

ORDER BELOW EXH.5 IN R.C.S NO.109/2021
(CNR NO. MHSO130001482021)

1. This order shall dispose of an application filed under Order XXXIX Rule 1 & 2 of Code of Civil Procedure, 1908 (Hereinafter referred to as 'C.P.C.' for the sake of brevity and convenience) for temporary injunction. Gat no.239/3 admeasuring 2 H 4 R, gat no.239/4 admeasuring 2 H 5 R and gat no.238 admeasuring 4H 34R situated at village Shendri are the suit properties. (hereinafter called as 'suit properties' for the sake of brevity and convenience)

The brief facts of plaintiff's case are as follows:

2. The suit properties are ancestral properties of plaintiff and defendants no.3 and 4. Defendant no.1 purchased the land admeasuring 1 H 37 R in gat no.239/1 from one Suresh Agatrao Gondil on 10/5/2019 by registered sale deed no.2151/2019. Defendant no.2 purchased the land admeasuring 1 H 33 R in gat no.239/2 from Suresh Agatrao Gondil on 10/5/2019 by registered sale deed no.2150/2019. Thereafter, defendant no.5 purchased the land adjoining to Barshi-Kurduwadi road admeasuring 0 H 65 R out of the area of 2 H 2 R in gat no.239/1 and area of 70 R adjoining to Barshi-Kurduwadi road out of the area of 2 H 3 R in gat no.239/2 from one Rupali Hazare and others by registered sale deed no.5455/2018.

3. Plaintiff further submits that, thereafter, it was disclosed through the private measurement that, defendant no.1 and 2 have encroached in gat no.239/3 from the east and south-north side. Defendant no.5 had brought the official measurement in the year 2019, however, defendant no.1 and 2 did not intentionally let the official measurement to be carried out. As defendant no.1 and 2 were not ready for the official

measurement, plaintiff and defendant no.4 got measured lands gat no.238, 239/1, 239/2, 239/3, 239/4 through a person named Anil Gandhi and it was disclosed that, defendants no.1 and 2 have encroached upto 48 gunthas in the suit property. When plaintiff and defendant no.4 claimed possession of encroached portion from defendant no.1 and 2 on 24/1/2021 and 25/1/2021, defendants no.1 and 2 refused it and told that, they will not allow to carry official measurement. Defendants no.1 and 2 also threatened the plaintiff and defendant no.4. Defendants no.1 and 2 refused to hand over the encroached portion and told the plaintiff on 2/2/2021 and 13/2/2021 that, they are going to create 20 ft. rough vehicle road for vehicle passing. The defendants no.1 and 2 are in preparation to create 20 ft. rough vehicle road thereby obstructing the plaintiff's possession in the suit property. Plaintiff will suffer irreparable loss if the defendants are allowed to construct the road. Hence, plaintiff has prayed through the present application that, defendants no.1 and 2 be restrained from creating south-north 20 ft. rough vehicle road on the west side of the area situated in gat no.239/3 and not to acquire such area and not to obstruct the plaintiff in his possession of the suit property. Hence, plaintiff has prayed to allow the application.

SAY OF DEFENDANTS NO.1 AND 2 (EXH.35) :-

4. Say of defendants was called. Defendants no.1 and 2 submitted that, plaintiff has no prima-facie case and balance of convenience. Rejection of the present application would not cause prejudice to the plaintiff. If the present application is allowed, plaintiff will take advantage of it and she will obstruct the possession of defendants no.1 and 2 in the property mentioned in para 1 of the counter claim. Whether defendants no.1 and 2 have encroached 48 R of area or not

would depend upon the merits of the case. Plaintiff has not carried official measurement of his land. Hence, whether anyone has encroached upon his or her land is not clear and as per the division of gat, according to the partition, everyone is cultivating the property in their possession. Hence, there is no substance in the complaint of plaintiff about encroachment. Defendants no.1 and 2 have not created any south-north 20 ft. vehicle road towards the west side of area in gat no.239/3. Defendants have not acquired any area of the plaintiff and they have not obstructed the plaintiff in possession of the suit property. Defendants no.1 and 2 have filed counter claim against the plaintiff to not change the natural course of water and release the rain water as well as not to create south-north 20 ft. road for her use by taking out the water from the well. Hence, defendants no.1 and 2 have prayed to reject the present application.

5. Say of defendants no.3 and 4 (Exh.12):-

Defendants no.3 and 4 have admitted the averments made in the present application as well as in the plaint. Defendants no.3 and 4 have no objection to allow the present application. They have reiterated in the line of the averments of the plaintiff.

6. Heard Learned advocate for plaintiff and defendants no.1 and 2. Perused the record and proceeding of the case. The points for determination along with findings and reasons thereon are as under:

Sr.No	Points	Findings
1.	Whether the plaintiff has a prima-facie case?	No
2.	Whether the balance of convenience lies in favor of plaintiff?	Does not survive.
3.	Whether plaintiff will suffer irreparable loss if injunction is refused?	Does not survive.
4.	What order?	As per final order.

REASONS

POINT NO.1 TO 3:

7. In order to prove her prima-facie case, plaintiff has relied upon 7/12th extract of gat no.239/1, 239/2, 239/3, 239/4, 238 at Exh.4/1 to 4/5, copy of rough map of gat no.238 and 239 at Ex.4/6, true copy of measurement map of gat no.239/1, 239/2, 239/3, 239/4, 238 and 237 at Exh.4/7, photographs of plaintiff's gat no.239/3 and 239/4 at Exh.4/8. Defendants no.1 and 2 have relied upon the xerox of rectification deed no.4511/2021 and xerox of sale deed no.2150/2019 and 2151/2019 and xerox of rectification deed no.4512/2021 at Exh.39/1 and 39/2 and 6D extract of M.E. No.3183 and 3184 at Exh.39/3 and 39/4.

