

ORDER BELOW EXH – 50 IN RCS NO. 174 /2018

The plaintiff has filed the present application by invoking provision under Order 39 Rule 1 and 2 of Code of Civil Procedure, 1908 (*herein after called as Code for the sake of brevity*) seeking the relief of temporary injunction in terms as to restrain the defendant no. 2, 3 and 14 from erecting the construction over Gat No. 37 i.e. suit property no. 1 A.

Brief Facts of the Plaintiff's Case is as under :-

02. Description of Suit Property :-

(A) District and Sub – district Sangli, Tal – Kavathe Mahankal, an agricultural property situated at Kerewadi Village, bearing Gat No. 37 admeasuring its area 03 H. 18 R wherein the plaintiff and defendant no. 1 to 4 have share in common having its boundary marks as follows -

Towards East : - Agricultural land of Gat No. 40

Towards West :- Agricultural land of Gat No. 36

Towards South :- Nagaj Boundary

Towards North :- Agricultural land of Gat No. 38

The above mentioned property having the possession and enjoyment in common of plaintiff and defendant no. 1 to 4 along with their easementary rights, is the subject matter of the suit. (*herein after called as suit property for the sake of brevity*)

03. It is the contention of the plaintiff that late Parasharam Patil is the predecessor of plaintiff and defendant no. 1 to 4. Late Namdev and Kondiba are the sons of deceased Parasharam. The plaintiff and defendant no. 1 to 3 are the sons and defendant no. 4 is the daughter of deceased

Namdev. The defendant no. 5 and 6 are the successors of deceased Kondiba. The suit properties of 1A to 1E are the ancestral properties of plaintiff and defendant no. 1 to 5. The father of plaintiff and defendant no. 1 to 4 inherited their share in suit properties after the death of Late Parasharam by way of partition between him and his brother kondiba. The father of plaintiff and defendant no. 1 to 4 has died on 04/10/2012 without making arrangements of his share in suit properties. After the death of Namdev, the plaintiff along with other sharers is cultivating and enjoying the suit properties. Before six months, the plaintiff has claimed his share in suit properties to the defendant no. 1 to 3. However, the defendant no. 1 to 3 have denied his share and caused obstruction to the possession of the plaintiff over suit properties. After getting the property extracts of suit property no. 1A to 1C, the plaintiff has come to knowledge that the defendant no. 1 to 3 have got entered their names over the suit properties no. 1A to 1C by joining hands with the revenue authorities. Hence, the plaintiff has filed the present suit.

3a. During the pendency of present suit and in the background of the fact that no partition has been effected between the parties, the defendant no. 2 and 3 has created interest of lease in respect of 60X70 mtr area admeasuring the total 4200 Sq. Mtr area out of Gat No. 37 in favour of defendant no. 14 on 09/03/2021 for a period of 31 years for a consideration by an agreement dated – 09/03/2021. Such agreement was executed without consent of plaintiff and hence is null and void and not binding upon the plaintiff. The defendant no. 14, at present is in attempt to erect the construction over the Gat no. 37 (i.e. subject matter of the present application) by avoiding the share of plaintiff in it. The defendant no. 14 has expressed his view of erection of construction over Gat No. 37. The above area specified in Gat No. 37 has been got leveled by the defendant

no. 14 in view of his intended construction. The defendant no. 2 and 3 are in collusion with defendant no. 14. The intended construction by defendants will change the original nature of the suit. In such event, the suit of the plaintiff will become in-fructuous. Therefore, in view of above facts, the defendants needs to be restrained from erecting the construction over suit property by allowing the present application.

04. The defendant no. 2, 3 and 14 have filed their reply vide Exh – 56 and contested the application. It is the contention of the defendants that originally the Gat No. 37 was owned and possessed by the predecessor of plaintiff and defendant no. 1 to 4 named as deceased Namdev. Such property was purchased by the deceased Namdev on 09/06/1968 from Noor Mohammad and Adbul Gulab Mulani by registered sale deed. The brother of Namdev named as Kondiba had no concern with such property. The partition between Namdev and Kondiba has took place on 11/09/1997 by mutation entry no. 640 with respect to other properties. The deceased Namdev, during his life time, has disposed of the Gat No. 37 and his share in other properties in favour of defendant no. 2 and 3. By an order of Circle Officer, Kuchi dated – 09/12/1997, the name of wife of Namdev – She-wantabai was entered upon the property extract of Gat No. 51. The plaintiff, till today has not challenged to such entries. In this context, the defendant no. 2 and 3 only are the owners and occupiers of Gat No. 37. They are in possession of such suit property since 12 years. In this context also, they became the owner of it by means of adverse possession. The certain area in Gat no. 37 has been acquired by the National High Way Authority. The plaintiff with intention to grab certain amount in compensation, has issued notice to these defendants to which they have answered to it by sending reply to them.

