

ORDER PASSED BELOW EXH. 5 IN R.C.S. NO. 292/12

1. This is an application filed by plaintiff praying for temporary injunction against defendants 3 and 4.

2. Perused application. Plaintiff contended that he purchased suit property as mentioned in plaint para No.1A and after that he constructed compound to the said purchased property and raised construction as mentioned in plaint para No.1B. He leased out his property. There were litigations in between defendants. In R.C.S. No. 205/1993, defendants were entered in the compromise and agreed to the ½ share each to the defendants 1 and 2 at one side and defendants 3 and 4 at another side in respect of land in block no. 177/7. After that, defendant no. 4 filed suit bearing Spl.C.S.No. 474/2000 against defendant no. 3 and others. The said suit decreed and accordingly, defendant no. 4 filed Spl. Darkhast No. 24/2005. In the execution of said Darkhast, the hands were joined with the employees of Tahasil Office and the possession receipt stating handing over of land adjacent to property mentioned in plaint para 1B to the defendant no.5 was brought in existence. In Sept. 2012, some unknown persons on behalf of defendants 3 and 4 started digging in property mentioned in plaint para 1A. At that time, plaintiff asked to defendants 3 and 4, but latter threatened him. Accordingly, plaintiff prayed for allowing this application.

3. Defendant no.3 filed his say at Exh. 28 and admitted the contents of plaintiff. Defendant no.4 filed his say at Exh.21. He resisted

the claim of plaintiff. He came with the case that the suit property along with other properties were ancestral properties of defendants 1 to 4 and their uncle namely Kashinath Shankar Kodule. Defendants 1, 2 and their mother had filed R.C.S. No. 205/1993 for partition and recovery of possession against defendants 3 and 4 and Kashinath Kodule. In the said suit, the compromise was effected as per Exh.25 on 16/02/1994 and accordingly, suit was decreed. In the said decree ½ share was given to defendants 1 and 2, their mother and sister and rest ½ share was given to defendants 3 and 4 out of land block nos. 177/7, 286/5, 286/9, 274/2, 274/3 and 274/4.

4. Defendant No. 4 further contended that defendants 1 and 2 sold 5 paise common share out of land block no. 177/7 to the plaintiff. At that time, neither partition was effected nor the said sold property was given to share of defendant no. 1 and 2. Defendants 3 and 4 have not signed on the said sale-deed as consenting parties, but they have signed as witnesses. The recitals in the said sale-deed are not binding on the defendant no.4. The false four boundaries are mentioned in the said sale-deed. In the said sale-deed, the recitals in respect of property sold being ancestral property are specifically made. Defendants 1 and 2 had no right to sale common share. Further, plaintiff has no right to take possession in common. The plaintiff was required to file general suit for partition and then take possession of the purchased property. After decree in R.C.S. No. 205/1993, defendants 1, 2 and their mother filed R.D. No. 15/1996 for execution of the decree. In the said Darkhast 0.82 Aare are land out of land block no. 177/2007 located at eastern side was given to the share of defendants 1, 2 and their mother and remaining 0.82 Aare

land at western side was given to the share of defendants 3 and 4. At that time, defendants 1 to 4 had given statement before T.I.L.R., Patan in respect of handing over possession to the purchasers. As per this statement, defendants 1 and 2 were under obligation to hand over possession to the plaintiff out of their land admeasuring 0 hec. 82 Aare at eastern side.

5. Defendant no. 4 further contended that he had filed Special Civil Suit No. 474/2000 for partition. In the said suit, plaintiff was not made party because in the R.D. No. 15/1996, defendants 1 and 2 had admitted their responsibility to hand over possession to the purchasers. Special Civil Suit No. 474/2000 decreed on 26/08/2005. Accordingly, Special Darkhast No. 14/2005 was filed on 04/10/2005. During that period, plaintiff raised construction of building as mentioned in plaint para 1A. The entry of said building was taken as per resolution No. 6/15 dt. 23/11/2005. In the said Darkhast, land located at the southern side was given to the mother of defendant no. 4 and during the partition, the officer handed over possession by excluding the land under construction on 12/06/2008. Accordingly, the Darkhast was disposed off. At that time, the plaintiff and other persons having entries on the suit property did not find in the possession of premises. Since then, the mother of defendant no.4 was in possession of the property given to her as per partition. Civil Court has no power to cancel the possession receipt. Plaintiff has not filed suit within limitation. The plaintiff is not entitled to ask relief about the vacant premises. Plaintiff is not having title to the suit property except the RCC building. Defendant no.4 has leased out the 10 X 20 feet premises to the Ganpat Tukaram Magar since July

2008. This fact is suppressed by the plaintiff. Accordingly, defendant no.4 prayed for rejecting this application.

6. The following points arise for my consideration and my findings thereon as under :-

S. No.	Points	Findings
1	Whether plaintiff proves prima- facie case in his favour?	In the affirmative
2	Whether plaintiff proves balance of convenience in his favour?	In the affirmative
3	Whether plaintiff proves that irreparable loss will be caused if application is rejected?	In the affirmative
4	What order?	As per final order.

