



COMMON ORDER BELOW EXH. 205,209 AND 220

1. These applications at Exh. 205 and 220 for filed by J.D. No. 02 & 7 temporary injunction to restrain to DH and daughter of J.D. No 08 i.e. Anju Kale from taking forcible possession of suit property or disputed field (i.e. survey No 60/1 & 64) till disposal of execution proceeding. The application at Exh. 205 resisted by DH, Lr's of JD No. 8 through their say on overleaf of application and JD No. 03 Shamrao at Exh. 213 as well as the application at exh. 220 resisted by DH by filing his say on overleaf of application and JD No. 03 Shamrao at Exh. 221.

2. The application at Exh. 209 filed by JD No. 2 & 7 for granting Status-quo order against the D.H and one Anju Kale i.e L.R's of JD No. 8 from entering in the disputed field. The application is opposed On behalf of DH and JD No. 8 by filling say on overleaf of application.

3. Read applications, says thereon and perused record. Heard learned advocate Smt. N. B. Bharad for JD No. 2 & 7, and learned advocate Shri. Shete behalf of J.D.No.3 and learned advocate Smt. S. V. Ippar on behalf of Lr's of JD.No.8 they argued in the line of their applications and says respectively.

4. Points are decided as below with reasons.

POINTS

FINDINGS

1. Whether prima-facie coupled with balance of convenience and factor of loss is made out ?

No

2. Whether application is
liabel to be allowed in the interest of
justice ? No.
3. What order ? As per final order.

REASONS

As to Points No. 1 to 3 :-

5. It is argued by Ld. Advcate Shri S. D. Deshmukh for D.H, that provisions for granting temporary injunction are embodied under order 39 rule 1 & 2. The J.D. could not have taken recourse U/s 151 of the code for the purpose of granting temporary injections. Therefor, the application is not tenable. He relied upon Judgement of Hon'ble Bombay High Court, **Prakash Akotkar & other Vs mansoorkha Gulabkha & Other, on 26 july 1995** quivalent citations AIR 1996 Bombay 36, 1996, in it oberseved that, “5. -- once it is found that the possession of co-owner is for the on behalf of other co-owner is for and on behlaf of other co-owner, the other co-owner from exrcising their right as co-owners.”

6. Ld. Adv. Shri Shete for J.D. No 03 submitted that, court have no inherent power to grant injection u/s 151 of C.P.C where injection is covered by order 39 rule 1 of C.P.C. He relied upon observation of Hon'ble Bombay High, Court in the case of **Nanasaheb s/o Sakharam Bhalekar Vs Dattu s/o Dhondiba Bhalekar and others 1991 Mh.L.J. 985.** in it is stated that, inherent powers of the court to grant injunction under section 151 of the code of civil procedure cannot

be exercised in the matter where specific remedy is provided no injunction can be granted under section 151 where case covered by order 39 rule 1(c).

7. Other hand, LD. Adv. Smt. N. B. Bharad, for J.D. 2 & 7 submitted that, an order of temporary injunctions can be passed U/s 151 of the C.P.C if peculiarity of the attending circumstances justified granting injunction. She also relied on judgment of Hon'ble Patna High court **Smt Indrawati Devi Vs Balu Ghose & other on 4 feb. 1988 Equivalent citations, AIR 1990 Part 1**, where in aboserved that, "12. I have, therefore, come to the conclusion that in the exercise of its inherent powers, the court can in exceptional circumstance not covered by the situations envisaged under order XXXIX, rules 1 and 2 of the code of C.P.C grant temporary injunction , which includes not only a prohibitory but also a mandatory injunction. I have also come to the conclusion on that in the exercise of its inherent powers, no distinction can be drawn on the ground that such an order is passed at the instance of the plaintiff or the defendant since the justification for the exercise of such power is the existence of exceptional circumstance and in the interest of justice. Consequently the inherent power of the court can be exceptional circumstance and not contrary to any provisions of law".

8. The provisions of u/s. 151 of the code made it clear that, the inherent power are not controlled by the provisions of the code. Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court. Under Order 39 rule 1 & 2 temporary injunction may be granted only when suit is

pending. In the case in hand the suit is already decreed and execution

proceeding is going on. In this situation the court has power to issue temporary injunction in peculiar circumstances of the case. Order 39 rule 1 and 2, if not apply to the fact of the case then, the order of temporary injunction could be issued in the exercise of the inherent powers of the court, U/s 151 of C.P.C. If the court is an opinion, that the interest of justice required the issue of such injunction. Therefore the objection raised behalf D.H. and J.D. No 03 is no much force. In this situation the court has power to issue temporary injunction in peculiar circumstances of the case. Therefore, the objection raised behalf D.H. and J.D. No 03 is no much force.

