

Laxman Krushna Sutar & Ors. ---- **Plaintiffs**

Vs.

Baburao Krushna Sutar & Ors. ---- **Defendants**

Order below Exh. 19

1. The plaintiffs have filed this application under Order 39 Rule 1 and 2 r.w. Sec. 151 of Civil Procedure Code for temporarily restraining defendant No. 1 from making any construction in the property bearing Gat No. 1/1, admeasuring 56 R situated at Malharpeth, Tal. Patan, Dist. Satara and also for not to change the nature and record of the said property as well as for not to alienate the said property till the final disposal of the suit. The said property is described in para 1/a of the plaint. The said property is hereinafter referred as “**suit property**” for the sake of convenience.

2. According to plaintiffs, in may 2014 when the defendant No. 1 had started to collect the material for construction in the suit property at that time they had all claimed for the partition and separate possession of all the ancestral properties. But the defendant No. 1 denied and hence, the plaintiffs were constrained to file this suit.

3. The defendant No. 1 on the basis of muscle power and money power started to make the construction in the suit property by digging pits for base and thereby he was trying to grab the portion out of suit property which is adjacent to the road. The defendant No. 1 had started this construction after filling this suit and the plaintiffs had tried to convince him by intimating him that the suit is pending, but in spite of that the defendant No. 1 on 26/12/2014 threatened the plaintiffs to complete the construction in the suit property. So, the plaintiffs have filed this application. The plaintiff No. 5 Nilesh Ramchandra Sutar has filed his affidavit at Exh. 20 in support of this application.

4. The defendant No. 1 has filed his say to this application vide Exh. 33. He has admitted genealogy put forth by the plaintiff in the plaint. The defendant No. 1 has also not disputed in respect of the description of the suit property in the plaint at para 1/a. The suit property was initially bearing Survey No. 496/1 when it was situated within the revenue limits of village Mandrul Haveli, Tal. Patan and after the formation of new revenue limit of village Malharpeth the suit property is given new Gat No. 1/1. The defendant No. 1 has also admitted the fact that Vishwakarma saw mill situated in the suit property was started in the year 1962 and in order to start this saw mill the funds were raised by mortgaging the suit property described in para 1/b at Sr. No. 2 and 3 with Shripati Bala Pawar. He has also admitted the fact that the saw mill was renewed in the year 1972. There is also no dispute in respect of the fact that the brother of plaintiff Nos. 1 to 3 and defendant No. 1 namely Ramchandra is died in the year 2012. The defendant No. 1 has also admitted the fact that all the properties described in para 1 except the property bearing Gat No. 6 situated at Mauje Nisare described in para 1/b of the plaint at Sr. No. 1 were ancestral joint family properties.

5. The defendant No. 1 has put forth the case that the suit property was arable land and it is originally belonging to Vitthal Devstan. The father of defendant No. 1 namely Krushna was the mirashi tenant in the suit property. Dindukale brother were sub-tenant of Krushna and they were cultivating the suit property. When Dindukale brothers left the possession of the suit property the defendant No. 1 worked hardly and thereby converted the suit property into good quality. The father of the defendant No. 1 Krushna was old aged and plaintiff Nos. 1 to 3 and deceased Ramchandra were taking their education therefore, the defendant No. 1 had managed and

cultivated suit property with the aid of his payment from service as well as from ancestral joint family income. As it become difficult for defendant No. 1 to look after all the joint family properties by looking after his service so, he returned towards his home town from bombay and started the business of saw mill by raising the loan by mortgaging the suit properties described in para 1/b at Sr. No. 2 and 3.

6. According to defendant No. 1 in the year 1975 as there were no cordial relations between the wives of plaintiff Nos. 1, 2, deceased Ramchandra and defendant No. 1 so, deceased Ramchandra put forth the proposal of residing separately with defendant No. 1. Accordingly the defendant No. 1 gave consent and all the properties described in para 1 of the plaint except Gat No. 6 were orally partitioned in the presence of panchas namely Baburao Kundlik Pawar, Baburao Pandurang Pawar and Bajrang Anant Chavan.

