

R.C.S.108/2021.

Avinash Phalake Vs. Kiran Shinde
& Others.

CNR. No. MHST090007442021

Order Below Exh-5.

1. This is an application filed by plaintiff under Order 39 Rule 1 and 2 of the Code of Civil Procedure for temporary injunction as to restrain defendants from causing obstruction over the suit property till disposal of suit.

2. **Suit property-**

The property situated at Mauje Padali station Tal. Koregaon bearing revision survey no. 102 area 1 H. 0.4 R out of it 12 Aane share. The boundaries of which are as follows.

East-	Arjun Govind Phalake.
South-	Prakash Dada Shinde and others.
West-	Pralhad Mahadev Phalake.
North-	Road.

The above property is the subject matter of this suit. More particularly described in plaint para no. 1. It is called as a “suit property”.

In short case of plaintiff-

3. The father of defendants namely Prakash Shinde for his legal necessity mortgaged the suit property to the plaintiff in the year 1996. Thereafter on 19/11/1999 father of defendant sold the suit property to the plaintiff for the consideration of Rs- 80,000/-. Since then plaintiff is in possession of the suit property. Thereafter on 29/09/2010 plaintiff had mortgaged the property to Subhash Phalake and subsequently on 24/04/2018 by redemption the Plaintiff has taken of suit property.

4. The plaintiff is owner and possessor of suit property. The aunt (आत्या) of defendant namely Indubai Chavan had filed suit against father of defendants, plaintiff and other person for partition and separate possession bearing R.C.S. no. 192/2010. The suit was dismissed on 13/02/2019. In the said suit Hon'ble civil Court has recorded finding that plaintiff is in possession of the suit property. The appeal against the decision of R.C.S. no. 192/2010 is pending before Hon'ble District Court. The defendants have no concern with the suit property. However, defendants are causing obstruction to the possession of plaintiff. Hence, on 16/06/2021 Plaintiff had sent legal notice to defendants. However defendants falsely replied. Hence, plaintiff constrained to file this suit and by this application plaintiff prayed to restrain defendants from causing obstruction over the suit property till disposal of suit.

5. Defendants resisted the application by filing say at Exh. 12 and denied the contention of plaintiff. It is contention of defendants that, suit property is their ancestral property and there is no partition by meets and bounds. The defendants have share in the suit property. The sale-deed executed by defendant's father is illegal because defendants father was under influence of liquor. The defendants have never sold their share in the suit property. Defendants have no knowledge about the alleged sale-deed. There is no consent of defendants on the sale-deed. The defendant are cultivating the suit property in common. Plaintiff is not in the possession of the suit property. By making false statement the plaintiff has filed this false suit. The plaintiff has suppressed the material facts from the Court.

6. It is further contention of defendants that, without partition the plaintiff has no right in the suit property. The plaintiff has not intentionally impleaded Indubai Chavan in the suit. The appeal against decision given in R.C.S. No. 192/2010 is pending before Hon'ble District Court. In R.C.S. No. 192/2010 the temporary injunction was allowed in

favour of Indubai Chavan. Present plaintiff i.e. the then defendant no 2 of R.C.S. No. 192/2010 had filed appeal against said decision, which was dismissed by Hon'ble District Court. Thereafter plaintiff moved to Hon'ble High Court by filing writ petition bearing no. 8382/2012. The said writ petition was also dismissed. Hence, plaintiff is not entitled to claim the reliefs prayed in the application. The defendant and their aunt namely Indubai are cultivating the suit property commonly and they have taken crop of soyabin and Jawar. The plaintiff is not in possession of suit property. The plaintiff has not come with the clean hand to seek of relief equitable relief. Hence, defendants prayed to reject the application with cost.

7. Considering the rival pleading of both the parties following points arise for my determination. To which I have recorded my findings there on as follows.

Sr. No.	Points	Findings
1	Does applicant make out a prima facie case ?	Yes.
2	Whether balance of convenience lies in favour of applicant ?	Yes
3	Whether applicant shall suffer irreparable losses if temporary injunction is not granted ?	Yes
4	Is the applicant entitled to temporary injunction ?	Yes
5	What order ?	As per final order.

REASONS

8. The applicant in support of his claim has filed following documents :-

1.	7/12 extract of Revision Survey no. 102.
2	Copy of the notice issued by the plaintiff
3.	Copy of replied notice sent by defendants.

