

-: Order below Exh.5 in R.C.S. No. 25/2009 :-
(Passed on this 19th September, 2009.)

The plaintiff has filed this temporary injunction application as per Order XXXIX Rule 1 of the Code of Civil Procedure against defendant Nos. 1 to 4.

2. The contention of the plaintiff, in short, is as under.

The plaintiff is a permanent resident of village Devbag. Her husband was died in year 2003 and thereafter she permanently resided at Devbag. The land Survey No. 21 (733) Hissa No. 6A admeasuring 0.11.8 fallow land 0.00.8 situated at Devbag is a tenancy land of the plaintiff. The above said land is said to be 'the suit land' .According to the plaintiff, the suit land is a permanent tenancy land of her father Pavlu Fernandis Ludrick. He died in year 1963 and thereafter the plaintiff's name has been entered as a tenant in the record of right of the suit land vide Mutation Entry No. 12311. The plaintiff is in a possession of the suit land.

3. According to the plaintiff, land Survey No. 21 Hissa No. 6B is situated within the suit land. Hissa No. 6B is admeasuring 1 guntha land, wherein Devbag Grampanchayat House No. 294 has been situated in it. The land Hissa No. 6B and 3/4th (Pavun) guntha land of the suit land, that means 750 square feet land of the suit land is a tenancy land of defendant Nos. 5 to 7. (For the convenience, I mention pavun guntha land i. e. 750 square feet as “ 3/4th guntha land”) Defendant Nos. 5 to 7 have no concerned with the suit land except 3/4th guntha land.

4. According to the plaintiff, Devbag Grampanchayat House No. 294 situated in Hissa No. 6B. The said house had been entered in the name of defendant No. 2 in year 1991-1992. Defendant Nos. 1 to 4 are residing in the said house. Defendant Nos. 1 to 4 have no concerned with the suit land and 3/4th guntha land situated in the suit land. Defendant Nos. 5 to 7 have not transferred 3/4th guntha land of the suit land to defendant Nos. 1 to 4 by any deed. It is alleged that, defendant Nos. 1 to 4 are residing in house No. 294 and they illegally constructed a bathroom in the suit land. Defendant No. 1 also set a stall on a handcart in the suit land. Defendant Nos. 1 to 4 have unloaded chira stones in the

suit land without the permission of the plaintiff. The plaintiff has resisted the act of the defendants, but they did not pay heed. The plaintiff has planted 15 to 20 coconut trees and also erected a fencing around the suit land. Defendant Nos. 1 to 4 have obstructed the plaintiff's possession of the suit land, therefore she has instituted the present suit and moved this application for temporary injunction.

5. Defendant Nos. 1 and 3 have resisted the plaintiff's application by filing written statement and say at Exh.41. Defendants have admitted the survey description and the four boundaries of the suit land mentioned in the application. They have also admitted that, the land Survey No. 21 Hissa No. 6B admeasuring 1 guntha land is situated within the suit land. However, Devbag Grampanchayat House No. 294 is situated in the land Survey No. 21 Hissa No. 6B. They also admitted that, they are residing in house No. 294. Defendant Nos. 1 and 3 have admitted that, name of the plaintiff has been mutated as a permanent tenant in the suit land. They denied the said entry to be correct.

6. According to defendant Nos. 1 and 3, they started residing in house No. 294 of land Pot Hissa No. 6B with the permission of defendant No. 7. When defendants were started for residing in house No. 294, then they realised that, no one is taking care of the suit land. Therefore, they had taken the suit land in their possession and also erected a fencing towards North and South side of boundary of the suit land. According to them, there is no any marks to show the boundary of Pot Hissa No. 6B and the suit land, therefore these two properties are one piece of land. It is alleged that, even though, name of the plaintiff has been entered to the record of right of the suit land as permanent tenant, then also they are in possession of the suit land. Defendants are taking fruits of the coconut trees situated in the suit land. It is alleged that, Talathi has not corrected the entries by visiting the suit land. The plaintiff has not produced four boundaries of 3/4th guntha land of the suit land.

7. According to them, they have purchased house No. 294 from defendant No. 7 in year 1997. Therefore, they become owner of the said house.