09. Before proceed further, it is proper to look into record for gather the journey of proceeding. Initially, the suit bearing RCS No. 53/1999 was instituted claiming relief of partition and separate possession by One Nayabrao against his brothers and sisters namely sahebrao, uttam, bhimrao, shamrao, taramati, sarswatibai, sanubai and son of bhimrao namely Vishnu. It got partly decreed on 11/11/2003 against in all eight defendants.

10. The present DH namely Uttamrao was in fact the original defendant no.02 in RCS No.53/1999, wherein he had filed consenting written statement. Being aggrieved, other defendants i.e. Judgment debtors preferred appeal before the Hon'ble District court vide R.C.A. No. 207/2003 and before the Hon'ble High Court of Bombay vide second appeal no 238/2005. Both the Hon'ble appellate courts confirmed the judgment of trial court.

11. The DH i.e. Uttamrao has filed the present execution proceeding i.e. R.D.04/2004. The record reveals that, this court had send the decree to the collector for effecting partition of the landed property under section 54 of CPC. The Tahsildar, Risod filed his report vide Exh.128 and informed the court that there is difference in the area referred to in the decree and the area as per revenue records so far as survey nos. 60/1, 7/2, 147, 102/2 and 117/1 are concerned. It is further informed that, in above survey number, persons other then parties to this execution proceeding are also in possession of their lands. The revenue authorities thereby sought the correction of area and order regarding in other person in possession for effecting partition.

12. Meanwhile, the DH had filed M.J.C. bearing no.10/2010 seeking to amend the plaint and decree u/s. 152 r/w 151 of C.P.C. it was rejected. Being aggrieved, the DH had filed Civil Writ Petition bearing no. 317/2012 before the Hon'ble High Court and it was dismissed.

13. Thereafter, the DH filed an application below Exh.92 for area of the suit land survey nos. 60/1, 7/2, 147, 102/2 and 117/1 as stated in decree and precept be corrected as per measurement sheets, revenue record and report of concern Talathi dated 6/2/10 below Exh. 72.or in the alternatively area of the suit lands survey nos. 60/1, 7/2, 147, 102/2 and 117/1 may be ascertained in view of the report of the concern Talathi dated 6/2/2010 below Exh.72 and be corrected identical with revenue record. Said application partly allowed and ordered that the applicant is allow to correct the exact area of the suit property only after its ascertainment to the satisfaction of the court and For ascertaining the exact area of the suit property and the persons on whom

the decree is binding the applicant is directed to produce necessary documents and matter is pending at this stage. All this instance, present applications has been moved.

14. It is also reveals on record that, the present execution proceeding has been filed by original defendant no. 2 namely Uttamrao (D.H) against original plaintiffs and other defendants, (JD No. 1 to 8.) during the pendency of proceeding the DH Uttamrao died and his L.R.'s namely Suresh, Dhondu, Ratan, Bhagwan, Satish and Shila are brought on record. The J.D. Nayabarao (Who was original plaintiff) also died and his L.R.'s I.e. Anjali, Gajanan, Rajani and Manjusha have been taken on record. It is also seen that, the JD No. 4 and 5 Taramati and Sarswati (Who was original deff. No 5& 6) also died.

15. As per application at Exh. 205, on 07/06/2021 the L.R.'s of Uttam (DH) i.e. Suresh, Dhondu, Satish and daughter of Naybarao (J.D. No. 8) namely Anju Kale on 07/06/2021 came in the field survey no.64 and 60/1 and they tried to take forcefully possession of land but applicants/ JD No. 2 and 7 resisted them. They have beaten to the applicants no.1 Vishnu(JD No. 7) and his brother Krishna. In that respect the police complainant has been registered by Vishnu. Further, it avered that, the act of the DH is illegal one. There is apprehension in the mind of applicant/J.D. No 2 & 7 about that DH will take forcible possession of field property without following due process of law. If DH succeed in their illegal act then the applicants definitely sustained in irreparable loss and injuries. Therefor, they have no alternate except to approach to this court and field this application. To support application affidavit of Bharat Rambhau Khanpate, Rameshwar Omkar Tayade And Tukaram Ramchdra

Thorat are filed with Exh 226. As per these affidavit The JD. No 02 and 7 i.e. Bhimrao & his son is in possession over survey number 99 extent to 02 H. 97 R. and Other J.D.and D.H. trying to obstruct to the possession of 2 & 7.