8. The suit is filed for possession of encroached portion and perpetual injunction. Through the present application, plaintiff has prayed to restrain the defendants no.1 and 2 from creating the 20 ft. vehicle road and not to acquire plaintiff's land as well as not to obstruct plaintiff's possession over the suit property. The burden to prove the prima-facie case for grant of temporary injunction is upon the plaintiff. A prima-facie case should be such that it should appear on record that there is bona fide contest between the parties. Considering the nature of the injunction claimed at this stage, it is necessary that, plaintiff must be firstly able to prima-facie show that, defendants have encroached upon the property belonging to the plaintiff. In order to prove his case, plaintiff has relied upon the 7/12th extract of the suit property which mentions the name of plaintiff. Plaintiff has relied upon the measurement map of gat no.238 and 239. It appears to be the private measurement carried out by one Anil Gandhi and Associates. The map

appears to mention red coloured portion of gat no.239/3 allegedly encroached by defendants no.1 and 2 from gat no.239/1 and 239/2. The map does not appear to mention the date the measurement was carried. Even the plaint does not appear to mention as to the date of which the private measurement was carried. However, such map is not a map of official measurement and in order to prove the prima-facie case, such map cannot be relied upon at this stage to prove the prima-facie case. Moreover the photographs filed on record by the plaintiff cannot be the conclusive proof for deciding the present application. In order to prove the prima-facie case, the averments of the plaintiff made in the plaint also needs to be taken into consideration.

9. In para 3 of the plaint, plaintiff has mentioned that, after carrying out the private measurement of the suit property gat no.239/3, it was disclosed that, defendants no.1 and 2 have encroached upto 48 R area of gat no.239/3 from the east and south-north side. It prima-facie indicates that, the alleged encroachment according to plaintiff, in his land was from east and south-north side. It is further mentioned in the plaint that, defendants no.1 and 2 are going to create 20 ft. road in the land of plaintiff. It is important to note here that, in the present application plaintiff has sought relief to restrain the defendants no.1 and 2 from creating a road in his land from the west side. However, in his plaint and the present application, plaintiff appears to mention that, defendants no.1 and 2 have encroached from the east and south-north side. If plaintiff has an apprehension and danger that, defendants no.1 and 2 are going to create a road from the west side, then it is but obvious that, defendants would have encroached the west side. However, there is no pleading on record at this stage, which clearly mentions that, defendants no.1 and 2 have encroached the plaintiff's

land from the west side. If there has been no alleged encroachment from the west side by the defendants no.1 and 2, then why would plaintiff himself assume the danger that, defendants no.1 and 2 are going to create a road from the west side through the suit property gat no.239/3. Moreover, the possession of encroached portion in the present suit is sought in regard to the portion which is allegedly encroached from the east and south-north side. Whether there is an encroachment by the defendants or not can only be decided after the adjudication of the suit. However, for a prima-facie case, there must be a probability of the plaintiff being entitled to the relief asked by him. A temporary injunction can only be granted if the person seeking an injunction as a concluded right capable of being enforced by way of injunction. At this stage, it appears that, there is no official measurement carried out in regard to gat no.239. In order to avail temporary injunction, it is necessary for the plaintiff to prima-facie show that, defendants no.1 and 2 have encroached upon the suit property and that, they are going to create a road over the plaintiff's property. However, there appears to be contradiction between the directions with regard to the alleged encroachment over the suit property gat no.239/3 and with regard to the allegations as to creating a road by the defendants over gat no.239/3. At this stage, there is no sufficient material for deciding a prima-facie case in favour of plaintiff which makes the plaintiff entitled to temporary injunction. Hence, in view of aforesaid reasons, I answer point no.1 in negative.

AS TO POINT NO.2 & 3:

10. The plaintiff has failed to prove prima-facie case in her favour. Under such circumstances, the judgment of Hon'ble Bombay High Court in the case of **Bhavana V/s. Navneet 2015 (3) Mah.L.J. 472** assumes

important. Hon'ble Bombay High Court has observed in para No.8 of the judgment that,

“Once it is observed that there is no prima facie case established, further aspects of conduct of appellants, balance of convenience etc. are immaterial and need not be considered.”

11. In view of above mentioned observation, similarly, in the present case, plaintiff has failed to establish her prima facie case, therefore, further aspects of conduct of plaintiff, balance of convenience, etc. are immaterial and need not be considered for the plaintiff. In this view, point no.2 and 3 does not survive and answered accordingly. In this backdrop and in answer to point no.4, the following order is passed.

ORDER

The application at Exh.5 is rejected.

(Pronounced in open Court)

Place: Barshi
Date: 25/07/2022

(N. S. Sabnis)
4th Jt. Civil Judge, Junior Division,
Barshi.

CERTIFICATE

I affirm that the contents of this PDF file Judgment/Order is same word to word as per the original Judgment / Order.

(a)	Name of the Stenographer	:	Y. V. Sital
(b)	Court	:	Shri. N.S.Sabnis 4 th Jt. Civil Judge, J.D.& J.M.F.C.Barshi
(c)	Judgment /Order signed by P.O. on	:	25/7/2022
(d)	Judgment /Order uploaded on	:	26/7/2022