7. According to defendant No. 1 the saw mill was given to his share as he had developed the saw mill business and had also developed the suit property. The land Gat No 95 situated at village Nisare was given to the share of plaintiff Nos. 1 to 3 and deceased Ramchandra. The equal shares were given to the plaintiff Nos. 1 to 3, deceased Ramchandra and defendant No. 1 in land Gat No. 7 situated at village Nisare. The suit house property described at para 1/c of the plaint was given to the shares of plaintiff Nos. 1 to 3 defendant No. 1 and deceased Ramchandra and it was decided to reside separately in this property. The properties situated at Vadgaon belonging to Laxmi were decided to keep as joint family properties till the death of Laxmi and after her death it was decided to partition the said properties.

8. It is the allegation of defendant No. 1 that he had started the construction in the suit property in the share allotted to him. He

had not started the construction in the area which is adjacent to the road. The plaintiffs have taken the crops in their respective shares situated in the suit property. The defendant No. 1 is only in the possession of 9.5 R area out of suit property and the said area is less than that of the share which he is entitled for. Thus, it is the contention of the defendant No. 1 that as the said area out of suit property which is in his possession is less so, the plaintiff cannot claim temporary injunction against him.

9. It is the contention of defendant No. 1 that he had cultivated Sugarcane crops in the land Gat No. 6 situated at Mauje Nisare as well as in the land Gat No. 7 situated at Mauje Nisare. The plaintiffs had also cultivated the Sugarcane crops in their respective shares in the land Gat No. 95 situated at Mauje Nisare. Thus, it is the contention of the defendant No. 1 that the plaintiffs and defendant No. 1 are separately enjoying their respective shares in the agricultural properties and house properties.

10. The defendant No. 1 has also alternatively put forth that if it is held that the suit property is not partitioned then as the defendant No. 1 is co-owner the temporary injunction cannot be granted against co-owner.

11. The defendant No. 1 has further raised objection that, the plaintiff has not given the correct shares out of suit property which are in their possession and therefore, due to that it is difficult to identify the suit property. The defendant No. 1 has spend the amount of lacs of rupees to collect the construction material and the construction is completed till plinth level. So, it is the contention of defendant No. 1 that if the temporary injunction order is passed against him it would cause irreparable loss to him.

12. The defendant No. 1 has also raised objection that the plaintiff has not come with clean hands and have suppressed the material facts. Thus, on such grounds the defendant No. 1 has prayed for rejection of this application.

13. Heard, Ld. Adv. Shri. D. P. Jadhav for plaintiff and Ld. Adv. Shri. S. S. Shinde for defendant No. 1. Perused the written arguments submitted by Ld. Advocate for the defendant No. 1 vide Exh. 63.

14. Considering the rival contentions of the parties and arguments of Ld. Advocates the following points arise for my determination. The points and their findings followed by reasons are as below.

Sr. No.	Points	Findings
1	Is there prima-facie case in favour of plaintiff ?	Affirmative
2	Is there balance of convenience in favour of plaintiff?	Affirmative
3	Whether irreparable loss can be caused to the plaintiff if temporary injunction is not granted?	Affirmative
4	What Order?	As per final order application is allowed.

Reasons

As to Point Nos. 1 to 3:-

15. The plaintiffs have filed this suit for partition and separate possession of ancestral joint family properties situated at Mauje Malharpeth, Tal. Patan, Dist. Satara and at Mauje Nisare, Tal. Patan, Dist. Satara. Initially at the time of institution of said suit the

plaintiffs had not filed the temporary injunction application but during the pendency of said suit and before the date of appearance of defendants the plaintiff had taken the matter on board on 31/12/2014 and filed this application for temporary injunction. As per order passed below this application on. 31/12/2014 the defendant No. 1 was directed to maintain status-quo in respect of making any further construction in the suit property. The said order is in existence till today. The plaintiffs in their plaint at para 4 have disclosed the fact that in May 2014 when the defendant No. 1 had started to collect the construction material to make the construction in the suit property at that time the plaintiffs had demanded the partition of ancestral joint family properties with defendant No. 1 but as the defendant No. 1 had denied so, the plaintiffs were constrained to file this suit. Thus, it is clear that on 10/10/2014 when the plaintiffs had filed this suit at that time the plaintiffs had come with the case that the defendant No. 1 had started to collect the construction material in the suit property.