Defendants have planted 14 coconut trees in the suit land and also set a stall in the suit land. It is further alleged that, they are residing in the house No. 294 which is surrounded by the suit land, therefore if they want to fetch a water from the well or to reach on the road, they must have to use the suit land for egress and ingress. Bathroom of the defendants is also situated in the suit land and therefore defendants have no option to enjoy their possession without taking the suit land in their possession. Hence, they prayed that, they are in a lawful possession of the suit land, therefore the application be dismissed.

8. Defendant Nos. 2 and 4 have appeared, but did not file say on their behalf, therefore, I passed order of no-say against defendant Nos. 2 and 4 on 16/06/2009.

9. The points for determination along with my findings thereon are as under.

:- POINTS :-

:- FINDINGS :-

1. Whether plaintiff proves her prima facie case ?	...	Partly yes.
2. In whose favour the balance of convenience lies ?	...	The plaintiff.
3. Who will suffer irreparable loss if the injunction application is rejected ?	...	The plaintiff.
4. What order ?	...	Application (Exh.5) is partly allowed.

:- REASONS :-

10. The plaintiff and defendants have filed their respective affidavits in support of their claim. The plaintiff has filed affidavits of Nepolian Isaq Fernandis (Exh.50), Halex Kaitan Disouza (Exh.76), Elias Agnel Fernandis (Exh.82). Defendants have filed affidavits of Nandkishor Ramakant Chodanekar (Exh.44), Laxmikant Jagannath Salgaonkar (Exh.45) in their support. 7 x 12 extract of the suit land is at Exh. 7, 8. 7 x 12 extract of Survey No. 733 Hissa No. 6B is at Exh.14. Mutation Entry No. 1928 is at Exh.9. Mutation Entry No. 12311 is at Exh.10. Assessment list of house No. 294 is at Exh.11, 12. Map of the suit land is

at Exh.13. Photos of the suit land are at Exh. 4/8 to 4/11, 43/1 to 43/4. Information about the crop column of the suit land given under Right to Information Act is at Exh. 80/1. Assessment list of house No. 174 is at Exh.75.

-: As To Point No.1 :-

11. Before adverting the facts and circumstances of the case, I conveniently mention the admitted facts of both the parties. It is admitted to both parties about the description and the boundaries of the suit land. It is also admitted that, the land Survey No. 21 Hissa No. 6B admeasuring 1 guntha land is situated within the suit land. Devbag Grampanchayat House No. 294 is situated in the land Survey No. 21 Hissa No. 6B. It is also admitted that, defendant Nos. 1 to 4 are residing in the house No. 294. It is also admitted that, the suit land is a Mad Bagayat wherein coconut trees are existed in it.

12. While determining a prima facie case, the Court must have to see the entire documents produced by the parties. As per documents of record of rights of the suit land and Survey No. 21 Hissa No. 6B, it is prima facie appear that, the plaintiff's name has been shown in the tenancy column of the suit land. However, defendant Nos. 5 to 7's name have been shown as a tenant in land Survey No. 21 Hissa No. 6B. Name of defendant Nos. 1 to 4 is not mutated in the suit land by any manner. Devbag Grampanchayat House No. 294 is mutated in the name of defendant No. 2, that shows that, defendant Nos. 1 to 4 are residing in the house No. 294.

13. To prove the prima facie case, the learned counsel for the plaintiff Shri. S. S. Gavankar contended that, 7 x 12 extract of the suit land, Mutation Entry No. 1928, 12311, categorically prove that, the plaintiff's father was a permanent tenant in the suit land before 1934 and thereafter, after demise of him, the plaintiff became a tenant in the suit land vide Mutation Entry No. 12311. He further contended that, entries in record of right show that, the plaintiff is in a long standing possession of the suit land. He further contended that, T.I.L.R.' snap of the suit land differentiated the suit land and the land Survey No. 21 Hissa No. 6B.