4.	Sale-deed dated 19/11/1999.
5.	Re-conveyance deed dated 24/04/2018.
6.	Copy of judgment given in R.C.S. No. 192/2010.
7.	Partition executed as per section 85 of Maharashtra Land Revenue Court.
8.	Mutation entry no. 1971
9.	Copy of order passed below Exh. 5 in R.C.S. no. 192/2010
10.	Copy of order passed below Exh. 53 in R.C.S. no. 192/2010
11.	Copy of judgment passed in misc. civil appeal no. 10/2012.
12.	Copy of order passed in writ petition no. 8385/2012
13.	G.R. issued on 16/07/2014.

9. On the contrary defendants have filed following documents.

1.	Copy of plaint given in R.C.S. No. 192/2010
2.	Written statement of defendant no. 2 and 3 in R.C.S. No. 192/2010
3.	Copy of writ in writ petition no. 8385/2012

As to Point No. 1 to 4 :-

10. All the point interlinked to each other therefore taken up for discussion together.

11. In the instant case the Ld. Advocate for plaintiff argued that, plaintiff is in possession of the suit property. Defendants are causing obstruction to the possession of the plaintiff. The plaintiff is owner of suit property by way of registered sale-deed. The 7/12 extract shows the possession of plaintiff over the suit property. The Court in R.C.S. No. 192/2010 has given finding that plaintiff is in possession of the suit

property. Hence, there is prima-facie material to show that, plaintiff is in possession of the suit property. The defendants have no right to cause obstruction to the possession of plaintiff. The balance of convenience is in favour of plaintiff. If temporary injunction is refused then irreparable loss would cause to plaintiff which cannot be compensated in terms of money. Hence, plaintiff prayed to allow the application by restraining defendants from causing obstruction over the suit property till disposal of suit.

12. On the contrary the Ld. Advocate for defendants vehemently argued that, plaintiff is not in the possession of the suit property. Suit property is ancestral property of defendants and their aunt namely Indubai Chavan. They are cultivating the suit property jointly. The plaintiff has suppressed the material facts from the Court and not come with the clean hands. Earlier in R.C.S. No. 192/2010 temporary injunction was granted in favour of Indubai Chavan which was confirmed till Hon'ble High Court. The sale deed executed in favour of plaintiff is illegal. Without partition the plaintiff cannot claim the possession over the suit property. As plaintiff is not in the possession of the suit property, he is not entitled for the equitable relief of injunction. Hence, defendants prayed to reject the application with cost.

13. In order to sustain an order of temporary injunction under Order 39, Rule (1) of the Code of Civil Procedure, it is for the plaintiff to establish that he has prima-facie case for grant of temporary injunction as prayed for, that he would suffer irreparable loss, if temporary injunction as prayed is refused; and that balance of convenience lies in his favour. All these three aspects are based on law of equity. The relief of temporary injunction is the discretionary one.

14. In the instant case plaintiff came with the case that, defendants father Prakash firstly mortgaged the suit property in the year 1996 and afterwards sold the suit property to plaintiff for consideration

of Rs. 80,000/-. In order to prima-facie prove this fact plaintiff has relied on sale-deed dated 19/11/1999. On perusal of above sale-deed it appears that, Prakash Shinde sold northern sides 12 Aane share in revision survey no. 102 to the plaintiff. Further on perusal of 7/12 extract of suit property it appears that, the name of plaintiff is recorded to the 7/12 extract of the suit property.

15. Further plaintiff pleaded that, in the year 2010 he has mortgaged the suit property to Subhash Phalake and on 24/04/2018 by executing deed of re-conveyance taken the suit property back. In order to prove this fact plaintiff has filed the deed of re-conveyance below Exh. 3. On perusal of re-conveyance deed it appears that, Subhash Phalake has re-conveyed 12 Aane share to the plaintiff in revision survey no. 102. So the pleading of plaintiff is prima-facie supported by documents on record.

16. Further the plaintiff claimed that Indubai Chavan had filed R.C.S. No. 192/2010 for partition and separate possession which was dismissed and in the said suit The Court has given finding that plaintiff is in the possession of the suit property. The plaintiff has filed the copy of judgment given in R.C.S. No. 192/2010. On perusal of the copy of judgment given in R.C.S. no. 192/2010 it appears that, Indubai had filed suit against the father of defendant, plaintiff and other persons for partition, declaration and cancellation of sale-deed and perpetual injunction. After trial on merit the suit was dismissed. In the said suit while answering issue no. 4B Court observed that, Avinash Phalake is in possession of the suit property as per the sale-deed. It is admitted to the both the parties that appeal before Hon'ble District Court is pending against decision of R.C.S. No. 192/2010. It is settled principle of law that, an appeal shall not operate as stay to any order or proceeding. In the instant case, the defendants have not filed on record any document which shows that the findings given in R.C.S. No. 192/2010 are stayed by Hon'ble District Court. Therefore, prima-facie I have to consider the

observation made by the civil court in R.C.S. No. 192/2010.