16. In this application the plaintiffs have disclosed the fact that when the defendant No. 1 was served with the summons from this suit at that time he had started the construction in the suit property and when the plaintiffs had requested him for not to construct as the suit was pending the defendant No. 1 had turned down their request and continued their construction. The plaintiffs have disclosed that such incidence was occurred on 26/12/2014. The summons at Exh 14 shows the Bailiff report that it is served on defendant No. 1 on 20/12/2014. Thus, it is clear that after service of summons the defendant No. 1 had started the construction in the suit property on 26/12/2014 as alleged by the plaintiffs. The defendant No. 1 himself has also admitted in his say as discussed earlier that he has started construction in the suit property and it is completed up to plinth level.

The defendant No. 1 has also filed on record at Exh. 52/14 the three coloured photographs from which it is clear that the defendant No. 1 has started the construction of basement. Therefore, it is clear that the construction of the defendant No. 1 was in progress when the plaintiffs had filed the application at Exh. 19. More over it is clear from the say of defendant No. 1 that after passing of the order of status-quo by this Court he has stopped this construction. Thus, the question before us is whether the defendant No. 1 can make such construction when the suit for partition is pending. The answer is definitely negative, because for this purpose it is necessary to go through the case of the plaintiffs and defendant No. 1 by comparing it with the documents produced on record.

17. The plaintiffs have come with the case that the suit property is not yet partitioned by metes and bonds. Whereas the defendant No. 1 has come with the case that the suit property is orally partitioned in the year 1975 and all are enjoying their respective shares as per this partition. The plaintiffs have heavily relied upon the mutation entry No. 8445 which is at Exh. 49. In this mutation entry it is mentioned that the name of defendant No. 1 is entered to the revenue record of the suit property as joint family manager in the year 1973 for the family of deceased Ramchandra, plaintiff Nos. 1 to 3, deceased Rukmini Sutar and Laxmi Ganpati Sutar. The plaintiffs have also filed on record vide Exh. 6 the 7 X 12 extract of the suit property of the year 2013-2014. In this 7 X 12 extract the name of defendant No. 1 is entered as joint family manager in other rights column. This shows that as per mutation entry No. 8445 the name of defendant No. 1 was entered to the revenue record of the suit property as joint family manager and it is continued as it is till today. The defendant No. 1 has given the explanation that as the suit property is belonging to Vitthal

Devsthan so, entry of the name of defendant No. 1 as joint family manager is not at all changed. This stand taken by the defendant No. 1 is not at all believable and acceptable because there was no legal difficulty for defendant No. 1 to enter names of the plaintiffs and defendants to the other rights column of 7 X 12 extract of suit property as per the oral partition occurred in the year 1975 which is the case put forth by defendant No. 1. If it all really the oral partition could have taken place in the year 1975 then the said partition could have been given effect to the revenue record but such is not the fact. Therefore, prima-facie the case put forth by the plaintiffs that the suit property is ancestral joint family property and it is not partitioned by metes and bounds appears to be reliable.

18. The defendant No. 1 has not filed affidavit of panchas named by him in his say who were present for oral partition in the year 1975 as per the case put forth by him. The defendant No. 1 has also not stated on affidavit that the panchas Baburao Kundlik Pawar, Baburao Pandurang Pawar and Bajrang Anant Chavan are all expired or not available. Thus, in such circumstances due to such impediment also the case put forth by the defendant No. 1 in respect of the oral partition prima-facie does not appear to be reliable.