The boundaries of the suit land and the land of Hissa No. 6B has been fixed by T.I.L.R. and that has been showed in the map. He further contended that, there is no single evidence about the fencing erected by defendant Nos. 1 to 4 or coconuts are planted by them in the suit land. Therefore, he prayed that, defendant Nos. 1 to 4 are residing in the house No. 294, that does not mean that, they are in a lawful possession. Hence, he prayed that, the application be allowed and defendant Nos. 1 to 4 be temporarily restrained. As against that, the learned counsel for defendant Nos. 1 and 3 Shri. S. S. Pai contended that, 3/4th guntha land of defendant Nos. 5 to 7 in the suit land has not been described by the plaintiff by showing four boundaries. He further contended that, Talathi Devbag had followed the old entries in the record of rights without visiting the suit land and seeing the actual crops over it. Therefore, he prayed that, entries in the record of rights of the suit land have no presumptive value. He further contended that, the plaintiff is not residing in Devbag, but she is residing at Fonda. The plaintiff has no any house in the suit land. Therefore, he prayed that, the plaintiff has no lawful possession over the suit land and the application be dismissed.

14. I have gone through the entire documents and pleadings of both the parties. It is not disputed by the parties that, plaintiff's name is entered in the suit land as a permanent tenant. 7 x 12 extract of the suit land (Exh.8) appear that, from year 1957 to 1969 the plaintiff's father Pavlu Rujay Ludrick has been mutated as a permanent tenant in the suit land. Even 7 x 12 extract (Exh.7) of the suit land appear that, the name of the plaintiff has been mutated as a permanent tenant in the suit land. Mutation Entry No. 1928 (Exh.9) warrant that, by the correction of Akarphod Patrak Pavlu Pedru Ludrick as a permanent tenant has been showed to Survey No. 733 Hissa No. 6. Mutation Entry No. 12311 (Exh.10) appeared that, the plaintiff's name has been mutated to the suit land as a permanent tenant after demise of her father. The said mutation entry is effected on 06/04/1973. That means, from 06/04/1973 to till today name of the plaintiff is in existence in the record of right of the suit land as permanent tenant.

15. The learned counsel for defendants contended that, though the

plaintiff's name has been mutated in the 7 x 12 extract of the suit land as permanent tenant, that entry is illegal. To support the contention, defendant Nos. 1 and 3 have not produced any single document to show that, the entries of name of the plaintiff and her father right from 1934 to till today is illegal. Even no competent authority has decided the name of plaintiff in the suit land as illegal. Neither defendant Nos. 1 to 4, nor defendant Nos. 5 to 7 have challenged the entries of the suit land before any Tribunal.

16. T.I.L.R.' sMap (Exh.13) prima facie revealed that, the land Survey No. 21 Hissa No. 6B is situated within the suit land. The boundaries of the suit land and land Survey No 21 Hissa No. 6B have been shown by T.I.L.R. After perusal of map (Exh.13) it prima facie revealed that, the land Survey No. 21 Hissa No. 6B is a part of the suit land. It is true that, house No. 294 is situated in the land Survey No. 21 Hissa No. 6B. That means, defendant Nos. 1 to 4 are residing in the land Survey No. 21 Hissa No. 6B, which is situated within the suit land, that means, suit land is situated around house No. 294. 7 x 12 extract of Survey No. 733 House No. 6B (Exh.14) prima facie revealed that, Tukaram Govind Koyande is a permanent tenant in the suit land which is 1 guntha land. From this document it prima facie revealed that, the land Survey No. 21 Hissa No. 6B is only 1 guntha land.

17. As per pleadings of the plaintiff, it is appear that, defendant Nos. 5 to 7 are tenant in 3/4th guntha land of the suit land. That means, defendant Nos. 5 to 7 have concerned with 1 guntha land of land Survey No. 21 Hissa No. 6B and 3/4th of one guntha land of the suit land. The parties have not taken any pain to show the exact location of 3/4th guntha land in the suit land. That means, as per the documentary evidence produced by the parties, the exact location of 3/4th guntha land is not determined in the suit land. As per record of rights, defendant Nos. 1 to 4 have only concerned with the house No. 294. To determine whether defendant Nos. 5 to 7 are tenant in 3/4th guntha land of the suit land, for that purpose their written statement is liable to be considered. Written statement (Exh.71) of

