

RCS 56/2016

Motiram Kashinath Gavand & others 2

v.

Haribhau Janardan Gavand & others2

ORDER BELOW EXHIBIT 5

1. Plaintiff preferred the present application for temporary injunction in RCS 56/2016 suit for declaration, removal of encroachment recovery of possession and perpetual injunction.
2. In nutshell it is case of plaintiffs that
In year 1984 ancestral properties of plaintiffs situated at village Pirkon were partitioned and S.N.117 H.N. 2B and S.N. 141 were given to share of father of plaintiffs namely Kashinath Govind Gavand. They are referred to as the suit property. After death of father of plaintiffs, suit property devolve upon plaintiffs and are in their possession. Further that defendants encroached upon the suit property to the extent of 1000 sq. ft. House no. 408 over the said property is in name of defendant no.1 Haribhau and house no. 408B is in name of defendant no.3 Tukaram. According to plaintiffs, defendants are trying to encroach over the remaining land admeasuring approximately 1000 Sq. ft. in the suit property. Defendants have no right and interests in the suit property. According to plaintiffs, cause of action first arose approximately 10 years ago, when completed construction of house and in February year 2016, when defendants started construction of house over the suit property. Further, it is contended that during pendency of this suit, if defendants succeeded in completing the construction of the

house then plaintiffs would suffer irreparable loss. Balance of convenience is in favour of plaintiffs and therefore plaintiffs prayed for temporary injunction against defendants.

3. Defendants strongly objected the present application and contended that Kashinath Govind Gavand mutated his name with help of revenue authority by taking advantage of plight of defendants. Father of defendants Janardan Posha Gavand were tenant in the S.N. 117/2B and vide ME 1604 said property was certified in name of Janardan Posha Gavand. Further, vide ME 1118 name of Janardan Posha Gavand is mutated as owner of the suit property. Further, it is contended that defendants are owners and are in possession of S.N. 141 H.N. 8A and defendant no.2 Namdev has built house thereon. According to them, suit properties are owned by defendants and plaintiffs had no cause of action for the present suit. Plaintiffs have no *locus standi* to file the present application and prayed to reject the present application.
4. Perused application and say. Heard both sides. Perused record.
5. Learned advocate for plaintiff argued that suit property S.N. 117/2B and S.N. 141/8A were given to share of father of plaintiffs vide oral partition between father of plaintiffs namely Kashinath and father of defendants namely Janardan. Plaintiffs relied on ME 1761 in this regard. According to plaintiffs, defendants have not challenged the said ME till today and therefore defendants have relinquished their right and interests in the suit property. After death of father of plaintiffs, suit property devolve upon plaintiffs. Plaintiffs relied on ME 1997 in this regard. It is argued that plaintiffs were enjoying their right of possession

approximately in year 2005 defendant no.1 and defendant no. 3 erected house no. 408A and 408B and have encroached over remaining land in S.N. 141/ 8A to the extent of 1000 sq. ft. Further it is argued that names of plaintiffs appears in 7/12 extract of the suit property. Defendants have not obtained permission from Grampanchayat Pirkon for construction of House no. 408A and 408B and therefore, alleged construction is illegal. According to plaintiffs, they have prima facie case. Balance of convenience is in their favour and they would suffer irreparable loss, if temporary injunction is not granted. It is prayed to allow the present application. Plaintiffs relied upon **Mr. Armando Pereira & another v. Mr. Krishnanath V. Malvankar 1999(2) ALL MR 660.**

6. Per contra, defendants argued that suit of plaintiffs is not maintainable and same is bad for non-joinder of necessary party and also by article 58 of the limitation act. Plaintiffs under-valued the suit and therefore balance of convenience is not in favour of plaintiffs. Suit properties are governed by tenancy law and father of defendants were tenant in S.N. 117/2A and has purchased the same under 32G of tenancy law. Entire amount was paid by father of defendant Janardan and therefore father of defendants are owner of the suit property. Father of defendants were not tenant in S.N. 141/8A and are owners of the same and ME 1118 was certified to that effect. Further it is argued that order of status quo was obtained by misleading the court. Defendants are regularly paying tax to Grampanchayat Pirkon in respect of the House no. 408A and 408 B. Only work of construction of roof over the house no. 408A and 408B has remained and the rainy season is about to commence. Plaintiffs have no prima facie case. Balance of convenience is not in their favour.

Further, if temporary injunction as prayed for is granted, it would cause irreparable loss to defendants than plaintiffs. Therefore, defendants prayed to reject the present application. In support of contentions reliance is placed on

- i. Kishorbhai Premchand Shah v. Hirji Bhojraj & sons Kutchi Oswal Jain Chhatralay Trust & ors 2014(1) ALL MR 185**
- ii. Pushpalata Narayan Thorbole v. Purshottam Dattatray Prabhu (since deceased through LRs) and others 2018 DGLS(Bom.)836**
- iii. Bhimabai Mahadeo Kambekar(dead) through Legal Representative v. Arthur Import and Export Company and others (2019) 3 SCC 191**
- iv. H. Lakshmaiah Reddy & ors v. L. Venkatesh Reddy 2015(4) ALL MR 914 (S.C.)**
- v. Piar Chand and ors v. Sant Ram and ors AIR 2017 (NOC) 918 HP**

7. From rival contentions of both sides following points arise for my determination. My findings with reasons thereon are stated as under

POINTS

- i. Whether plaintiffs have prima facie case? No.
- ii. Whether balance of convenience is in favour of plaintiffs? No.
- iii. Whether plaintiffs would suffer irreparable loss if relief as prayed is not granted? No.
- iv. What order? Application rejected

REASONS

8. As all points (i) to (iii) are interconnected with each other and based on same facts and

circumstances they are discussed together to avoid repetition.