19. Now, we shall go through some revenue record of the other suit properties which is produced on record by the defendant No. 1 himself. The mutation entry No. 859 which is at Exh. 41 make it clear that defendant No. 1 had given the application to the revenue officer and accordingly the names of plaintiffs Nos. 1 to 3, deceased Ramchandra and defendant No. 1 were entered to the revenue record of the land Gat No. 7 and Gat No. 95 of village Nisare in Anewari. This mutation entry does not make it clear that as per oral partition effected in the year 1975 the defendant No. 1 had given such

application to enter the names of plaintiff Nos. 1 to 3, defendant No. 1 and deceased Ramchandra. More over this mutation entry is effected on 20/01/1982 so it shows that as per the case of defendant No. 1 when the oral partition was effected in the year 1975 it was not given effect to the revenue record itself in the year 1975. Therefore, this mutation entry is also not sufficient to arrive at the conclusion that the oral partition was effected in the year 1975. The defendant No. 1 has put forth the case that he had paid the borrowed amount and redeemed the suit property bearing Gat No. 7 and Gat No. 95. To this effect the defendant No. 1 has produced on record vide Exh. 52/7 the original copy of re-conveyance deed executed by Shripati Bala Pawar in favour of defendant No. 1 on 05/08/1976. In this re-conveyance deed also in the recitals it is mentioned that the land Gat No. 69 of village Nisare is the ancestral property belonging to defendant No. 1. This document also make it clear that the land situated at Nisare were re-conveyance by defendant No. 1 which were belonging to joint family.

20. The defendant No. 1 has also raised objection that the description of the suit property as per shares of plaintiffs and defendant No. 1 is not given in the plaint. The Ld. Advocate for the defendant No. 1 in his argument put forth that in the plaint at para 1/a four boundaries of the suit properties are not mentioned and the rough sketch map along with plaint is not given to show the respective possession of plaintiff and defendant No. 1 therefore, it is difficult to identify the suit property. This objection of Ld. Advocate for defendant No. 1 is not at all sustainable because, the plaintiff has made the suit property as whole Gat No. 1/1 admeasuring 56 R. So, in such circumstances as per Order 7 Rule 3 of Civil Procedure Code it was not necessary to mention four boundaries of said property in order to identify it. More over as the plaintiffs have come with the case that

the suit property is not yet partitioned by metes and bonds and they are enjoying these properties as per their convenience so, it was not expected from plaintiff to file rough sketch map of the suit property along with plaint as filed by the defendant along with written statement.

21. The defendant No. 1 has also raised objection that plaintiff No. 1 Laxman Sutar has falsely got entered his name to the property situated at Vadgaon which were belonging to their sister Laxmi Ganpati Sutar. To this effect he had relied upon the mutation entry No. 16 to show the fact that, the plaintiff No. 1 has falsely got entered his name to the property belonging to Laxmibai. This mutation entry is of the year 1975. Moreover the property situated at Vadgaon belonging to Laxmibai are not at all suit properties so, in such circumstances the fact brought into notice by the defendant No. 1 is not at all helpful to arrive at the conclusion that the plaintiffs have not come with clean hands and they have suppressed material facts.

22. It is not at all disputed that the saw mill stands in the name of defendant No. 1 whether it is joint family property or belonging to defendant No. 1 can be decided only after full fledged evidence so, the document relied upon by the defendant No. 1 in respect of the saw mill are not at all helpful to defendant No. 1 to arrive at the conclusion that the oral partition is effected in the year 1975. More over the affidavit of Masud Iqbal Gadkari filed on record by the defendant No. 1 at Exh. 46 does not disclose the fact that in the year 1975 the saw mill was given to the share of defendant No. 1. He has disclosed in his affidavit that he is not at all running the saw mill on rent basis by paying the rent of Rs. 8,000/- as alleged by the plaintiffs. He has disclosed that he is working in this saw mill on the daily wages of Rs. 350/- per day since from the year 2012. On the

basis of this affidavit of Masud Ikbal Gadkari the whole case of the plaintiffs cannot be held to be false because, the other documents on record as discussed earlier rather supports the case of the plaintiffs to arrive at the conclusion that the suit properties are joint family properties then that to arrive at the conclusion that the suit properties are already partitioned.