17. The defendants have claimed that plaintiff has suppressed the material facts that, temporary injunction was granted in favour of Indubai and the present plaintiff was restrained from causing obstruction to the possession of Indubai and the injunction order is confirmed till Hon'ble High Court. Here it is necessary to mention that, interim orders only operates till decision of suit and after the decision of suit they will not operate subject to outcome of decision. In the instant case the plaintiff has very well mentioned that the suit was pending between plaintiff and Indubai and others. Therefore, only because the interim order are not mentioned does not mean the plaintiff has suppressed the material facts. Hence, I do not find any substance in the contention of defendants that plaintiff suppressed material facts from the Court.

18. The defendants have further claimed that the suit property is their ancestral property and there is no partition by meets and bound. This fact is already decided by judgment given in R.C.S. No. 192/2010. Therefore this fact can not be considered again in this proceeding.

19. In the instant case the Ld. advocate for defendants vehemently argued that, plaintiff is not in the possession of suit property as mentioned in the plaint. The boundaries mentioned in the plaint is not been mentioned in the sale-deed and for the first time the said boundaries are mentioned. Hence, it cannot be said that plaintiff is in possession of the suit property. Here it is to necessary to mention that on perusal of sale-deed it appears that, defendant father have sold the 12 Aane share of northern side of revision survey no. 102. The above contention prima-facie shows that, the northern side of the survey no. 102 is given to the plaintiff. Further in R.C.S. No. 192/2010 the Civil Court given finding that plaintiff is in possession of the suit property as per sale-deed. Hence, I do not find any substance in the contention of the defendants that plaintiff is not in the possession of the suit property.

20. In the instant case the Ld. Advocate for defendants further argued that, the pleading in respect of obstruction is vague. The plaintiff is not mentioned when and how the obstruction is caused. Hence, the application liable to be rejected. Here it is necessary to mention that defendants have denied the possession of plaintiff that itself amounts to obstruction. Hence, I do not find merit in the above contention of defendants that pleading in respect of obstruction is vague.

21. In the instant case the Ld. advocate for defendant placed his reliance on the case of *Jairaj Devidas and others Vs. Hirabai Shinwar Jadhav and others (2012 2 BomCR 386)* in which Hon'ble High Court observed that, the party who claims equitable relief has to come with the clean hands and there should be no suppression of facts. In the above cited case the plaintiff had already filed civil suit bearing no. 530/2004 for same relief which was not mentioned in the suit. However, in the instant case plaintiff has mentioned the earlier suit filed between the parties. Only non-mentioning of interim order will not amount to material suppression. Hence, the observation made in the above cited case are not applicable to the present case.

22. Further Ld. advocate for defendants placed his reliance on the case of *Ramdas Vs. Sitabai & Ors decided on 29 May, 2009 (Civil Appeal No. 6508 of 2005)* in the above cited case the Hon'ble Supreme Court observed that, without there any physical formal partition of an undivided landed property, the co-sharer can not put vendee in possession although such co-sharer may have right to transfer his undivided share. I have considered the observation made by Hon'ble Supreme Court. In the instant case in R.C.S. No. 192/2010 this fact already been considered and after trial on merit the suit was decided. Hence, at this stage in this proceeding the above observation is not applicable.

23. further the Ld. advocate for defendants placed his reliance

on the case of *Jonala Sura Reddy Vs. Tityaguru Srinivasa Reddy (AIR 2004 AP 222)* in the above cited case the plaintiff had not whispered a single word regarding the earlier suit and did not come with the clean hands. However in the instant case there is no such fact exist. Hence, the observation made in the above case is not applicable to the present case.

