

R.C.S. No 51/2021,
Ganesh Vasantrao Nikam +2 Vrs.
Gram Panchayat Arak (Chinchala) + 1

ORDER BELOW EXH.5.

1 The plaintiff Nos.1, 2 and 3 have filed this suit for perpetual injunction against Gram Panchayat Secretary to perpetually restrain them from obstructing the possession of plaintiffs over the suit property as comprised in para No.3 of the plaint. Wherein they have filed present application under Order 39 Rule 1 and 2 of Civil Procedure Code.

Brief facts of the plaintiffs case as under :-

2. Plaintiffs averred that they have owned Gram Panchayat property/house bearing No.243, 242 and 244 as more particularly comprised in chart prepared in para No.3 of the plaint and application. The property sketched in front of the houses of A,B,C,D,E,F,G,H in chart is shown as the disputed property and same is situated from western side of the said houses. It is the contention of the plaintiffs that they are using disputed property since last sixty years, as if, to access in their houses, they have constructed cattle shed thereon, and they also keeping their field equipment, bull cart and wooden fuel thereon.

3. Plaintiffs further averred that they are in continuous possession of the suit property since long. Now, due to political enmity present defendant Nos.1 and 2 passed resolution on dated 30/04/2020 and decided to construct Gram Panchayat Bhavan over the suit property. On 05/05/2021 and 28/05/2021 the defendants have issued notice to plaintiffs, to vacate the suit property and for the

removal of dung and encroachment made thereon. Now, the defendants entered the suit property in Gram Panchayat record and decided to dispossess the plaintiffs to construct Gram Panchayat Bhavan thereon. They also averred that if they dispossessed by the defendants and constructed Gram Panchayat Bhavan thereon they will not get free air, light and oxygen to enjoyment of their life. Hence, to restrain the defendants from dispossessing them, they constrain to file present suit and application.

Brief facts of the defendants case as under :-

4. On the contrary defendants have filed their say at Exh.42. Wherein defendants denied ownership and possession of the plaintiffs over the properties described in para No.3 of plaint, and so also denied the possession of plaintiffs over the suit property. It is further contented that plaintiffs are claiming customary right and easementary right over the suit property. However, plaintiffs not sought relief in respect of declaration. As per the Namuna 8 filed along with Ex.30 plaintiff No.1 owned and possessed Gram Panchayat property No.243, the plaintiff No.2 owned and possessed property No.242 and the plaintiff No.3 owned and possessed property No.244. As per fourth boundaries comprised in Namuna 8 filed by them, plaintiffs have available another road to access in their houses. Indeed, plaintiffs falsely claiming that they have possession and customary right over the suit property. Defendants i.e. Secretary and Sarpanch are the Government Servant of the Gram Panchayat. The plaintiffs did not issued notice to the defendants before institution of the suit which is mandatory as per Section 80 of the Civil Procedure Code.

5. The plaintiffs have unauthorizedly encroached over the suit property and castrate their dung thereon and they are putting wastage on the said property which is threatening to the health of villagers. Some people of the locality also filed complaint against the plaintiffs in that regard. Hence, defendants issued notice on dated 05/05/2021 towards the father of the plaintiff No.1 namely Vasantrao and the plaintiff No.2 and father of the plaintiff No.3 Vishnu Parasharam Bhalerao for the removal of dung and encroachment. However, the plaintiffs did not remove such dung and therefore, again on dated 28/05/2021 notice came to be issued. However, the plaintiffs did not respond. Thereafter, on 18/06/2021 and 21/06/2021 Gram Panchayat issued notice to the plaintiffs for the removal of encroachment. But, all in vain. The ownership of the suit property bearing No.241 is the Government and said property has been transfer in the custody of defendants. Plaintiffs ought to have add as party to Maharashtra Government and Zilha Parishad, Washim as a necessary party. So also though the plaintiffs have filed this suit in respect with notice given them under Section 53 of Village Gram Panchayat Act. However, plaintiffs had to approached before the S.D.O. Officer, but plaintiffs have failed to do so and instituted present suit which is not tenable. The balance of convenience does not lies in favor of the plaintiffs. The plaintiffs having no prima facie case. Hence, finally prayed to reject the application.