REASONS

7. Parties have filed bulk of documents in support of their contentions. Perused the same.

8. Heard Adv. U. V. Panval for plaintiff and Adv. H.D. Patil for defendant No.4. Also heard Adv. P. A. Molawade for defendant No. 3. They argued in consonance with their pleadings.

9. **As to point No. 1 to 3 :-**

To begin with, here it would be proper to reproduce the following observations made in *Dalpat Kumar Vs. Prahlad Singh* (AIR 1993 C 276) filed on behalf of defendant no.4 :-

"4.....It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury for dispossession. Irreparable injury, however, does not mean that there must be no physical

possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

Above are the guiding principles to be kept in mind while deciding application for temporary injunction. Let see whether plaintiff fulfills above principles.

10. From the pleadings, documents and arguments, it is admitted to the parties that land block No. 177/7 is converted into land block No. 124/7. Further, from all above, following points are apparently clear :-

a). *Defendant no. 1, 2 and their mother filed R.C.S. No. 205/1993 about suit property and other properties for partition in which parties entered into compromise vide Exh.25. In the said compromise, defendant no. 1, 2, their mother and sister were allotted ½ share and*

defendants 3 and 4 were allotted ½ share in land block no. 177/07.

b). On 05/05/1994 defendants 1 and 2 sold property as mentioned in plaint para 1A to the plaintiff. On the said sale-deed defendants 3 and 4 signed as witnesses.

c). Defendants 1, 2 and their mother filed R.D. No. 15/1996 against present defendants 3 to 5 and in the execution of said Darkhast out of block no. 177/07, ½ share at the eastern side was allotted to defendants 1, 2 and their mother and rest of the ½ share at the western side was allotted to the defendants 3 to 5 .

d). Defendant no. 4 filed Special Civil Suit No. 474/2000 against defendant no.3 and others. The said suit decreed partly on 26/08/2005 and separate share was allotted to defendant no.4 in land block no. 177/07.

e). Defendant no.4 filed Special Darkhast No. 24/2005 on 04/10/2005 and in the execution of it, the standing buildings were saved and rest of the adjoining landed property was made subject of partition.

11. From above chronologies, it prima-facie appears that defendants 1 and 2 sold suit property to the plaintiff and defendants no. 3 and 4 are witnesses to the registered sale-deed. It means defendants 3 and 4 were well within the knowledge that defendants 1 and 2 sold suit property to the plaintiff by mentioning specific four boundaries. I regard of sale deed, advocate for plaintiff relied on the following observations

made in *Dr. N. Seetharam Shetty Vs. Upendra Madhav Kini [2000 (1) Civil LJ 827]*

"9. Sr. Manjunath did not seriously dispute the execution of such a sale-deed in favour of the respondents plaintiffs. In the absence of the sale-deed being disputed and also in the absence of any challenge to the title of Lalithamma, the vendor of the plaintiffs, the findings of the Learned Judge that the plaintiffs have a prima facie right to be in possession has to be upheld and the Learned Judge has hold that there is threat of interference granted injunction. Therefore in my view Learned Judge was justified in granting injunction in so far as 'A' schedule property is concerned."

In the present case also the sale deed in favour of plaintiff is not seriously disputed till filing this suit. Further, the execution of sale deed is admitted by the defendant no. 4. Defendants no. 3 and 4 are witnesses to the said sale deed. Defendant No. 3 and 4 could have raised the grievances about the right of defendants no. 1 and 2 at the time of execution of sale deed. There is no document to show that defendants 3 and 4 have raised any such grievance. Considering all above observations are applicable to present case.

12. Counter to above, Advocate for defendant No.4 argued that plaintiff has purchased undivided share and in this respect, he relied on the following observations made in *Ramdas Vs. Sitabai (AIR 2009 SC 2735)* :-

Transfer of Property Act (4 of 1882), 8. 64 – Purchase of undivided share of co-sharer – Right of purchaser to claim possession.

