look prima facie case, but in this suit both parties are claiming ownership over the suit property and have allegation against other party about the encroachment. There is no material on record to show that, defendants are carrying out construction over the suit property and the photographs are of the same construction. If in due course of time the plaintiff prove that, the suit property is owned by them and defendant cause encroachment over it, then they have right to get possession of suit property by removal of said encroachment. As both parties are claiming ownership over the suit property and allegations of encroachment by other party. Moreover, there is no reason as to why plaintiffs not claim temporary injunction against defendant no.3. Hence, by taking into



consideration facts and circumstances of the case it seems that, the plaintiff failed to establish prima facie case in his favour. Hence, I answer point no. 1 in negative.

**Point no. 2 and 3 :-**

13. So far as factors of balance of convenience and irreparable loss are concerned, from the facts of the case its seems that, both parties are claiming ownership over the suit property. plaintiffs claim that, they are owners of the suit property. On the other hand defendants are claiming ownership over the suit property. If plaintiff succeeded in this suit they have right to get peaceful possession of suit property by removing construction carried out by defendant. But if injunction granted and plaintiffs failed to prove his case then it will cause irreparable loss to defendants. Defendants claimed that, construction is already completed. Hence, factor of balance of convenience and irreparable loss are in the favour of defendants. Hence, I answer point nos. 2 and 3 in favour of defendants.

**Point no. 4 :-**

14. In the light of above discussion, it is concluded that plaintiffs failed to prove the prima facie case. The factors of balance of convenience and irreparable loss lie in favour of defendants. Hence, the application needs to be rejected. While answering to point no. 4 I pass the following order -

**ORDER**

The application below Exh. 5 is rejected with cost.

Place: Khalapur  
Date : 10.01.2020

(Vishal S. Dhondage)  
Jt. Civil Judge, J.D., Khalapur