6. After going through the plaint, written statement, say, documents on record and after hearing of both side and written notes of reply filed by learned advocate of plaintiffs. The following

points arises for my determination, on which I record my findings along with reasons stated below.

Sr.No.	Points	Findings
1.	Whether plaintiffs madeout prima facie case in their favor ?	In affirmative
2.	Whether plaintiffs prove that balance of convenience lies in their favor ?	In affirmative
3.	Whether plaintiffs would suffer irreparable loss, if the temporary injunction refused ?	In affirmative
4.	What order ?	As per final order.

REASONS

7. In support of application plaintiffs relied on original Gram Panchayat notice on dated 05/05/2021 and 28/05/2021, xerox copy of Namuna 8 of the Gram Panchayat property bearing No.242 ,243 and 244. Xerox copy of partition deed on dated 13/10/2014, xerox copy of sale deed on dated 01/11/2018, original tax paid receipt on dated 13/02/2019, 28/08/2020, 07/09/2018 and 07/09/2018 with receipt No.10 bearing property No.242 whereupon name of the Ramkrushna Punjaji Nikam shown as possessor of the house. Original tax receipt dated 21/10/2016, 09/08/2016, 07/09/2018 and 17/05/2021 whereupon name of Ganesh Vasanta Nikam shown as possessor of property No.243. Request application dated 24/08/2021, original resolution passed on dated 30/04/2021, original copy of Namuna 8 of Gram Panchayat property bearing No.4, 8, 240 and 5. Five photographs along with certificate under Section 65 of Indian Evidence Act. Affidavits of Sonali Sanjay Nikam, Himmat Vitthal Nikam and Gawathan map.

8. On the contrary defendants have filed documents along with list Exh.30 i.e. xerox copy of estimate dated 29/01/2020, xerox copy of order passed by Deputy Engineer on dated 29/01/2020, verified copy of Namuna 8 of Gram Panchayat property bearing Nos.243, 242 and 244. Verified copy of Namuna 8 of Gram Panchayat property bearing No.241, 205 and 156. Original spot map sign by Secretary and Sarpanch of Gram Panchayat Arak (Chinchala), complaint filed by Haridas Laxman Bure on dated 15/03/2021, complaint filed by Ramdas Laxman Bure on dated 15/03/2021, complaint filed by Kishor Baban Bure on dated 05/03/2021, photographs of the houses of the plaintiffs.

Disputed facts :- admittedly plaintiffs are not owner of the suit property but through encroachment they are in possession over the suit property since long. Whereas defendants denied the possession of the plaintiffs over the suit property.

As to point No.1 :-

9. To establish prima facie case, it does not mean that the plaintiffs should have present case which will in all probability succeed in trial. The Court must be satisfied that there is bona fide dispute raised by the applicant that there is strong case for trial which needs investigation and decision on merits and applicant being entitled to relief claim by him. In order to establish prima facie case it is averred by plaintiffs that they have owned Gram Panchayat property/house bearing No.243, 242 and 244 as more particularly comprised in chart prepared in para No.3 of the plaint and application. The properties described in chart by alphabeticals

A,B,C,D,E,F,G,H are owned and possessed by the plaintiffs. So also the suit property situated towards western side of the said properties are using by them since last sixty years, as if, to access in their houses. They have constructed cattle shed thereon, keeps their field equipment, bull cart and wooden fuel thereon. Hence, they are in peaceful possession over the suit property and therefore, their possession can not be remove without following due course of law by the defendants.

10. On other hand defendants denied ownership and possession of the plaintiffs over the properties described in para No.3 of plaint, and so also denied the possession of plaintiffs over the suit property since last sixty years, as if, to access in their houses and other said purposes. Hence, defendants issued notice to plaintiffs for the removal of encroachment made by them over the suit property on dated 05/05/2021 and 28/05/2021. However, the plaintiffs did not heed pay to remove such dung and encroachment. Hence, prayed that plaintiffs have no prima facie case and balance of convenience also not lies in their favor. So also this suit is not tenable as the plaintiffs not sought relief for declaration, also not added Government and Nagar Parishad as necessary party in present suit and not issued notice under Section 80 of Civil procedure code.

