

R.C.S. No. 22/2014
Dipak Khairkar -Vs- Asha Bavankar + 1

ORDER BELOW EXH – 05

(Passed on 15th January, 2016)

This is an application under ***Order XXXIX Rule 01 of The Code of Civil Procedure***, for grant of temporary injunction. Suit is for declaration and perpetual injunction.

2. It is the story of plaintiff that, on 24/04/2000 he has purchased 1.04 H.R. land in S.No.160/2 and on the same day defendant No.2 had purchased 1.21 H.R. land in S.No.160/1 alongwith the half share each in the Well water and electric motor pump from the same vendor. The Well is situated in land S.No.160/2. During widening of the National Highway No.06, 0.25 acres land each of S.No.160/1 and 160/2 was acquired. However, revenue entry in that regard was never made. In year 2008, again the acquisition of some portion of land of both these fields was made for the further widening of National Highway No.06. Entry in regard to this acquisition is also not made in record of rights. Actually, defendant No.2 had 2.25 acres of land in S.No.160/1 and plaintiff has 2 acres land in S.No.160/2. North-south Dura is installed in between two fields and it is demarcated as “A-B” in plaint maps. Without having ownership and possession over 1.21 H.R. land, on 11/04/2014, defendant No.2 has wrongly sold that much portion of land to defendant No.1. Before that sale deed, a mutual partition was affected between plaintiff and defendant No.2. In said partition, the aspect of acquisition and lessening of the area of lands of both survey numbers is admitted by defendant No.02. On 02/04/2014, both lands were measured and boundary “A-B” is fixed. However, on 26/05/2014 defendant No.1 has tried to take possession of land of plaintiff by taking disadvantage of the wrong area mentioned in sale-deed. On 10/06/2014, defendant No.1

has objected the measurement carried out by T.I.L.R. Office. Defendant No.1 is constructing a marriage hall on said land purchased by her. She is using the Well-water for the construction purpose as well as for commercial purpose. Actually, Well-watter is meant to be used for agricultural purpose only. Therefore, suit is filed. Relief of declaration is that, sale deed in favour of defendant No.01 is valid only to the extent of 2.25 acres and not beyond that. Perpetual injunction is sought in regard to restraining defendant No.1 from taking forcible possession of the land of plaintiff and also restraining defendant No.1 from using Well-water for construction purpose or any other commercial purpose. These reliefs for perpetual injunction are sought in the form of temporary injunction in this application.

3. By filing the say and written statement at **Exh.17**, defendant No.1 has objected the claim of plaintiff. She has admitted the sale-deed in favour of plaintiff and defendant No.2 dated 24/04/2000 alongwith the half shares in the Well-water and the electric motor pump. However, she has denied the aspect of any sort of acquisition of land for the National Highway No.06 and decrease in area of land of plaintiff and defendant No.2. It is her case that, before purchasing the said land, she got both the lands measured and boundary demarcation between two fields was duly made. It is shown in plaint map as “A-B”. In the same measurement, 1.21 H.R. land of defendant No.2 was found and accordingly it was purchased by her. In the sale deed in her favour, it is mentioned that she can enjoy the half share in the Well-water as per her wish. Therefore, plaintiff cannot restrained her from using the Well-water for any purpose. She has admitted that, a construction of cattle-shed is made on survey No.160/1. As per defendant No.1, she is the owner of 1.21 H.R. land which is purchased by her. Lastly, she has prayed for the dismissal of suit with compensatory costs and rejection of present application for temporary injunction.

4. Defendant No.02 has not filed his written statement. Therefore, suit is proceeded without his written statement.

5. Perused the counter pleading. Heard the arguments advanced by learned advocates for both the parties. After the entire arguments, when the matter was posted for order, again some documents are filed on record. Thereafter, again the matter was posted for hearing on those documents. Considering the material on record following points arise for my determination. Findings thereon are recorded for the reasons to follow;

Points for determination	Decision
1 In whose favour is the prima facie case ?	...Plaintiff.
2 In whose favour the balance of convenience lie ?	...Plaintiff.
3 To whom the irreparable loss will be caused if, the relief of temporary injunction is not granted ?	...Plaintiff.
4 What order ?	Application is allowed

REASONS

As To Points No. 1 to 3

6. Just for convenience, these three points are taken together for discussion. It is an admitted fact that, plaintiff as well as defendant No.2 have purchased 1.04 H.R. land in S.No.160/2 and 1.21 H.R. land in S.No.160/1 respectively from one Rishi Pritamdas Matharani. Under such admitted situation of a material fact, the most important document in present case is the deed of partition dated 29/03/2014 between plaintiff and defendant No.2. Even though the title of said instrument show that, it is in regard to the partition, however, its recitals are entirely different. As plaintiff and defendant No.2 have separately purchased their lands, no question of partition between them arise. Recitals of this instrument reveal that, it is an agreement whereby both the brothers have admitted that 12 R. each was acquired for widening of the National

Highway No.06 from S.No.160/1 and 160/2 respectively. It also shows that, after acquisition of land, defendant No.2 was left with 1.09 R. land whereas plaintiff is left with 92 R. land. Therefore, vendor of defendant No.1 has admitted in writing the aspect of acquisition of land for the National Highway as well as decrease in the area of the land owned by him. Needless to say that, ***one cannot passed a better title than what he has***. If the vendor of defendant No.1 was himself not the owner and possessor of 1.21 H.R. land, he cannot pass the title of that much area of land to defendant No.1. Therefore, even though the sale-deed in favour of defendant No.1 executed by defendant No.2 show that, 1.21 H.R. land was sold, if defendant No.2 himself was not the owner of that much area of land, it cannot be said that defendant No.1 has become the owner of 1.21 H.R. land.