4a. The defendant no. 2 and 3 are enjoying the Gat No. 37 since 25 years. Moreover, the defendant no. 3 has constructed house over 1400 Sq. feet in it. For agricultural purpose and also for restoring the building material, the defendants have erected mud house over 60 X 40 mtr area over Gat No. 37. The defendants are paying the taxes with regard to such house properties. The plaintiff has no concern with such properties. The plaintiff has concealed the facts as to pending proceedings before the revenue authorities. Therefore, he is not entitled to seek the equitable relief. The defendant no. 2 and 3 have created leasehold rights in favour of defendant no. 14 with respect to 4200 sq. Mtr area in Gat No. 37. The defendant no. 14 with intent to start up the petrol pump over such area, have obtained necessary approvals from the concerned authorities. For aforesaid purpose, the defendant no. 14 has incurred huge amounts. The relief claimed by the plaintiff is subjected to the final decision of the case. Therefore, such relief can not be granted at this stage. Otherwise, the defendants will suffer from irreparable loss which can not be compensated in terms of money. Hence, in view of above facts, the present application may be rejected.

05. On the basis of the facts alleged, documents filed on record and submissions made by parties, following points arise for my determination to which I recorded my findings along with reasons thereto which are as under -

Sr. No.	POINTS FOR DETERMINATION	FINDINGS
1	Does plaintiff prove that <i>prima facie</i> case is in his favor ?	... YES
2	Does plaintiff prove that balance of conve-	... YES

	nience lies in his favor ?	
3	To whom irreparable loss will cause ?	To The Plaintiff If Relief of Temporary Injunction Will Refuse To Him.
4	What Order ?	Application is Allowed.

UNDISPUTED FACTS :-

06. The relation between the parties, creation of leasehold interest by defendant no. 2 and 3 in favour of defendant no.14, the attempt of construction by defendant no. 2, 3 and 14 over Gat No. 37 etc these are undisputed facts between parties.

REASONS

07. In support of contentions, the plaintiff has relied on the documents filed vide list of documents at Exh – 3, 33, 46 and 49.

08. In defence, the defendants have filed the documents vide Exh – 22, 58, 60 and 65.

09. In support of contentions, the plaintiff has relied on the principle laid down in *M. Gurudas & Ors. V Rasaranjan & Ors decided in Civil Appeal No. 4101 of 2006 on 13 September, 2006.*

10. Application is duly supported with affidavit.

11. Heard the Ld. Advocates for both parties at length. They argued as per their respective contentions.

POINT NO. 1 TO 3 :-

12. The point no. 1 to 3 are inter connected to each other and the subject matter of these points is also same. Therefore, to avoid the repetition of discussion, these points are taken together for discussion. While deciding the present application, the given facts has to be seen within the domain of Order 39 Rule 1 and 2 of Code of Civil Procedure, 1908 with reference to the *prima facie* case, balance of convenience and irreparable loss.

13. Perused the record. It appears that the plaintiff has filed the present suit for partition, possession and for perpetual injunction. It is mainly the contention of the plaintiff that the partition of suit properties including the Gat No. 37 has not been taken place by metes and bounds between himself and the defendant no. 1 to 4. The suit properties being the ancestral one, the plaintiff has right, interest and share in it. As against this, it is the contention of the defendant no. 2 and 3 that out of the suit properties, the Gat No. 37 was owned and possessed by their father deceased Namdev by a registered sale deed dated – 09/09/1968. During the life time of Namdev, he alienated the Gat No. 37 in favour of present defendant no. 2 and 3 by moving an application to the revenue authority on 11/09/1997. Accordingly, the names of defendants had been entered upon the 7/12 extract of Gat No. 37 by mutation entry no. 642. The plaintiff has not challenged such entry at that time. Therefore, such entry became absolute and final. Besides the suit properties as mentioned in the application dated – 11/09/1997, upon the property extracts of other suit properties, the names of plaintiff and defendant no. 1 to 4 had been entered.

14. Taking into consideration the above rivalry pleadings and contentions of the parties, it can be said that whether the plaintiff is entitled to seek the

partition in suit properties or not ? whether partition between them was already took place or not ? whether the properties mentioned in the application dated – 11/09/1997 are subject to the partition or not ? whether the transfer of Gat No. 37, 51 and 320 was valid and legal one or not ? And they are ancestral or self – acquired properties ? Etc these are the triable issues and the same are required thorough hearing and evidence. The present suit is at its primary stage. Therefore, those can not be decided at this juncture. The present application being the interim one, the facts have to be seen at its first instance i.e. *prima facie*.