11. In order to establish possession over the suit property plaintiffs contend that admittedly they are having no title over the suit property, however, they are using suit property since long and thereby they have peaceful possession over the suit property. Now, the defendants have issued notice to them to remove their possession

without following due course of law. Though, the defendant is authority to take action for the removal of encroachment, however, defendants can only dispose them by way of due course of law and it can be decided in final conclusion of the suit. To prove their possession over the suit property they have relied upon the notice issued by defendants for the removal of encroachment dated 05/05/2021 and 28/05/2021. Perused these notices wherein it is contended that plaintiffs are directed to remove their dung and encroachment from the suit property. It means that defendants are acquainted and knowledge that plaintiffs have kept their dung over the suit property. Therefore, it reveals that plaintiffs have possession over the suit property. Plaintiffs produced Namuna 8 of the properties bearing Gram Panchayat 242 to 244 which also enumerates that plaintiffs are the owner and possessor of the said properties. I also gone through the Namuna 8 of Gram Panchayat 242 to 244 filed by defendants along with Ex.30 it also shows that plaintiffs are the owner and possessor of said properties and suit property is situated to adjacent of these properties. Plaintiffs have also filed xerox copy of partition deed on dated 13/10/2014 which reflect that partition of the properties of the father plaintiff No.1 has taken place. Plaintiffs have filed xerox copy of sale deed on dated 01/11/2018 perused the sale deed wherein it is contended that Gram Panchayat property No.244 was purchased by plaintiff No.3 from Uttam Govinda Bhalerao. Wherein fourth boundaries have described. It is contended therein that from the western side of the Gram Panchayat property No.244 road is situated. Plaintiffs also filed original tax paid receipts on dated 13/02/2019, 28/08/2020 and 07/09/2018 bearing property No.242 whereupon name of the

Ramkrushna Punjaji Nikam shown as possessor and tax payer. Plaintiffs also filed original tax receipt dated 21/10/2016, 09/08/2016, 07/09/2018 and 17/05/2021 whereupon name of Ganesh Vasanta Nikam shown as possessor and tax payer of property No.243. After going through these documents it has concluded that plaintiffs are the owner of the Gram Panchayat property No.242 to 244.

12. Learned advocate for plaintiffs submitted that defendants already acquainted with the possession over the suit property and then they have issued notice. It means that there is possession of these plaintiffs over the suit property and defendants cannot dispossess the plaintiffs without due course of law as they have easementary right over the suit property. Learned advocate for the plaintiffs relied upon the authority of Hon'ble Gujarat High Court *Gopalbhai Jikabhai Suvagiya Vrs. Vinubhai Nathabhai Hirani Bearing Second Appeal No.208/2015. Wherein case referred by the Hon'ble Court in* para No.30 and para No.42. Of the said authority. Hon'ble Supreme Court in *Ram Kanya Bai and Anothers Vrs. Jagdish and others Civil Appeal No.4922/2011 dated 4 July, 2011* wherein Hon'ble Court held that,

"that when a person (dominant owner) has an easementary right and the servient owner disturbs, obstructs or interference with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil Court for the relief of declaration and/of injunction."

In Ram Kanya Bai and Anothers Vrs. Jagdish and others Hon'ble Court observe that,

'The easement by grant does not get extinguished even though another passage is available to the dominant owner.'

I gone through these authorities wherein facts contended found to be distinct from the case in hand hence, with due respect observations held by the Hon'ble Court in aforesaid authorities not applicable to the present case.

13. Learned advocate for defendants submitted that before institution of this suit the plaintiffs had to issue notice to the defendants under Section 80 of Code of Civil procedure and 180 of the Bombay Village Panchayat Act. On this point learned advocate for plaintiffs relied upon authority of Hon'ble Bombay High Court ***Gram Panchayat Vrs. Vijay Kumar 1986 Mh.L.J. 618 Bombay***

Where upon Hon'ble Court held that,

"No need to since prior notice under Section 80 of Civil Procedure code and 180(2) of Village Panchayat Act. For future action purporting to done."

After going through this authority it reveals that though the said notice is not given to the defendants, however, such notice is not required for future action purporting to done. Hence, observation held by the Hon'ble Bombay High in aforesaid authority Court is applicable to the present case in hand.