A purchaser cannot have a better title than what vendor had. An undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court.

In present suit as stated earlier, defendant nos. 1 and 2 have executed sale-deed by noting specific four boundaries. Further, in the Exh.25 in R.C.S. No. 205/1993, it is noted that the properties are under cultivation of the parties as per compromise arrived at by them. Considering this, there is some room to presume that the parties were under separate cultivation at the time of filing Exh. 25 i.e. compromise pursis in R.C.S. No. 205/1993. Hence, the principle of law mentioned in above case can be seen at the final adjudication of suit.

13. Coming to the aspect of plaintiffs possession over suit property, it is the case of defendant no.4 that the plaintiff has raised construction in the premises which is allotted to the deceased defendant no.5 in the year 2005. But, the grievance in this respect is not made by him in any pending proceeding or by filing new proceeding. It is admitted to the defendant no.4 that plaintiff is in the possession of the building constructed by him. He has no objection in this respect. But, he has grievance about the adjoining vacant premises. It is prima facie clear that there is registered sale-deed in favour of plaintiff. It is also apparently clear that vide the said registered sale-deed, specific portion by mentioning four boundaries is given to the plaintiff. Further, it is apparently clear that plaintiff's house bearing no. 666 is there on suit

property. It means since execution of sale-deed by defendants 1 and 2 in favour of plaintiff, the latter has possession over the suit property.

14. At this juncture, advocate for plaintiff relied on the following observations :-

1. **Govindbhai Ramjibhai Chauhan Vs. Gokulchand**

Juthalal Agrawal [1997(1) Civil LJ 594]

"5. Having found that the plaintiff was in settled possession of the disputed land, may be a trespasser or as unauthorized occupant, the appellate Court was not justified in holding that the plaintiff was not entitled to seek the temporary injunction being a trespasser or wrong doer. The law is well settled that even a settled trespasser can seek temporary injunction to protect his possession till he is dispossessed in accordance with law.

2. **Gorakh Mahadev Survase and others Vs. Narayan**

Balu Dhombe and others [2012(2) Mh.L.J. 215]

Civil Procedure Code, O. 39, RR. 1 and 2 – Temporary injunction – Grant of injunction to protect possession of immovable property – Parties must substantiate their case of possession by corroborative material – Parties must be able to substantiate their case of possession, which is the most vital aspect insofar as the grant of injunction is concerned.

15. On the contrary, Advocate for defendant No. 4 relied on the following observations made in **Mulji Umershi Shah Vs. Paradisia**

Builders Pvt. Ltd., Mumbai [AIR 1998 Bombay 87]

"The contention that in a suit for injunction based primarily on possession, question of title cannot be gone into and therefore while considering the application for temporary injunction the only consideration before the Court was possession and not the title of plaintiff is neither impressive nor sound. In the suit for perpetual injunction the Court may be called upon to hold inquiry in title, right, interest or status, as the case may be, of the plaintiff to find out whether plaintiff is entitled to protection of his possession by decree of injunction. The same consideration, prima facie, is required to be seen while considering an application for temporary injunction. The question of possession presupposes lawful possession and for adjudication of that question whether finally or at interlocutory stage, the inquiry into title, right, interest or status of plaintiff is not foreign to the subject-matter."

From the documents on record, it is prima facie clear that it is admitted to the parties that plaintiff purchased suit property from defendants 1 and 2. It means there is no dispute in respect of deriving title by the plaintiff from defendants 1 and 2. Whether the title is perfect or not is a question to be decided after recording of evidence. Prima facie, it appears that the plaintiff has acquired title to the suit property. Accordingly, plaintiff comply the requisites of observations made in *Mulji Umershi Shah case*. As stated above, plaintiff is in possession of suit property. Hence, the above observations in *Govindbhai Ramjibhai Chauhan and Gorakh Mahadev Survase cases* are applicable to the

present case.

16. Defendant no. 4 further assailed the possession of plaintiff being the possession of the co-owner with defendants. His advocate argued that plaintiff being stepped into shoes of co-owner, is not entitled to the injunction against defendants no.4. In this respect, he relied on the following observations made in **Prakash S. Akotkar Vs. Mansoorkha Gulabkha (AIR 1996 Bom 36)** :-

"5.Having found the character of possession as co-owner, as indicated above, the only question that arises for determination is, whether a co-owner in possession is entitled to an injunction of this nature against the other co-owners. Once, it is found that the possession of co-owner is for and on behalf of other co-owners, the other co-owner cannot claim injunction of this nature so as to exclude the other co-owners from exercising their right as co-owners."