8. Very important aspect hear is the date of execution of such agreement. Said agreement between plaintiff and defendant No.2 was executed on 29/03/2014 and the sale deed by defendant No.2 in favour of defendant No.1 is dated 11/04/2014. Therefore, before the execution of sale deed in favour of defendant No.1, the defendant No.2 himself knew that he is not owner of 1.21 H.R. land in S.No.160/1. Therefore, what mischief appears on record is prima facie played by defendant No.2. On one hand, vide agreement dated 29/03/2014 defendant No.02 admits that he is having 1.09 H.R. land and within 30 days he executes the sale-deed in favour of defendant No.1 by saying that, he is owner of 1.21 H.R. land. Prima facie this is mischief played by defendant No.2.

9. Now comes the aspect of acquisition of land. In the measurement dated 02/04/2014 as well as 10/06/2014 the specific area of proposed acquisition is shown. Under such situation, the story of acquisition of land for the widening of National Highway No.06 receives strength. No doubt, the 7/12 extract show 1.21 H.R. land in S.No.160/1 and 1.04 H.R. land in S.No.160/2. However, it must be borne in mind

that, entries in the revenue record are merely made for fiscal purposes. They did not confer any right title or interest on the holder of it. It may be the case that, the entries in revenue record were not taken in regard to the acquisition of land. However, it does not mean that if no entry is taken in the revenue record, the acquisition itself has not taken place. Both the parties have admitted the existence of boundary "A-B" as shown in both the plaint maps. As the boundary separating the two fields is admitted and there is sufficient arguable and fightable case with plaintiffs, it will be appropriate at this prima facie stage to restrain defendant No.1 either from changing the boundary or entering to the eastern side of it.

10. Another material relief is in regard to restraining defendant No.1 from using the Well-water for commercial purpose. It is admitted fact that, plaintiff and defendant No.1 have purchased the land from the same vendor and have purchased half share each in the Well-water as well as electric pump. Even it is admitted fact that, said half share in Well-water of defendant No.2 is sold to defendant No.1. Therefore, plaintiff as well as defendant No.1 are certainly entitled to use and utilities the half share in the Well-water. However, dispute is actually in regard to the nature and purpose of use of said Well-water. As per plaintiff, defendant No.1 is erecting rather, has erected a marriage hall and is using the water for commercial purpose. Needless to say that, the use of water for agricultural purpose and for commercial purpose is entirely different. When the Well was dug it was meant for agricultural purpose. When half share each in the Well-water was sold to plaintiff and defendant No.2, it was also meant to be used for agricultural purpose. However, after the defendant No.1 has purchased said land, she has erected marriage hall on it and now, said water is likely to be used for the commercial purpose. Erection of marriage hall by defendant No.1 is admitted by learned advocate for defendant No.1 during the course of argument on present application. Therefore, if the water in the Well is to be used by defendant No.1, it cannot be for the purpose other

than agricultural purpose. This is because, there is no end or limit to the use of water for commercial purpose. However, the farmer can and will use it only to the extent his crop needs. Therefore, the sudden change of use of the Well-water from agricultural to commercial is not expected. If that continues, plaintiff will not be left with requisite water to irrigate his field, which was the actual purpose of allotting half share in the Well-water. Plaintiff has putforth a very good and arguable case to contest on merit. Therefore, there is sufficient prima facie case in favour of plaintiff.

11. To protect the possession and to make the water available, the plaintiff certainly needs the order of temporary injunction. If such order is not passed, plaintiff may loose his possession which is to the eastern side of the admitted “AB” Dhura. So also, if the Well-water is used for commercial purpose, it will not be available for the plaintiff for agricultural purpose. This will certainly cause serious inconvenience and irreparable loss to plaintiff. No doubt, defendant No.01 can use the Well-water for agricultural purpose as per her share and she cannot be restrained from exercising of her right, but not for commercial purpose.

12. From the entire discussion supra, the prima facie case is in favour of plaintiff, the balance of convenience also tilt in favour of plaintiff and if the temporary injunction is not granted, irreparable loss which cannot be compensated in terms of money will be caused to plaintiff. Resultantly, I answer points No.01 to 03 in the affirmative.

As To Point No. 4

13. From the findings in affirmative to the points supra, I conclude that plaintiff is entitled to the relief of temporary injunction as prayed for. Cost of this application shall be cost in cause. Hence, I pass following order;

ORDER

- i. Application is allowed.
- ii. Defendant No.1, her relatives or agents or servants on her behalf are temporarily restrained for taking forcible possession of land S.No.160/2 by trespassing to east of the admitted boundary “AB” shown in both plaint maps till decision of this suit.
- iii. Defendant No.1, her relatives, agent and servants on her behalf are temporarily restrained from using the Well-water situated in field S.No.160/2 to the extent of her half share for any commercial purpose and commercial construction till the decision of this suit.
- iv. Defendant No.01 can use the Well-water for agricultural purpose as per her half share and she is not restrained from exercising of her said right, but not for commercial purpose.
- v. Cost of this application shall be the cost in cause.

Karanja (Gh)
Dt.15.01.2016

(Ritesh R. Mawatwal)
Civil Judge Junior Division,
Karanja (Gh.)