24. Further the Ld. advocate for defendants in order to show that, the judgment given in R.C.S. No. 192/2010 is wrong placed his reliance on the case of *Vineeta Sharma Vs. Rakesh Sharma, Sou Parvati W/O Vishwanath Zangare and Ors. Vs. Sk. Rasul s/o Sk. Abdul Musalma (2014(2) Mh.LJ 457]* *Basheer Vs. Dnyaneshwar (2015 5 Mah LJ 853. Shri Kashinath Rajaram Kasabe and Ors. Vs. Shri Ramchandra Tukaram Kasale (second appeal no. 563/1992). Nilkanth Vs. Bhaurao (2008 4 ALLMR 383). Shrikant Trimbakrao Begade Vs. Nattu Maroti Shivarkar (2017 (4) MhLJ 590). Raghunath and Ors. Vs. Kedar Nath (AIR 1969 SC 1316). Santosh W/O. Motiram Solanke & Ors. Vs. Arjun S/O. Asaram Solanke & Ors. (2014 (2) All MR 273). Sameersingh Sureshsingh Vs. Savita Sameersingh Suryawanshi (2008 (3) BomCR 241)*. I have considered the observation made in the above cases. Here it is necessary to mention that, this Court is not appellant Court of the Court which passed judgment R.C.S. No. 192/2010. This Court has no right to say that, the judgment given in R.C.S. No. 192/2010 is wrong. Therefore, the observations made in the above case are not applicable to the case in hand.

25. Further the Ld. advocate for defendant placed his reliance on the case of *Atmaram S/O. Amruta Mehange Vs. Smt. Banarasibai W/O Nandlal decided on 29 February, 2016*. In the above cited case plaintiff had no document to show the possession over the suit property. More-over, there was money lending transaction between the parties. In the instant case there is not such fact exists. There is prima-facie material on record to show the possession of plaintiff. Hence, the observations

made in the above case are not applicable to the present case.

26. Further the Ld. advocate for defendant placed his reliance on the case of ***Sakhahari Parwatrao Karahale and Anr. Vs. Bhimashankar Parwatrao Karahale (2002 9 SCC 608)*** In the above cited case there was no partition between the member of joint family and each member of joint family is co-sharer and possession of one is the possession of all. However in the instant case in R.C.S. No. 192/2010 the Court has given finding that, the partition of effected between the parties. Hence, above observations are not applicable to the instant case.

27. Further the Ld. advocate for defendants placed his reliance on the case of ***M. Ramachandra And Ors. Vs. Shri Doddamuniyappa And Anr. (2002 Supreme (6) 360)*** In the above cited case the sale-deeds did not mentioned the clear description of the properties and there was confusion regarding the identity of property. However in the instant case the Court have given finding that, the plaintiff is in possession. Which is not been stayed till today. Hence, the observations made in the above case are not applicable to the case in hand.

28. Further the Ld. advocate for defendant placed his reliance on the case of ***Jalandhar Improvement Trust Vs. Sampuram Singh (AIR 1999 SC 1347)***. I have considered the observation made in the above case. In the cited case Hon'ble High Court observed that, there is no estoppel against law. However in the instant case there is no such facts. Hence, the observations made in the above case are not applicable.

29. Further the Ld. advocate for defendant placed his reliance on the case of ***Archana Shyamkishor Pashine and Ors. Vs. Additional Commissioner (Revenue) and Anr. (2066 4 ALLMR 705)***. The facts of above case are different in the instant case. Hence, the observations made in the above case are not applicable to the present case.

30. Further the Ld. advocate for defendant placed his reliance

on the case of *Vishnu Keshav Sanap Vs. Bhagwan Vithoba Ingale & Ors. (2011 (6) BomCR 662)*. In the above cited case the order of additional commissioner was under challenge. The facts of above case are different from this case. Hence, the observations made in the above cases are not applicable.

31. In the instant case on perusal of copy of judgment passed in R.C.S. No. 192/2010 it prima-facie appear that, Court has given finding that, present plaintiff is in the possession of the suit property as per the sale-deed and mortgage-deed. The said observation has not been stayed till today. Therefore I have to considered the above observation. Further the 7/12 extract also shows the possession of plaintiff over the suit property. On the contrary there is nothing on record to show the possession of the plaintiff over the suit property i.e. 12 Aane share. Therefore, it can prima-facie be inferred that, plaintiff is in possession of the suit property.

32. Considering all discussion prima-facie it appears that, plaintiff is in possession of the suit property. Further plaintiff has prima-facie arguable case before the case. Further balance of convenience also tilts in favour of plaintiff. If injunction is refused plaintiff would suffer irreparable loss which cannot be compensated in terms of money. The plaintiff is entitled for injunction. Hence, I answer to point no. 1 to 4 is affirmative and in answer to point no. 5 I pass to following order.

ORDER

- 1] Application is allowed.
- 2] Defendants are hereby restrained from causing obstruction to the possession of the plaintiff over the suit property till disposal of main suit.
- 3] Cost in cause.

Date :- 17/12/2021.

(Atul B. Patil)
Jt. Civil Judge Junior Division, Koregaon.