At the cost of repetition, it has to be stated that defendant no 1 and 2 have sold suit property by mentioning specific boundaries and it is mentioned in Exh.25 in RCS. No. 205/1993 that the parties were in possession of portion as per partition. Considering this, plaintiff cannot be termed as the co-owner at this juncture and accordingly, above observations are not applicable to present case.

17. By perusing the say of defendant no.4, it appears that he is making grievances about the premises adjoining to the constructed house of plaintiff. It means defendant no.4 is denying any vacant place of plaintiff adjoining to his building. Defendant no.4 is taking the help of

proceeding before Tahasildar in respect of effecting partition as per decree. In the said proceeding while preparing partition chart, it is noted in the remark column that the land under construction is excluded and remaining land is taken into account while effecting partition. Further, it is also noted in the proceedings before Tahasildar that there was no-one in the possession of the premises adjoining to the buildings standing on the properties under partition.

18. Here, it has to be made clear that the plaintiff was not made party in any of the proceedings started after the execution of sale-deed even though defendants 1 to 4 were having the knowledge of execution of sale-deed. In such circumstances, there was no means to the plaintiff to get knowledge about the proceedings in between defendants inter-se. If the plaintiff was given the opportunity in any of the proceedings, the dispute would not have arose. Here, it appears to my mind that the serious question is raised in order to grant discretionary relief. Considering this, it appears to my mind that prima facie case is in favour of plaintiff.

19. Advocate for defendants no.4 argued that plaintiff has suppressed the material fact about the leasing out of premises before property mentioned in plaint para no.1/B. In this support defendant no. 4 filed on record the copy of agreement in this respect. He relied on the following observations made in **Seemax Construction (P) Ltd. Vs. State Bank of India (AIR 1992 Delhi 197)**

"The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking

discretionary relief has to approach the court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from court is not entitled to any discretionary relief. The court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the court."

The perusal of the above mentioned copy reveals that the specific four boundaries are not mentioned in it. Therefore, it is very hard to digest the case of defendant no.4. Accordingly, defendant no.4 is not entitled to the benefits of above observations.

20. As stated above, plaintiff is having in actual possession as mentioned in plaint. Defendant no. 3 and 4 appear to be obstructing his possession. Therefore, the balance of convenience lies in plaintiff's favour. If the plaintiff is obstructed while enjoying the suit property as mentioned in the plaint para 1A, he is likely to suffer irreparable loss. Further, if as per the contents of documents filed on record by defendant no.4 in respect of the proceedings before Tahasildar, the premises adjoining to the constructed buildings are not allowed to plaintiff to be enjoyed as per the contents of sale-deed in his favour, the serious question is likely to arise in respect of ingress and egress to the constructed building. In such circumstances, the plaintiff would not be in a position to enjoy the house constructed by him. Considering this, if the temporary injunction is not granted, the obstruction of defendant no. 3 and 4 will continue further and plaintiff is likely to suffer irreparable

loss. Hence, point no. 1 to 3 are recorded in affirmative.

21. Advocate for the plaintiff argued that defendants have played fraud and he relied on the case law in this respect. It is clear that there is no pleading of plaintiff in respect of fraud. Hence, this submission cannot be considered. Advocate for plaintiff also relied on the observations made in *Maharwal Khewaji Trust Faridkot Vs. Baldeo Das [2005(1)BCJ 268 SC]*. But, the facts and circumstances in the present case are totally different from the cited case. Hence, the same is not applicable here. Considering all above, plaintiff has prima facie fulfilled the principles mentioned in *Dalpat Kumar case*. Accordingly, present application is worthy to be allowed. Hence, order :-

O R D E R

1. Application is allowed.
2. Defendants no. 3 and 4 are hereby restrained from causing obstruction to the possession of plaintiff over property mentioned in plaint para no. 1 A and 1 B, till the final decision of this suit or any other order passed sooner.
3. Defendants no. 3 and 4 are further restrained from alienating property mentioned in plaint para no. 1 A and also raising construction over it, till final decision of this suit or any other order passed sooner.

Order below exh. 5 in R.C.S. No. 292/12

4. Parties to expedite suit.

Place : Patan

(Shashikant R. Mokashi)

Date : 27.11.2012

Jt. Civil Judge, J.D., Patan.