

MHST160000322016



Regular Civil Suit No.9/2016
Jaysing Vs. Baban & ors.

Order Below Exh.5
(Passed on 20th September, 2023)

This is an application filed by the plaintiff for grant of temporary injunction against defendant No.4 & 5. It is contended by the plaintiff that the suit properties are his ancestral properties. Initially, the suit properties belonged to his grandfather Bhairu Kakade. Said Bhairu was having three sons namely Narayan, Vitthal and Sakharam. Further, said Vitthal died and the name of Sakharam Bhairu Kakade was mutated in respect of the suit properties. Said Sakharam died in the year 1971, he was having only son Krushna. Plaintiff Jaysing is son of said Krushna. The plaintiff was working in the BEST Company at Mumbai since 1971 to 2005. In the year 1976, some of the field properties at Mouje Velang were acquired by the Government and alternate properties were given to the plaintiff under rehabilitation in the year 1980. Initially, the name of Krushna Sakharam Kakade was entered as a “Manager” in the revenue records of the suit properties vide mutation entry No.1962. In the year 1982, said Krushna died. However, after the death of Krushna, the plaintiff never filed any application before Talathi for mutation of entry in his name. In April – May 2012, when he attended one marriage function at Kanher Khed, he came to know from the villagers of Velang that defendant No.1 has committed fraud in respect of his field properties. So, he started to collect the necessary documents. Thereafter, he came to know about

mutation entry No.3301 in favour of defendant No.1. The perusal of said mutation entry prima facie shows that said entry was taken in the name of defendant No.1 on the application filed by the plaintiff. In fact, he has not filed any such application. The name of plaintiff was not entered in the revenue record of the suit properties and therefore, there is no question of filing such an application by him. Defendant No.1 is not from the family of plaintiff and therefore he has no any right to succeed the suit property as such. Said mutation entry has not been taken in pursuance of any registered document, which can show the transaction of alienation. In fact, the mutation entry No.3301 itself is illegal.

2. The plaintiff challenged said mutation entry No.3301 in RTS Revision Application No. 42/2013 before the Sub Divisional Magistrate, Wai. However, said application has been dismissed vide order dtd.08.10.2015 and the plaintiff was asked to claim his rights before the competent civil Court. The plaintiff further submitted that defendant No.1 subsequently filed an application for mutation in the name of his sons defendant No.2 & 3. Accordingly, their names have been recorded vide mutation entry No.3322. Further, it has come to his notice that the defendant No.1 has alienated the suit property mentioned at plaint paragraph No.1A in favour of defendant No.4 vide registered sale-deed dtd.11.09.2002. Accordingly, the mutation entry No.3527 has been taken in favour of defendant No.4 in respect of the suit property bearing survey No.95/1. Further, it also came to his knowledge that on 01.08.2003 defendant No.1 sold out the suit property mentioned at plaint paragraph No.1B bearing survey No.113/5 in favour of defendant No.5. Both these sale-deeds are illegal and not binding on the plaintiff and he has prayed for declaration to that effect.

He has also prayed for partition of his separate share in the property mentioned at plaint paragraph No.1B. Now, defendant No.4 & 5 are having title on the basis of said sale-deeds and therefore, they are in a position to alienate the suit property. If the suit properties are alienated by them, it will cause irreparable loss to the plaintiff, which cannot be compensated in terms of money. The plaintiff has good prima facie case and balance of convenience lies in his favour. Therefore, the application be allowed.

3. Defendant No.4 has resisted the application by filing his say at Exh.42. He submitted that the relief of declaration is not within the stipulated period of limitation. The plaintiff challenged the sale-deeds after a long period of 14 years. The plaintiff has not filed any document which can show the family tree of his predecessors Bhairu. The plaintiff has not come with clean hands before the Court and he has suppressed some material facts. In the year 1989, the plaintiff, himself filed an application before the revenue authorities for taking mutation entry in the name of defendant No.1 in respect of the 7/12 extracts of the suit properties. Therefore, he is now estopped by the principle of estoppel. The plaintiff was well within the knowledge of execution of sale deeds. Still, he did not earlier raise his grievance before any of the authorities including the Grampanchayat before filing this suit. The plaintiff was not due diligent for his rights and he did not apply before the revenue authorities for taking entry in his name right after the death of his father in the year 1982. Thus, he kept mum for a long period of 30 years.

4. The defendant No.4 further submitted that the plaintiff has not mentioned four boundaries of the suit properties and even he has

not filed his family tree. He has burden to prove his case by submission of clear facts with clean hands and he has to lead sufficient and reliable evidence in support of his contentions. The suit properties were in possession of defendant No.1. Therefore, the plaintiff did not take any effort to mutate his name in the revenue records. The contentions regarding alleged incident of April-May 2012 are totally false. The plaintiff did not visit his native place and he has not paid any taxes of the suit properties.