15. By moving the present application, the plaintiff is claiming the relief of temporary injunction in terms as to restrain the defendant no. 2, 3 and 14 from constructing any kind of structure over and in the Gat No. 37 i.e. subject matter of present application. Admittedly, the defendant no. 2 and 3 are the brothers of plaintiff. After perusal of 7/12 extract of Gat No. 37 vide Exh – 3/1, it appears that the names of defendant no. 2 and 3 are entered upon it against the entire Gat No. 37. It is also admitted that certain area in Gat No. 37 has been acquired by the National Highway Authority wherein a dispute as to apportionment in the amount of compensation has been arose. Consequently, a Land Reference Misc. Application No.28/2020 has been filed in the Honourable District Court, Sangli. A copy of judgment in such proceeding is filed vide list of documents at Exh – 46. From the perusal of lease deed dated – 09/03/2021, it appears that such deed is registered one wherein the leasehold rights and interest in 4200 Sq. Mtr. Area out of Gat No. 37 has been created in favour of defendant no. 14 by the defendant no. 2 and 3. Further, the rights as to construct buildings and structures therein also been appears to be given to defendant no. 14. The above said lease deed was mutated by mutation entry no. 1716 dated – 27/07/2021.

16. I carefully gone through the decision in Land Reference Misc. Application No.28/2020. It appears that present plaintiff is the non – applicant no. 3 and defendant no. 2 and 3 are the non – applicant no. 1 and 2 respectively in such proceeding. The Honourable District Court has observed that the names of defendant no.2 and 3 got entered by them upon the 7/12 extract of Gat no. 37 by mutation entry no. 642 on the basis of the application of their father i.e. Namdev is not a valid mode of transfer of property as envisaged in the law. In this context, all the heirs of deceased Namdev i.e. plaintiff and defendant no. 1 to 4 are sharers in the amount of compensation. However, such shares are subjected to final decision in this suit. It is further observed that the plaintiff and defendant no. 2 and 3 (i.e non – applicant no. 1 to 3 therein), defendant no.1 and 4 have equal shares in the compensation i.e 1/5 share.

17. From the above discussion, it apparently appears that the plaintiff has *prima facie* proved his interest and right in the Gat No. 37. Admittedly, the relation between parties is not denied by either party. The issues involved in the suit is required sufficient time and extension of opportunities to the parties to lead the oral as well documentary evidence in their favour. Meanwhile, the nature of the suit property i.e. Gat No. 37 needs to be protected at its present position or status. By virtue of the interest created by the defendant no. 2 and 3 in favour of defendant no. 14, it will change the original nature of the property and it may raise the complications in the proceedings. The Honourable Supreme Court in ***M. Gurudas & Ors's case (Supra)*** at page no. 4 it has been held that '*A finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist*'. Therefore, taking into consideration the above principle and that of the factual matrix, it can be said that the plaintiff has proved that he has *prima facie* case to seek the relief of temporary injunction. Hence, in view of facts, I answer point

no. 1 in affirmative.

18. The question as to balance of convenience and irreparable loss can be decided *viz - a - viz*. As I already held that the plaintiff has proved that he has *prima facie* case in his favour for granting the relief of temporary relief, hence the balance of convenience automatically lies in his favour. So far as irreparable loss is concerned, in this aspect it is the contention of the defendants that they have invested huge amount in the proposed project over the Gat No. 37 for purchasing building material and also for obtaining the requisite approvals from the concerned departments. Therefore, ultimately they will suffer from irreparable loss in case of granting of temporary injunction in favour of plaintiff. Admittedly, the construction over the Gat No. 37 is yet not initiated. However, primary works for construction has been carrying therein. The estimate for proposed project is involving large amount. Even though, in the background of the fact that the work of construction is yet not initiated, there appears no hurdle to grant the relief of temporary injunction in favour of plaintiff to avoid future complications.

19. On the contrary if such relief is not granted and defendants constructed the structure over Gat No. 37 by converting its nature, it may lead to complications in the suit and multiplicity of proceeding. Therefore, in view of the facts that the plaintiff has *prima facie* proved that he has interest and right in the Gat No. 37, such right and interest needs to be protected till final disposal of the suit. No prejudice will cause to the defendants in case of granting of such relief in favour of plaintiff as the defendant no. 2 and 3 will continuously enjoy their right in common in Gat No. 37. As against this, if such relief will refuse to the plaintiff, he will be debarred from his right, interest and share in Gat No. 37. The cross NCR's registered against each other (Vide Exh – 60/1 and 62/1) are evident of

the fact that there exist a civil dispute regarding the construction of structure over Gat No. 37 and it may lead, sometimes to filing of criminal complaints against each other. Therefore, it is required to maintain the present position and nature of Gat No. 37 as it is. Hence, in view of all the above facts, I hold that the plaintiff has *prima facie* proved that balance of convenience lies in his favour and he will suffer from irreparable loss if the relief of temporary injunction will not granted to him. In result, I answer point no. 2 and 3 in affirmative.

POINT NO. 4 :-

20. In view of discussion as to point no. 1 to 3, I pass the following order.

O R D E R

1. Application is hereby allowed.
2. The defendant no. 2, 3 and 14 are hereby temporarily restrained from erecting any kind of construction over and in the Gat No. 37 (more particularly specified in para no. 1 of the application) either themselves or through any person on their behalf till further order.
3. Costs shall follow the event.
4. Both parties are hereby directed to expedite the suit.

Date :- 30/09/2023

Place :- Kavathe Mahankal

Priyanka J. Ligade

Jt. Civil Judge Junior Division