

ORDER BELOW EXH. 5

(Decided on 16/02/2023)

The plaintiff has filed the present application under Order XXXIX Rule 1, 2 and 3 r/w Section 151 of the Code of Civil Procedure. The defendants have filed their say and strongly opposed the application vide their say.

2. Suit properties -

The property situated in Mouje Kharpudi Bk., Tq. Khed, Dist. Pune Gat no. 1536 ad measuring portion of each along with description of boundaries as stated in the plaint.

3. Plaintiff has submitted that, suit property in para 1A of the plaint is the joint family property of himself along with defendant no. 2 to 12. Initially, it was owned by Kondiba. After demise of Kondiba, his four sons namely Laxman, Tukaram Bhau and Dadabhau were inherited the same. They have 1/4th share each in the said suit property stated in para 1A of the plaint. Till date, they have jointly possessed and cultivated it. They used to enjoy income yielding from the said suit property in common. Till date, partition is not effected between them. But, Dadabhau one of the son of deceased Kondiba had illegally executed the sale deed bearing no. 4072/2003 in favour of one Vitthal Ananta Daundkar for the portion in property stated in para 1A of the plaint which is more than his 1/4th share in the suit property in para 1A. The said property i.e. the subject of such transfer is stated in para 1B of the plaint. The said Dadabhau who is the father of defendant no. 11 had transfer the said suit property stated in para 1B without any economic and legal necessity of the joint family and without the consent of his other three brothers. The said transaction was effected for the portion more than his share without effecting the partition.

4. Further, submitted that, as till date partition is not effected, the suit property in para 1B also remains in possession of plaintiff and

defendant no. 2 to 12 along with property in para 1A. Though, Dadabhau had executed sale deed bearing no. 4072/2003 in favour of Vitthal Ananta Daundkar, the physical possession of the said property was never transferred or hand over to the said purchaser. The partition of suit property in para 1A was not effected, also Dadabhau was not in separate possession of the portion which he had transferred in favour of Vitthal Ananta Daundkar. Thus, only sale deed was executed in favour of Vitthal Ananta Daundkar without delivering actual physical possession. Therefore, the said sale deed was not valid. Also, the Vitthal Ananta Daundkar again transfer the said suit property in para 1B vide sale deed bearing no. 1302/2018 in favour of defendant no.1 without delivering actual physical possession to her. Therefore, there is only transfer of the said property by the illegal sale deed. But, the possession of the suit property in para 1B is not with defendant no. 1. In spite of it, on the basis of the illegal sale deed, defendant no. 1 is claiming her possession in the suit property stated in para 1B of the plaint. But, the possession of said portion and the suit properties in para 1A and B remain with the plaintiff along with defendant no. 2 to 12. In spite of it, defendant no. 1 has illegally caused obstruction to the peaceful possession of plaintiff and defendant no. 2 to 12 in the suit properties. Also, defendant no. 1 illegally threatened them that, she will make construction on the suit property stated in para 1A and 1B of the plaint and thereby she is trying to dispossess the plaintiff from the suit property. Hence, the suit to claim the partition in the suit properties. Also, submitted that, defendant no. 1 is illegally making construction and thereby depriving his rights therein. Therefore, it is necessary to protect the alleged portion. Hence, the application.

5. On the contrary, defendant no. 1 has opposed the application vide her reply at Exh. 33. She has denied all adverse allegations leveled against her in the application below Exh. 5. Further, she has submitted

that, she had entered into valid transaction with Vitthal Ananta Daundkar i.e. defendant no. 13. In accordance to the terms and conditions agreed between them, the said Vitthal Ananta Daundkar had executed sale deed of suit property stated in para 1B of the plaint in her favour vide document bearing no. 1308/2018 on 31/03/2018 for the valuable consideration. On the same day of execution of such sale deed, the Vitthal Ananta Daundkar had delivered the physical possession of the said suit property to her. Also, her vendor Vitthal Ananta Daundkar was entitled to effect the said transfer in her favour. The said Vitthal Ananta Daundkar had purchased the respective suit property in para 1B of the plaint from Dadabhau vide sale deed bearing no. 4072/2003 dated 18/11/2003 for valuable consideration.