defendant Nos. 6 and 7 revealed that, they have not claimed any right over the suit land, except 3/4th guntha tenancy land of them in the suit land. As per map (Exh.13) it appear that, boundaries of Hissa No. 6B and the suit land has been fixed by T.I.L.R. Entries of the record of rights of the suit land prima facie appear that, the plaintiff has concerned with the suit land. On the contrary, defendant Nos. 1 and 3 have pleaded that, they took a possession of the suit land in year 1993 and thereafter they are enjoying the possession of the suit land. They admitted construction of the bathroom raised by them in the suit land. They also admitted setting of stall on a handcart in the suit land. To support their contention, Nandkishor Ramakant Chodanekar (Exh.44), Laxmikant Jagannath Salgaonkar (Exh.45) in their affidavit stated that, defendant Nos. 1 to 4 are in the possession of the suit land. Defendant Nos. 1 and 3 merely pleaded their possession over the suit land. It is true that, if a person is residing in a house situated in the suit land, then he must have to use the said land for egress and ingress, but that does not mean that, they are in possession of the suit land without any prima facie cogent and satisfactory evidence. There is no prima facie single evidence to show that, defendant Nos. 1 to 4 have planted coconuts, as well as erected fencing in the suit land. On the contrary, plaintiff' spermanent tenancy in the suit land is not challenged from 1973 to till today. The said entry is not decided as illegal.

18. When a person gets a right under tenancy in the immovable property, then it presumed that, inquiry by the revenue officer would have been conducted. After inquiry, then and then only the person who is claiming to be a tenant, that person' sname is to be entered in the said immovable property. Tenancy right is inherited right which goes in favour of legal heirs after demise of tenant. As per Section 40 of the Bombay Tenancy and Agricultural Lands Act, the plaintiff acquired the tenancy right in the suit land from her father.

19. Entry in the record of right of the suit land from year 1973 to till today has not been challenged. There is no prima facie evidence led by the defendants to rebut the presumption in favour of the entries in the record of rights. In absence of any prima facie evidence, the entries in the record of rights in the

suit land are presumed to be correct. To rebut the presumption, defendant Nos. 1 and 3 have filed their affidavit and affidavits of Chodanekar (Exh.44), Salgaonkar (Exh.45). As against that, the plaintiff has filed her affidavit as well as affidavits of Nepolian Isaq Fernandis (Exh.50), Halex Kaitan Disouza (Exh.76), Elias Aagnel Fernandis (Exh.82) to prove the plaintiff's possession. After perusal of the affidavits filed by the parties it revealed that, these are affidavits against affidavits. Everyone is trying to show their possession over the suit land. When the entries in the record of rights are long standing entries, which are not decided as illegal, then in such a case, the affidavits of witnesses are not liable to be reliable.

20. After perusal of overall evidence led by the parties, defendant Nos. 1 to 4 have not prima facie proved that, they have planted coconut trees or plucked coconuts or erected a fencing, but defendants are merely relied upon the affidavits which are not believable, when the consistent and cogent documentary evidence has been come before the Court from year 1934 to till today.

21. The suit land is a Mad-Bagayat. Coconut trees are existed in the suit land. Coconut tree is not a small crop which had a life like rice, wheat etc. Coconut trees have a life atleast 10 to 15 years. Therefore, even though Talathi has not visited the suit land for seeing the crop, that does not mean that, the plaintiff has lost her possession over the suit land. Right from 1934 to till today there is entry of Mad-Bagayat in the suit land.

22. Defendant Nos. 6 and 7 in their written statement (Exh.71) did not claim their possession over the entire suit land, but they claimed their possession over 3/4th guntha land of the suit land. That means, by excluding 3/4th guntha land the remaining entire land of the suit land is a permanent tenancy land of the plaintiff. The plaintiff and defendant Nos. 1 to 4 have produced photos of the suit land. Photos did not convey the possession of any party, but it only clarifies the actual position of the suit land. But, after considering the entire documents produced by the parties, it prima facie proves that, the entry of the plaintiff as a permanent tenant in the suit land is a long standing entry which is not rebutted by

the prima facie evidence of defendant Nos. 1 to 4. Therefore, the 7 x 12 extract of the suit land and the entries over it has a presumptive value. As per settled principle of law, long standing entries of possession in the 7 x 12 extracts of the suit land itself proves the possession of a person whose name it has been entered in the record of right. The plaintiff's name has been entered in the suit land as a permanent tenant from 1973 to till today which is not canceled, that shows a prima facie possession of the plaintiff.