9. According to plaintiffs, S.N. 117/2B and S.N. 141/8A are suit property. On careful reading of application for temporary injunction, it is pertinent to note that plaintiffs failed to describe the suit property properly, boundaries of the suit property are not mentioned. Further, in paragraph 2 of the present application, plaintiffs averred about alleged encroachment at hands of defendants. However, it is not specifically averred and pleaded as to when, on which date alleged encroachment was made by defendants.
10. Plaintiffs are seeking temporary injunction to restrain defendants from further construction of alleged houses over S.N. 141/8A. According to plaintiffs, after death of their father Kashinath, they are in possession of the suit property and defendants have no right to construct houses as alleged over the suit property. Perused documents filed by plaintiffs below Exh.4. Perused certified copy of 7/12 extract of S.N. 117/2B dated 29/03/2016 produced on record. On perusal of the same, it appears in names of plaintiffs and remark "*niyantrit satta prakar*" is mentioned over the same. On perusal of certified copy of 7/12 extract of S.N. 141/8/A/1, it appears in name of plaintiffs however same is not described as the suit property and therefore it cannot be taken into consideration. From certified copy of ME 1761 dated 18/02/2013, it appears that name of Kashinath Gavand was mutated to the suit property. Further, on perusal of certified entry of ME 1861, it appears that *shet sara* for S.N.141/8A was omitted since year 1984 on count of acquisition vide order of Tahsildar Uran. Further, on perusal of ME 2010 dated 18/02/2013 it appears

that S.N.141/8A is in name of PWD, Maharashtra. If this is the factual situation of the suit property, then both parties have not stated before the court that S.N. 141/8A was acquired.

11. Plaintiffs relied on affidavit of Rukmini Pandurang Patil (Exh.62), Supriya Gurunath Gavand (Exh.63), Prabhavati Parashuram Gavand (Exh.64). On perusal of affidavits at Exh. 62 to 64, it is not clear whether deponents are adjacent land holder of the suit property. Therefore, in the present matter, mere filing of affidavits is of no help to plaintiffs. 7/12 extract of S.N.141/8/A/1 is produced by plaintiffs on record. However, same is not described as suit property in the present suit.

12. In support of contentions plaintiffs relied upon **Mr. Armando Pereira & another (cited supra)**. However, facts and circumstances in cases relied on by plaintiffs is totally different from case in hand and therefore with due respect to authority it of no help to the case of plaintiffs. On the other hand, defendants argued that suit is bad for non-joinder of necessary party, suit is not properly valued, barred by limitation and also barred by section 85 of the Bombay Tenancy and Agricultural Lands Act. Defendants produced certified copy of ME 1604 to show that Janardan Posha Gavand paid amount as per section 32G of BTAL Act regarding suit property S.N. 117/2B. However, all these contentions can be taken into consideration at time of final decision of the suit and therefore, does not sustain. In the present matter, defendants relied upon **Kishorbhai Premchand Shah (cited supra), Pushpalata Narayan Thorbole (cited supra), Bhimabai Mahadeo Kambekar(dead) through Legal Representative (cited supra), H. Lakshmaiah Reddy & ors (cited supra) and Piar Chand**

and ors (cited supra). However, with due respect to authorities, facts and circumstances and point under consideration in cases relied on by defendants are different from case in hand and therefore they do not come to help of defendants.

13. It is pertinent to note that plaintiffs averred and pleaded that suit property was given to share of their father Kashinath vide oral partition. However, it is not specifically averred and pleaded that when alleged oral partition took place, who were parties to alleged oral partition. It is argued that vide ME 1761 suit property came to share of father of plaintiffs. However, arguments made and entry certified vide ME 1761 appears to be totally different. Therefore, submission does not sustain. It appears from ME 1861 and ME 2010 produced by plaintiffs on record that suit property S.N. 141/8A was acquired and separate 7/12 extract was made in name of PWD, Maharashtra state. It is pertinent to note that both parties have not pleaded nor brought this fact to the notice of the court. According to plaintiffs, S.N. 141/8A is the suit property. However, plaintiffs produced 7/12 extract of S.N. 141/8/A/1. Suit property is not properly described, boundaries are not mentioned and therefore suit property cannot be ascertained. Plaintiffs failed to prove their prima facie possession over the suit property in question. Therefore, point no. (i) is answered in negative. Plaintiffs failed to prove prima facie case and therefore rest of points does not sustain. Accordingly, point no. (ii) and (iii) are answered in negative.
14. Plaintiffs failed to prove prima facie case. Both parties failed to bring to the notice of the court about acquisition of S.N. 141/8A and entry certified vide ME 2010 and ME 1861. Plaintiffs

have not approached the court with clean hands. Contentions raised by the plaintiffs can be decided on merit at time of trial. In peculiar facts and circumstances of the present case, for reasons stated above it will not be justifiable to extend equitable relief of temporary injunction to plaintiffs. Therefore, in the interests of justice, I deem fit to pass following order,

ORDER

Application Exh. 5 rejected with costs.
(Pronounced in open court)

Date: 30/04/2016
Uran

(V.R.Kulkarni)
2nd Jt. Civil Judge, J.D.,
Uran