14. The learned advocate for defendants submitted that plaintiffs are seeking easementary right, however they have not claim relief of declaration. Learned advocate for defendants further submitted that defendants have brought on record by producing reliable evidence that the suit property is the property of Gram Panchayat. On this point he relied upon authority of **Hon'ble**

Bombay High Court Nagpur Bench, Village Panchayat, Antora
Vrs. Wasudeo Ramchandraj Mohod and another Civil Revision
Application No. 57/2012. Hon'ble Court held that,

"As per Section 53(2) encroachment – provides for a power of Village Panchayat to remove any encroachment in any open site not being the private property whether such a site is vested in the Panchayat or not."

It has already discussed that admittedly plaintiffs are having no title over the suit property, however, they are using suit property since long and thereby they have peaceful possession over the suit property. Therefore, they can be protected their settled possession if, defendants dispossessing them without following due course of law. I gone through this authority facts contended in aforesaid authority found to be distinct from the case in hand hence, with due respect observations held by the Hon'ble Court in aforesaid authority not applicable to the present case.

15. Now, it has to be seen whether these plaintiffs are in continuous and peaceful possession of the suit property. As discussed supra defendants have denied the possessions of the plaintiffs over the suit property but, it already came on record that defendants have knowledge that plaintiffs have castrated their dung over the suit property and then defendants directed to plaintiffs to remove the dung and dumpage from the suit property. So also in para No.27 of the written statement defendants admitted that plaintiffs have tanked dung over the suit property. So also defendants admitted that peoples of the village complained them for the removal of the dung situated on the suit properties and therefore, they issued notice to

the plaintiffs, however the complainants stated that there is dumpage and dung over the suit property in their complaint. It means that plaintiffs have prima facie established their possession over the suit property. In support of application plaintiffs also filed affidavit of Sonali Sanjay Nikam and Himmat Vitthal Nikam both of them supported with the contention in respect of the possession of the plaintiffs over the suit property. No doubt that Gram Panchayat is authority to remove the encroachment. However the procedure of removal of encroachment shall be as per the procedure of law and same things will be decided at the conclusion of the trial. After going through entire discussion made herein above it reveals that plaintiffs have established their prima facie possession over the suit property. Therefore, at this juncture their possession is need to be protected till the final disposal of the suit. Hence, I answer to point No.1 in affirmative.

As to points No. 2 :-

16. The second condition to grant interim injunction that balance of convenience must be favor of the applicant. As I already discussed supra that the plaintiffs have established their possession over the suit property. On the other hand defendants also admitted that plaintiffs have castrated dung over the suit property and for the removal of the same notices have been issued, wherein also contended that plaintiffs to remove the encroachment along with dung and dumpage. It means that plaintiffs have brought on record that balance of convenience also lies in their favor. On the other hand though the defendants contended that the plaintiffs have illegally encroached the suit property and they have no possession

over the suit property but considering the documents and discussion made in above paras it appears that balance of convenience also lies in favor of the plaintiffs. Hence, I answer to point No.2 in affirmative.

As to point No.3 :-

17. As I already held that the plaintiffs have prove his prima facie case and balance of convenience lies in their favor. Plaintiffs have filed notice given by the defendants dated 05/05/2021 and 28/05/2021 which shows that direction has been given to the plaintiffs for the removal of encroachment and for the removal of the dungs. At this stage if defendants not restrained then they will disposes to plaintiffs and the object of the suit will become irretrievable. Hence, it appears that the comparative inconvenience which likely to be caused to the plaintiffs by refusing the injunction will be greater than that such likely to be caused to the defendants. Therefore, the plaintiffs needs to be protected from the consequences to apprehended injury. Hence, I answer point No.3 in affirmative. Consequently, to answer the point No.4 I pass following order.

ORDER

- 1] The application Exh.5 is allowed.
- 2] The Defendants and anyone on their behalf are hereby restrained from disturbing the possession of plaintiffs over the suit property till the disposal of the suit.

Sd/-

(R. S. Mankar)

Date :- 30/10/2021.

2nd Jt.C.J.J.D., Mangrulpir.

I affirm that the contents of this P.D.F. File order are same, word to word, as per the original order.

Name of the Stenographer : S. P. Kale, Stenographer (G-III)

Name of the Court : C.J.J.D. & J.M.F.C., Mangrulpir

Date of order : 30.10.2021

Original copy of order signed by
the presiding officer on : 30.10.2021

PDF copy of order uploaded on : 30.10.2021