

MISC. APPLN. NO. 73/2017
(Sudam Shinde vs. Namdeo Ghodke)

ORDER BELOW EXHIBIT No.5
(Decided on 23/03/2018).

This application filed by applicant through this miscellaneous application, which is filed for restoration of the main suit vide No.127/2010, along-with application under Section 5 of Limitation Act, 1963, for condoning the delay to file restoration application.

2. Perused the application, say and heard both the sides. Considering the controversy between the parties, following points arose for my determination and I am submitting my reasons to them as under ;

No.	Points	Findings
1)	Whether applicant has prima facie case ?	Negative.
2)	Whether balance of convenience lies in.....No. favour of applicant ?	
3)	Whether irreparable loss cost to the.....No. applicant, if injunction refused ?	
4)	What Order ?	As per final Order.

REASONS

3. **AS TO POINT No.1 to 3 :**

According to applicant, the suit property described in

para No.1A and 1B i.e C.S.No.608 and 604, respectively, are in possession and ownership of him. It is contention of the applicant that, he received the property from his father through inheritance. The land bearing C.S.No.606 and 607 belongs to non-applicant which situated near the suit property. The house situated in the C.S.No.608 has bearing Grampanchayat property No.1535/2.

4. The non-applicant, by pretexting as a owner of Grampanchayat property No.1535/2, intended to construct over the suit property. In that exercise non-applicant brought the heap of bricks and same is lying in the suit property. Therefore, applicant try to convenience non-applicant about his ownership and possession over the suit property, but it is in-vain. In that respect, applicant brought one Regular Civil Suit No.127/2010 before this Court, for injunction, however, the same was dismissed in default as well as for want of prosecution. Non-applicant under the urge of that dismissal of the suit, started encroachment over the land of applicant. However, it is contention of applicant that, the suit was not decided on merit, therefore, defendant should not take undue advantage of dismissal of the suit. According to applicant, if non-applicant be allowed to continue the construction, then irreparable loss will be caused to him. With this, applicant pray for ad-interim relief of injunction.

5. Non-applicant appeared and contest the claim of plaintiff. According to him, the instant application is not tenable in absence of main relief in the suit which is dismissed by this Court.

The delay itself not condoned by this Court for filing of application for restoration and therefore, granting any relief in favour of applicant is unwarranted. Inter alia, it is contention of non-applicant that, his father Gunda Ghodke has purchased the suit property from one Yamunabai Shitole by virtue sale-deed dated 15.09.1967. Therefore, since then non-applicant was in continuous possession in the suit property. Hence, the claim of plaintiff is venerable and this fact known to him, therefore he could not taken effective steps in the suit and ultimately it was dismissed for want of prosecution. If non-applicant restrained from construction, then loss will be cause to him. With this, non-applicant opposed the application.

6. The Learned Counsel of non-applicant, while buttressing the argument on this application, categorically raise an objection about the maintainability of the application in view of O-39 R-1 and 2 of C.P.C. According to him, the provisions of O-39, R-1 and 2 will be applicable only when the main relief is pending in that regard. Further more he contended that, this Court cannot grant relief by invoking inherent powers provided under Section 151 of C.P.C. He further argued that, the powers under Section 151 can only be invoked in absence of specific provisions in C.P.C. or any other law. To counter this argument Ld. Counsel for applicant submitted that, if the main relief is not available, then Court can invoke the power engrafted in Section 151 of C.P.C. By invoking inherent powers Court can consider the equitable relief in favour of plaintiff.

7. In deed, the inherent powers can be invoked in absence of any other relief to meet the ends of justice. However, while granting any relief under the purview of Section 151 of C.P.C., it is expected that, Court must be vigilant and consider all aspects and invincibilities while granting such relief.

8. In the present case applicant claiming his possession and ownership over the suit property by way of inheritance from his father. On the other hand non-applicant claiming the ownership over the suit property by virtue of sale-deed executed by one Yamunabai in the year 1967, in favour of his father. According to non-applicant, the existence and execution of this sale-deed known to plaintiff and therefore, applicant allows dismissing the suit without adjudication. It is pertinent to note that, if such deadlock arose, then it is just and proper to wait till final adjudication of the suit. At this juncture, when the restoration application itself not decided by the Court for want of delay, in such circumstances it is difficult to grant any relief in favour of applicant. It is settled position of law that, injunction cannot be granted in favour of a person who is not vigilant to his rights. The relief of injunction is an equitable relief and parties who were negligent and slept over their rights are not entitled to such equitable relief. In this case, on 10.10.2016 the suit was dismissed by this Court. The plaintiff ought to have file restoration application within 30 days from 10.10.2016. However, there is delay of 321 days for filing application for restoration. While explaining the delay plaintiff taken the grounds of his ill-health

and medication, however, that needs to pounder over. At this stage of the proceeding, when condonation of delay itself not allowed, then it is difficult to grant equitable relief in favour of applicant. It is also difficult to grant relief when non-applicant approach this Court with a specific plea of title over the property by virtue of sale-deed.

9. On the basis of above discussion, applicant has no prima facie case and in absence of prima facie case, no question of irreparable loss or balance of convenience arise. Thus, I am answering all the three ingredients for grant of equitable relief in negative and going to pass following order so far as point No. 4 is concerned.

ORDER

- 1) Application is rejected.
- 2) Cost is the main cause of the application.

Miraj.
Date : 23.03.2018.

Sd/-23.3.18
(V. K. Umale)
Civil Judge, Jr. Dn. Miraj.