23. The defendant No. 1 has also produced on record along with list at Exh. 61 the receipts of final bills issued by Balasaheb Desai Sahkari Sakhar Karkhana Ltd. Daulatnagar, Patan of the year 1999-2000, which are in the names of plaintiff No. 3 Pandurang Krushna Sutar, deceased Ramchandra Krushna Sutar, plaintiff No. 2 Anandrao Krushna Sutar and plaintiff No. 1 Laxman Krushna Sutar to show the fact that the plaintiffs and defendant No. 1 are taking sugarcane crops in their respective share as per partition effected in the year 1975. These documents are not sufficient to arrive at the conclusion that the partition is effected. But at the most it can be held that the plaintiffs and defendant No. 1 are enjoying the properties described in plaint at para 1 as per their own convenience. So, in such circumstances the documents relied upon by the defendant No. 1 in respect of Daulat Panipuravatha Seva Sahkari Santha Ltd. Malharpeth and Somaidevi Panipuravatha Seva Sahkari Santha Ltd. Nisare produced along with list at Exh. 61 are also not sufficient to prima-facie to arrive at the conclusion that the partition is effected in the year 1975 as alleged by the defendant No. 1.

24. The revenue record of the suit property as discussed earlier prima-facie shows that the suit property is not at all partitioned by metes and bonds and it stands in the name of defendant No. 1 as joint family manager. More over as alleged by the plaintiffs it is prima-facie clear that the plaintiffs and defendants are enjoying the

suit property as per their convenience. So, when the property is not partition by metes and bonds every co-sharer has right, title and interest in the every inch of suit property. No one can claim exclusive rights over specific portion out of disputed property before partition. Therefore, in such circumstances if the defendant No. 1 is allowed to continue the construction in the suit property it would amount to compulsory partition the suit property by denying the rights of the plaintiffs and other defendants in the suit property. Such observations are also made by Hon'ble High Court in the authority *I Gouri Vs. C. H. Ibrahim AIR 1980 Kerala 94.* The Hon'ble High Court expressed that *if several owners are in possession of an undivided property none of them has right to appropriate to his exclusive use any portion of this property as this will effect a compulsory partition in his own favour according to his choice. Therefore, one of several co-sharers of joint undivided property has no right to erect a building on undivided land without consent of other co-sharer.* Such observations are also made by Hon'ble High Court in the authority *Rukmani Vs. H. N. Thirumalai Chettiar AIR 1985 Madras 283.* So, though the defendant No. 1 has come with the case that he has spend the huge amount for collection of construction material such case is not sufficient to grant equitable remedy in favour of defendant No. 1. More over it is settled law that when the parties are slept over their right and when the construction is completed more than lintel level the injunction cannot be granted. In the case in hand as per the case of the defendant No. 1 the construction is completed up to plinth level so, due to such circumstances also it is necessary to grant the temporary injunction against defendant No. 1. If the defendant No. 1 is not restrained from making construction in the suit property it would amount to deprive the right, title and interest of the plaintiffs

and other defendants involved in the suit property and which would cause irreparable injury to them. So, the balance of convenience is also in favour of plaintiffs then that of the defendant No. 1. Hence, the factual aspects make it clear that the plaintiffs have prima-facie proved that they have arguable case in their favour and there requires further inquiry in respect of right, title and interest of parties involved in the suit property.

25. The Ld. Advocate for defendant No. 1 to this effect has relied upon the authorities such as

i) *T. A. George & Ors. Vs. D. D. A & Ors. AIR 1995 Delhi 131.* In this cited supra the Hon'ble High Court has made the observation that,

Civil P. C. (1908) O. 39, R. 1, 2 – Temporary injunction – Relief of – can be refused if party does not approach Court with clean hands.

ii) *M/s. Seemax Constructin Pvt. Ltd. Vs. State Bank of India & another AIR 1992 Delhi 197.* It is observed by Hon'ble High Court in this authority that,

Civil P. C. (1908), O. 39 R. 1, 2 S. 151- Relief of injunction-suppression of material facts – Effect – Suit for interim and permanent injunction restraining defendants from invoking bank guarantees – suits on same facts, plea and relief claimed, filed earlier in other courts, withdrawn after filling of present suit – fact not disclosed – amounts to suppression of material fact – suit liable to be dismissed without going into merits.