16. The DH has resisted application at Exh. 205 on ground that, application is not tenable and liable to be rejected. On behalf of LR's of JD. No.8 application is opposed on ground that, the averments in the application is false. Application is not tenable. Therefore, application is liable to be rejected. As per Exh 213 JD No.3 Shamrao resisted application and denied all averment in application. He further contended that, some JD and DH is died and yet DH have not obtained their share as per law through DH succeed up-to Hon'ble High Court and decree of principal court attained finality. It is contented that, JD no.3 and other J.D. also owned and in possession property in field Survey No. 60/1, 64 & 99 along with property in other survey number in suit. The DH is facing trial since long and have not got any share in ancestral property and they have no source of income, moreover the present execution matter may take more time to deliver property as per share in suit, therefore JD No. 3 and his son Santosh have handed over his 02 H. 15 R. land in Sr. No. 64 on 10/06/2021 and 02 H. 97 R. land in Sr. NO. 99 with standing crop in last week of June 2021 to decree holder i.e. LR's of Uttamrao for temporarily maintenance till the actual delivery of suit property with the condition that at the time of execution of decree as per law they will divide that land as per law and shall handover the possession to concern share holder without hesitation. The JD No. 2 & 7 know this fact very well, JD No. 3 and his son have handed over the above property to L.R.'s of DH even then on the basis of false and

imaginary story they are trying to oust the L.R.'s of DH from the property by filing such type of applications.

17. As per application at Exh. 220 it is averred that, late Taramati and late Sarswatibai were residing in the suit property i.e. house property along with the applicants. The applicants and his family taken all care of them in their old age since beginning to till their death. The house property was in possession of late Taramatibai. Even after the death of the Taramatibai the applicants I.e JD. No. 2 & 7 have paying tax to Municipal Council. The JD no.3 and his son Santosh no concern with house property. On 28/12/2021 the JD No.3 Shramrao and his son Santosh came in the house property bearing property no. 96 which is shown on the name of late Taramati and tried to take forcible possession. In that respect Crime No. 874/2021 U/s.323 etc. have been register against JD No. 3 and his son Santosh. There is apprehension in the mind of applicant about that DH will take forcible possession of field property without following due process of law. DH succeed in their illegal act then the applicants definitely sustained in irreparable loss and injuries.

18. The DH resisted the application at Exh. 220 by filling his say on overleaf of application on ground that, application is not tenable and liable to be rejected. The JD No.3 has resisted application by filing say at Exh. 221. He denied all the averments in the application and further contended that, late J.D. Taramati & Saraswatibai were widow in their young age and no issue. The father of DH and JD No. 1 to 7 namely Shankarrao brought the late Taramati & Saraswatibai at Risod from their in-laws house and provided them one room in property no.96 for accommodation in their life time temporary and other portion of house

was in possession of JD No.3 Shamrao. In due course, the name of Taramati & Saraswatibai was recorded in Municipal Council, Risod. The JD for 3 Shamrao provided food, medicine etc. to his late sisters Taramati & Saraswatibai in their life time. Therefore, relation between them were also cordial. Late Taramati & Saraswatibai were lastly leaving with JD no. 3 and had handover that room to JD no.3 since then is in possession of JD No. 3 Shamrao. That the JD No.2 and 7 have no concern to property No. 96 and said property was never in their possession. The partition is not effected through court.

19. The original suit bearing no. 53/1999 is partly decreed and it is ordered that, Suit for partition in respect of movable property as mentioned in para 2(c) of the plaint is rejected. Plaintiff Naibrao, defendant no. 1 Sahebrao defendant no. 2 Uttam and defendant no.4 Syhamrao shall have $9/48$ the share each in the suit property as described in para 2 (A) & (B) of the plaint. Similarly, defendant No.3 Bhimrao and defendant No. 8 Vishnu shall have $9/48^{\text{th}}$ share jointly i.e. $9/96$ share each in the suit property as described in para no. 2(A) and (B) of the plaint. The defendant 5 Taramati, defendant No. 6 Sawaraswatibai and defendant no. 7 Sarubai shall have $1/48^{\text{th}}$ share each in the suit property as described in para 2(A) & (B) of the plaint.