5. He further submitted that the revenue appeal filed by the plaintiff was decided on merit and the application for cancellation of mutation entry No.3301 has been rejected by the concerned revenue authorities. He also submitted that prior to 1972, there was partition in between the predecessors of plaintiff and defendant No.1. Accordingly, they were in separate possession of their share. Meanwhile, some of the properties were acquired by the Government and in lieu of those properties, some properties were given by the Government. Therefore, it was not possible for the plaintiff to visit his native village Velang for cultivation of the suit properties and therefore, the suit properties were given to defendant No.1 in family arrangement. Defendant No.4 enquired about all the necessary documents before entering into the sale transaction in respect of the suit property. Therefore, as the name of defendant No.1 was recorded in the revenue record prior to 30 years, he entered into the sale transaction after getting all the information. Thus, he is a bonafied purchaser and therefore, the plaintiff cannot claim any right against defendant No.4. Now, there is increase in the prices of suit properties and therefore, the plaintiff is claiming his rights only with a view to gain more profit. For all these reasons, he ultimately prayed to reject the application with compensatory cost.

6. Defendant No.5 failed to file his written statement even after availing sufficient opportunities. Therefore, the suit is being proceeded in absence of his written statement vide order dtd.20.06.2016 passed below Exh.1.

7. Perusal of record shows that defendant No.1 has also filed his written statement at Exh.32. He submitted that during the lifetime of deceased Krushna, he gave all his remaining properties to defendant No.1 and his wife in family arrangement. The mutation entry No.3301 has been taken on the application filed by the plaintiff, himself. Even, the RTS Appeal No.42/13 dtd.08.10.2015 has been rejected vide order dtd.08.10.2015 by the Sub Divisional Magistrate, Wai. Therefore, the plaintiff has no right in the suit properties. He also resisted other contentions in the plaint. He submitted that the suit properties were adjacent to the share of defendant No.1, it was difficult for the plaintiff to cultivate the suit properties and therefore, prior to 1976 defendant No.1 was cultivating them. Thereafter, the plaintiff got certain alternate field properties in lieu of acquisition of some of his properties. Therefore, the plaintiff, himself filed an application before the revenue authorities for taking the entry in the name of defendant No.1. Accordingly, the Circle Officer issued notices to all the concerned and after full hearing the name of defendant No.1 was recorded in the records of suit properties, as the defendant No.1 was in its possession till the execution of sale-deeds. He became owner of the suit properties by adverse possession, as well.

8. Considering the rival submissions of both the sides, following points arise for my determination, to which I record my findings with the reasons given as under -

<u>Sr. No.</u>	<u>Points for determination</u>	<u>Findings</u>
1.	Whether the plaintiff has prima facie case ?	Yes.
2.	Whether the balance of convenience lies in his favour ?	Yes.
3.	Whether he would suffer irreparable loss, if the injunction as sought by him is not granted ?	Yes.
4.	What order ?	The application is partly allowed.

REASONS

9. I have heard Learned Advocate Mr. S.D.Khamkar for the plaintiff and Learned Advocate Mr. R.V.Mule for defendant No.4. Learned Advocate Mr. Khamkar submitted that the plaintiff is having share in the suit property. The sale-deeds executed by defendant No.1 in favour of defendant No.4 & 5 are illegal. In fact, no any application has been filed by the plaintiff, on the basis of which mutation entry No.3301 was allegedly recorded in favour of defendant No.1. The plaintiff came within the knowledge of said mutation entry after a long time and thereafter, he collected some necessary documents. Therefore, the issue of limitation is out of consideration.

10. On the other hand, Learned Advocate Mr. Mule submitted that it was the plaintiff, himself, on whose application the mutation entry No.3301 was taken. Therefore, he is now estopped from claiming his rights. The sale-deeds executed by defendant No.1 are quite older.

Therefore, the contention of plaintiff that he came within the knowledge of its execution in the year 2012 cannot be acceptable. The mutation entry No.3301 was already challenged by the plaintiff before the revenue authorities, which came to be dismissed long back. Now, defendant No.4 has developed the suit property and he is in possession of the same. Therefore, if the present application is allowed, it will cause irreparable loss to the defendant No.4. Hence, he prayed to reject it.