23. The plaintiff has produced assessment list of house No. 174 (Exh.75) which appeared that, the plaintiff is residing at village Devbag. When the plaintiff is residing at other place, that does not mean that, defendant Nos. 1 to 4 are in possession of the suit land. A person can reside in any place, but he can enjoy his possession over his immovable property and the trees over it. Therefore, the contention raised by the learned counsel of the defendants that, the plaintiff is residing at other place, therefore she is not in possession of the suit land, is not acceptable. 7 x 12 extract of the suit land and land Survey No. 21 Hissa No. 6B are determined as a separate in the record of right. That means, their separate existence has been mentioned in the record of right. Their separate boundaries are shown in a map (Exh.13). That means, the suit land and land Survey No. 21 Hissa No. 6B are a separate lands, even though there is no any fencing in between them. Therefore, after considering the entire documents produced by the parties, I prima facie hold that, the plaintiff is in a prima facie possession of the suit land excluding 3/4th guntha land of it. 3/4th guntha land is a tenancy land of defendant Nos. 5 to 7. Therefore, I hold that, defendant Nos. 1 to 4 are not in possession of the suit land, but they are in a possession of house No. 294. The prima facie case is to be decided on a prima facie right of the parties. The plaintiff' s prima facie possession over the suit land has been determined before this Court. Therefore, the plaintiff has a prima facie case. The plaintiff has not proved her exclusive possession over the suit land. Therefore, she has a partly prima facie case. Hence, I answer point No. 1 in partly affirmative.

-: As To Point Nos. 2 and 3 :-

24. The plaintiff has proved her prima facie possession over the suit land excluding 3/4th guntha land of defendant Nos. 5 to 7. As per photos filed by the plaintiff it appeared that, defendant Nos. 1 to 4 have unloaded stones in the suit land. That means, defendant Nos. 1 to 4 did an act without any right in the suit land. The plaintiff has proved her prima facie possession as well as prima facie right over the suit land, therefore the balance of convenience lies in her favour. If defendant Nos. 1 to 4 succeeded in raising any construction over the suit land, then definitely the plaintiff will suffer irreparable loss. If the application is allowed, then defendant Nos. 1 to 4 will not suffer any irreparable loss, why because their act to raise a construction over the suit land is without any legal right and is an illegal. Therefore, I hold that, the balance of convenience and irreparable loss lies in favour of the plaintiff. Hence, I answer point Nos. 2 and 3 in the affirmative in favour of the plaintiff.

-: As To Point No. 4 :-

25. The plaintiff has proved her partly prima facie case, balance of convenience, irreparable loss. Therefore, the plaintiff's application will have to be partly allowed. The plaintiff has proved that, she is in a prima facie possession of the suit land excluding 3/4th guntha (750 square feet) land of defendant Nos. 5 to 7 in it. Defendant Nos. 5 to 7's land is not located in the suit land. Defendant Nos. 5 to 7 have not denied the plaintiff's prima facie possession over the suit land. Therefore, defendant Nos. 1 to 4 will have to be temporarily restrained for the suit land excluding 3/4th guntha land of defendant Nos. 5 to 7. Defendant Nos. 1 to 4's house No. 294 is situated in the land Survey No. 21 Hissa No. 6B. Defendant Nos. 1 to 4 required to use some portion of the suit land for egress and ingress. Therefore, even though the injunction has been granted against them, that does not mean that, defendant Nos. 1 to 4 are restrained from egress and ingress in their house No. 294. Hence, in answer to point No. 4, I pass the following order.

:- ORDER :-

1. Application (Exh.5) is partly allowed.
2. Defendant Nos. 1 to 4 or anybody claiming through them are hereby temporarily restrained from obstructing the plaintiff's possession over the suit land, excluding 3/4th (750 square feet) guntha land of defendant Nos. 5 to 7 and they are further restrained from raising any construction as well as from damaging the fencing and the coconut trees of the suit land, as well as they are restrained from obstructing the plaintiff from plucking the coconuts of the trees of the suit land, till the disposal of the suit.
3. Cost of the application is cost in cause.

Malvan,
Date : 19/09/2009.

(S. K. Dhekale)
Civil Judge (J.D.), Malvan.