20. It is contention of JD No. 2 and 7 that, the L.R.'s of DH and Nayabrao (J.D.no 8) trying to take forcible possession of survey no. 64 and 60/1 of disputed land. Per contra, (JD No. 03) Shamrao contented that, he is in possession of survey no. 64 and 99 and he and his son Santosh have handed over 02 H. 15 R of land in Survey no. 64 on 10/06/2021 and 02 H. 97 R land in Survey no. 99 to the L.R.'s of DH

Uttamrao for his livelihood/maintenance till execution of decree as per law. It seems that, both are claiming peaceful possession of the survey no. 60 and 64/1. Perusal of 7/12 extracts filed with at Exh. 192 it appeared that, the survey no. 61/1 total land 04 H. 5 R. it is mutated 00.H. 20 R land on the name of Sahebrao Sankarrao Babar and 01 H. 01 R. land each on the name of Bhimrao Shankarrao Babar, Narayan, Shankarrao Babar and Dyaneshwar Ramchandra Thorat and 00H. 81 R. land on the of the Vishnu Bhimrao Babar and after death of Sahebrao the name of Mainabai Sahebaro Babar also entered in 7/12 extract. Further, on extract of survey no. 64 filed along with Exh. 192 shows that, suvey no. 64 ad-measuring 12 H. 48 R. land and in it 02 H. 15 R land on the name of Santosh Shamrao Babar 02 H 14 R land on the name of Bhimrao Shankarrao Babar, 03 H. 03 R. land on the of Taramati Pandurang Jadhav and 03 H. 02 R. on the name of Swarswati Sidhaji Jadhav and 02 H. 14 R. land on the name of Harinarayan Sahebrao Babar. So, the name of other JD and L.R.'s of Sahebrao, Narayan also mutated on survey no. 60/1 and 64 which shows that, the JD No. 2 and 7 are not a absolute owner and possessor as per revenue record i.e 7/12 extract. Furthermore, as per plaint and decree the total area of field survey no. 60/1 is 04 H. 92 R. land and as per report of Tahsildar shows 04 H. 5R. Land out of which 01 H. 01 R. is in the name of Dyaneshwar Thorat. There is variance in area of survey no. 60/1. It also seen that, said Dyaneshwar not a party to this proceeding.

21. Furthermore, as per JD No. 2 and 7 the house property no. 96 was in possession of Taramati and Swarswatibai and after their death said house is in possession of them. Per contra JD No. 3 also claim the possession over the said house. The fact is on record that, the said

Taramati and Swarswatibai was real sisters of DH and JD 1 to 4 and they had no issue. Considering the nature of proceeding only providing food medicines in lifetime of Taramati and Sarswatibai. The present JD have no right to claim absolute owner and possession over house property. Mere occupation of some portion or lager portion in joint property does not ouster the possession of others in undivided joint family property. Possession of joint property by one co-owner is possession of all even if all but one are actually out of possession. In this circumstances, Therefore, JD No. 2 and 7 as well as JD no. 3 have no absolute right over house property. As per decree, the house property also joint family property and partition yet be effect according to law till today. The D.H. & J.D. are co-sharer in the house property. The affidavit filed by persons the behalf JD no. 2 and 7 with Exh.226 is not helpful to them.

22. It is fact on record that, the survey no. 60, 64/1 and house property are the joint undivided family property and preliminary decree has been passed and matter is pending for execution. The undivided property/decreetal property yet be partitioned. The DH and J.D. have right over the undivided family property till final decree.

23. By way of instance applications JD No. 2 and 7 sought temporary injunction till disposal of present execution proceeding. It is also gather from the application that, concerned JD prayer for temporary injunction as a like manner of the absolute owner and possessor of Survey No. 60/1 and 64 and M.C. house no. 96. It is fact on record that, partition yet be effected among the legal heirs of the deceased Shankarrao i.e. between D.H. and J.D. therefore, one co-sharer cannot

claim the injunction against the another co-sharer because the possession of one co-sharer over the decretal property is also the possession on behalf of another co-sharer in the properties. In the backdrop of the above discussion. The JD No. 2 and 7 failed to show prima-facie case and balance of convenience in their favour and factor of loss also in favours of them. As well as they unable to show peculiar circumstances to grant temporary injection in the interest of justice in their favour. In this circumstances it is not proper to grant temporary injunction in favour of JD.No. 2 and 7. Therefore I have, answered point no 1 & 2 in negative.

24. The application at Exh 209 is for interim status quo order till disposal of application at Exh. 205 and 220. There is no necessity to pass separate order on it. In this result, in view of point no 3 following order is passed.

O R D E R

1. The application u/s. 151 of C.P.C art Exh. 205 and 220 are hereby rejected.
2. The application at Exh. 209 for grant of status quo order is hereby disposed of.
3. The parties bear their respective costs.

Date:- 02.05.2022

(Sharad N. Gavali)
Jt. Civil Judge, (J.D.),Risod, Dist.Washim.

CERTIFICATE

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

Name of the Stenographer : **Rohan S. Koshti (L.G.)**

Name of court : Jt.C.J.J.D.& JMFC, Risod.

Date : 02.05.2022

Order signed by the
Presiding Officer : 02.05.2022

Order uploaded on : 05.05.2022