As discussed earlier the plaintiffs have not suppressed the material facts and have come with clean hands so, the observations made by Hon'ble High Courts in the above referred cited supras are

not applicable to the case in hand.

iii) *Prakash S. Akotkar & Ors. Vs. Mansoorkha Gulabkha & ors. AIR 1996 Bombay 36.* It is observed by Hon'bel High Court in this cited supra that, *co-owner in possession of property for and on behalf of other co-owners, cannot claim injunction against other co-owners restraining them from interfering with his possession and enjoyment of suit property so as to exclude them from exercising their right as co-owner.* In this case the plaintiffs have not claimed for temporary injunction for restraining defendant No. 1 from disturbing their possession in the suit property. So, in such circumstances the ratio led down in this cited supra cannot be applied to the case in hand.

iv) *Unique Alliance Industries, Goa Vs. Anupama Agencies, Trichur and Ors. AIR Kerala 52.* In this cited supra the Hon'ble High Court has observed that, *only on ground that plaintiff had a prima-facie debatable and arguable case temporary injunction cannot be granted. The case must be established with sufficient material or proved by affidavit.*

In the case in hand the plaintiffs as discussed earlier have proved by sufficient material on record that suit property is not partitioned by metes and bounds. So, in view of such observations made by Hon'ble High Court the temporary injunction can be granted against defendant No. 1.

v) *Mandali Ranganna & Ors. Vs. T. Ramchandra & Ors. AIR 2008 S. C. 2291.* It is observed by Hon'ble Apex Court in this cited supra that, *while considering an application for grant of injunction the Court should not only take into consideration the basic elements like prima-facie case, balance of convenience and*

irreparable loss but also take into consideration the conduct of parties. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one.

In the case in hand the plaintiffs have filed this application as soon as the defendant No. 1 had started construction in suit property. Only because the defendant No. 1 has incurred lacs of amount for collecting construction material the temporary injunction cannot be refused. Thus, the conduct of defendant No. 1 to construct in the suit property in spite of warning given by plaintiff disentitle him for equitable remedy. Therefore, the observations made by Hon'ble Apex Court rather supports case of plaintiffs then that of defendant No. 1.

26. The Ld. Advocate for defendant No. 1 has also relied upon the following authorities.

i) *R. K. Madhuryyajit Singh & Ors. Vs. Takhellambam Abung Singh & Ors. AIR 2001 Gauhati 181.*

ii) *Ms. Kavitha Goud, Vs. Nookala Sudarshan Reddy & Ors. AIR 2004 A. P. 326.*

iii) *Ramji Rai & Anr. Vs. Jagdish Mallah (Dead) Through Lrs. AIR 2007 S. C. 900.*

iv) *Smt. Rekha Narayan Marotkar & Ors. Vs. Rambhau Badhu Khadgi & Ors. AIR 2007 Bombay 135.*

The facts and the circumstances in all above referred cited supras are different then that of the facts and the circumstances in the case in hand. More over, the observations made in the above all cited supras are not helpful to the defendant No. 1 but they are rather helpful to the plaintiffs. Therefore, I have not discussed more on these

authorities. In view of all these discussions I have answered the point under consideration in **affirmative**.

As to point No. 4. :-

27. In view of these findings the application deserves to be allowed. As a result the following order.

:: ORDER ::

1. The application is allowed.
2. The defendant No. 1 is temporarily restrained from carrying out any further construction in the suit property, changing the nature and record of the suit property and alienating it by any mode of transfer till the final disposal of the suit.
3. Cost in main cause.

(Dictated & pronounced in open court.)

Karad
Dt. 12/02/2015

(D. R. Shetty)
Civil Judge Sr. Dn. Karad.

G. D. Jadhav,
Stenographer (L.G.)