

: ORDER BELOW EXH.5 IN CIVIL APPEAL NO. 31/2019 :
(CNR No. MHRG15-000514-2019)

1) This is an application filed under Order 39, Rule 1 & 2 of the Code of Civil Procedure, by the appellant (original plaintiff), restraining the respondent (original defendant) not to change the nature of the suit property, during pendency of the appeal. (for the sake of convenience, hereinafter, parties are referred as per their original nomenclature).

2) According to the appellant/plaintiff, she has purchased 2 R land out of Survey No.27/1A/1 total admeasuring 52.4 R land. Out of said 2 R land, defendant has encroached upon 1 R land. She has purchased the said property after paying consideration amount, which is not disputed by the defendant. The defendant has attempted to create third party rights in the said 1 R land and using it by raising compound and cattle-shed and also intended to do permanent construction of the cattle-shed. If, he has done so, it will cause irreparable loss to the plaintiff and therefore, she is seeking temporary injunction, during pendency of this appeal.

3) The respondent/defendant has filed his reply at Exh.12 and has strongly opposed the application, contending that there is a bar of the Bombay Prevention of the Fragmentation and Consolidation of Land Holdings Act, 1947. The property belongs to the defendant and other co-sharers. He has only taken hand loan of Rs.60,000/- and deed was of Mortgage-deed. However, by cheating him, sale-deed was executed. There is no partition between the defendant and his other co-sharers and consent of

- 2 -

other co-sharers is also not taken. The notices were also not given to other co-sharers and property is admeasuring 4.5 R and there cannot be encroachment of 4.5 R land in 2 R land. The suit of the plaintiff is already dismissed and therefore, it is submitted to reject the application.

4) Considering the rival submissions on behalf of the parties, following points arise for determination and I have given findings thereon for the reasons stated below :-

<u>POINTS</u>	<u>FINDINGS</u>
1) Whether plaintiff has made out prima facie case ?	In the affirmative
2) Whether balance of convenience lies in favour of the plaintiff ?	In the affirmative
3) Whether irreparable loss would be caused to the plaintiff, if temporary injunction is not granted ?	In the affirmative
4) What Order & Decree ?	As per final order

: REASONS :

5) Heard Ld. Advocate Miss. S. A. Yelukar, for the appellant and Ld. Advocate Shri. Mubin Jhetam, for the respondent.

AS TO POINTS NO. 1 TO 3

6) The plaintiff has filed suit for removal of encroachment and perpetual injunction, is dismissed by the Court. There are observations against the plaintiff/present appellant and also in respect of the execution of sale-deed, which is suffers from the provisions of the Bombay Prevention of the Fragmentation and Consolidation of Land Holdings Act, 1947 and the consent of other co-sharers etc. However, the fact that the respondent has executed the registered deed in respect of 2 R land is not disputed. But, according to him, it was mortgage-deed and by cheating, the sale-deed was executed. So, it is for the respondent to prove the cheating and intention of the parties was to execute the mortgage-deed, against the evidence of registered sale-deed. The registered sale-deed executed by the defendant is on record in respect of 2 R land. Even, it appears that the respondent is not disputing that he is using said property.

7) The decree is under challenge and still the rights of the party in respect of the disputed property is under consideration. In that case, if the respondent carry out any permanent construction or change the nature of the suit property, it will cause loss to the plaintiff. It is necessary to preserve the present position of the suit property till decision of the appeal and therefore, I find the the plaintiff has made out the prima facie case for temporary injunction against the defendant not to carry out any permanent construction or not to change the nature of the disputed property, till decision of the appeal is sustainable. No irreparable loss would be caused to the defendant, if nature of

- 4 -

property is kept as it is during pendency of the appeal. On the other hand, in a case of change in nature or permanent construction in the suit property, the irreparable loss would be caused to the appellant. With this, I answer points no. 1 to 3 in the affirmative and proceed to pass the following order :-

: O R D E R :

- 1) The application is allowed.
- 2) The defendant/respondent is hereby restrained by way of temporary injunction, not to carry out any permanent construction and not to change the nature of the disputed property during pendency of appeal.
- 3) Costs in cause.

(Dictated and pronounced in open Court)

Mangaon.
Date : 06.01.2020.

(Priya P. Bankar)
District Judge-1, Mangaon-Raigad