11. In support of his case, Learned Advocate for the plaintiff relied upon following authorities.

(i) In case of ***Vidhyadhar Atmaram Umarye Vs. Chief Secretary, Government of Goa, reported in 2014 (6) Mh.L.J. 250***, wherein the Hon'ble Bombay High Court held that “*merely entering the name in the Survey Records by itself would not give a cause of action to the Appellant / Plaintiff to file a suit for declaration unless his right to enjoy the property has been infringed or at least there is a clear and unequivocal threat to infringe the right of the Appellant / Plaintiff in the suit property.*”

(ii) In case of ***State of Maharashtra Vs. Pravin Jethalal Kamdar reported in AIR 2000 SC 1099*** wherein the Hon'ble Supreme Court has held that “*possession taken under void documents. Suit to recover possession simpliciter can be filed. There is no need to seek declaration about invalidity of the documents. Even if relief of declaration is sought alongwith recovery of possession. Suit would be governed by Article 65 and not by Article 58.*”

(iii) In case of ***Prem Singh & Ors. Vs Birbal & Ors. reported in 2006(5) Mh.L.J.441***, wherein the Hon'ble Supreme Court has held that “*when a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eyes of the law, as it would be a nullity. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid.*”

(iv) In case of ***Maharwal Khewaji Trust (Registered), Faridkot Vs. Baldev Dass reported in 2004 CJ (SC) 737***, wherein the Hon'ble Supreme Court upheld the order of temporary injunction passed by the trial Court on the grounds that there was no extraordinary ground for permitting the respondent to put up the construction and alienate the suit property.”

As to point No.1 to 3 -

12. All these points are inter connected with each other. Hence, they are taken for simultaneous discussion, so as to avoid repetition. It is the basic principle of law, which is required to be considered at the time of dealing with the application for temporary injunction is that the plaintiff must have prima facie case in his favour. The plaintiff has filed certain documents on record. Its perusal shows that the suit properties were standing in the name of his father Krushna till his death in the year 1982. This fact is also not disputed by any of the defendants. The main contention of the plaintiff is that he did not file any application for mutation entry No.3301 in favour of defendant No.1 and therefore, the

subsequent sale transactions done by defendant No.1 in favour of defendant No.4 & 5 are illegal.

13. Admittedly, the plaintiff filed RTS Revision Application No.42/13 before the Sub Divisional Magistrate, Wai, by which he challenged mutation entry No.3301 and said application was rejected on 08.10.2015. However, mere rejection of plaintiff's application before the revenue authorities does not disentitle him for claiming his rights in the suit property. He has come with a specific case that the defendant No.1 got mutated his name on the application, which was not filed by him. In such circumstances, the plaintiff has good prima facie case. Admittedly, defendant No.4 & 5 are in possession of the suit properties on the basis of sale-deeds dtd.11.09.2002 and 01.08.2003. The plaintiff has challenged those sale-deeds by specific contention that he came within its knowledge since 2012. Therefore, this fact has to be proved by the plaintiff by leading reliable and cogent evidence. In such circumstances, the Court cannot directly reach to the conclusion that the plaintiff has not filed the present suit within the stipulated period of limitation.

14. In view of this discussion, especially the position of defendant No.4 & 5 that they can further alienate the suit properties has to be considered. If they alienate the suit property in favour of any third persons, it will create more complications in the matter. In such circumstances, the plaintiff has good prima facie case on the basis of documents filed by him. He is having balance of convenience. If the application is not allowed, it will cause him more hardship and he will put to suffer irreparable loss.

15. So far as the prayers of restraining the defendants from carrying out any construction in the suit property and restraining them

from using it for other business purpose are concerned, it is to be noted that the defendant No.4 & 5 are in possession of the suit properties and they are using it on the basis of registered sale deeds. There is nothing to show that they are about to change its permanent nature. The final adjudication of real dispute between the parties requires complete trial. Hence, such an injunction at this stage cannot be granted.

16. In the light of above discussion, the defendant No.4 & 5 are only required to be temporarily restrained from alienating the suit properties, till final decision of the suit. Hence, I answer Point No.1 to 3 in the affirmative.

As to Point No.4 -

17. In view of the affirmative findings to the aforementioned points, the application deserves to be partly allowed. Hence, I pass the following order.

ORDER

1. The application (Exh.5) is hereby partly allowed.
2. Defendant No. 4 & 5 and any other person on their behalf are temporarily restrained from creating third party interest in the suit properties in any form of alienation till the final decision of the suit.
3. Cost in main cause.

Dictated and pronounced in the open Court.

Place : Wai.
Date : 20.09.2023.

(R.M. Bhende)
2nd Jt. Civil Judge Junior Division,
Wai, Dist. Satara.

CERTIFICATE

“ I certify that this Order uploaded is a true and correct copy of original signed Order”.

Order dictated on : 20.09.2023

Order checked and signed on : 20.09.2023

Uploaded by : S. S. Kumbhar.
Stenographer (Grade-III)

Uploaded on : 27.09.2023