6. Further submitted that, since execution of sale deed of the suit property in para 1B in her favour she is in possession of the said property. Even thereafter, she had carried out measurement of the said property at her own expenses. Accordingly, measurement was effected vide proceeding No. 22236/2020 and thereby demarcated permanent boundaries in the said suit property. The said measurement was carried out by the Government machinery i.e. by TILR. In the said measurement it is disclosed that, the portion in her possession is more than plaintiff. It is her valid possession in accordance with sale deed bearing no. 1302/2018 in her favour. Therefore, only due to ill-will towards her, the plaintiff has instituted this false suit and this application against her. The plaintiff has filed this suit after the expiry of four years only to harass her.

7. Further submitted that, she has taken efforts to develop the land and to make level of it. She has installed the pipeline in the said portion of the suit property in para 1B. Therefore, only due to ill-will against her, the plaintiff has filed this application to harass her. Hence, the application is devoid of merits, it is liable to be rejected.

8. Following points arose for my determination and I have recorded my findings thereon for the reasons as follow :-

Sr. No.	Points	Findings
1.	Whether plaintiffs have made out a prima-facie case?	In negative.
2.	Whether balance of convenience lies in favour of the plaintiffs ?	In negative.
3.	Whether plaintiffs will suffer irreparable loss, if the application is rejected?	In negative.
4.	What order?	Application is rejected.

REASONS

As to point No. 1 :-

9. Ld. Advocate for plaintiff has argued that, the plaintiff has filed the present suit for partition of suit property, as till date partition of such property between himself and defendant no. 2 to 12 is not effected. Therefore, such suit property is joint family property and till date it is in their possession. Also, for the same reason the Dadabhau i.e. the one of the son of deceased Kondiba who was equally entitled to 1/4th share as others in the suit property. But, the said Dadabhau had illegally executed sale deed bearing no. 4072/2003 in favour of one Vitthal Ananta Daundkar for the portion more than his share in the suit property. Although, he had executed such sale deed, the possession of it was not delivered in the favour of purchaser. Again on the strength of such sale deed, the purchaser Vitthal Ananda Daundkar had transfer the respective portion in favour of defendant no. 1 by illegally executing the sale deed without having any legal right in that behalf and without actual delivering of possession in favour of defendant no. 1.

10. Further argued that, although, defendant no. 1 has contended in respect of measurement carried out by her. But, she had effected the said measurement in collusion with concern officers in absence of

plaintiff. The notices were not duly issued prior to carrying out the measurement of her portion in the suit property. The signature of defendant no. 12 on the document of such measurement relied by defendant no. 1 is the forged. Defendant no. 1 never used to sign the documents. On the contrary, he used to give thumb impression. Also, the defendant no. 12 gave his thumb impression on his written-statement filed in the present suit. From this, it is clear that, defendant no. 1 has obtained the measurement report in collusion with officers. Also, defendant no. 1 obtained the order in her favour by playing fraud. Therefore, the claim of defendant no. 1 in respect of her possession in the suit property is not true and correct. In this respect, Ld. Advocate for plaintiff had relied on citation of Hon'ble Supreme Court reported in *2007 DGLS (SC) 266 in A. V. Papayya Sastry and Ors. Vs. Government of A. P. and Ors.* wherein, Hon'ble Supreme Court held that, if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. It is in nullity and non-est in the eye of law. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. In such circumstances, it is clear that, the contention of defendant no. 1 in respect of possession is not true.

11. Further argued that, according to defendant no. 1 she obtained the sanction of scheme of Gharkul. But, no document in that regard is filed on record. On the contrary, 7/12 extract relied by the plaintiff bears name of plaintiff and defendant no. 2 to 12. It shows that, there is no partition effected in respect of suit property. Although, the sale deed of portion of suit property in favour of defendant no. 1 was executed in the year 2018, but the plaintiff has filed the present suit only after getting the knowledge about such sale deed recently and when defendant no. 1 illegally carrying out construction in the suit property. From these reasons, it is clear that, the plaintiff has prima facie case and balance of convenience is in his favour. If the defendant

no. 1 will succeed in completing the alleged construction, it will cause irreparable loss to such plaintiff. Therefore, it is necessary to protect the interest of plaintiff in the suit property. For the same reason, it is necessary to restrain defendant no. 1, as prayed. Hence, prayed to allow the application.

12. On the contrary, Ld. Advocate for defendant no. 1 has argued that, defendant no. 13 had executed registered sale deed bearing no. 1302/2018 in respect of portion of suit property in favour of defendant no. 1 for valuable consideration. Also, the said vendor had purchased the said respective portion from Dadabhau for valuable consideration vide sale deed bearing no. 4072/2003. The said vendor was in possession in accordance to terms and conditions of the sale deed bearing no. 4072/2003 since the date of execution of it. But, plaintiff or defendant no. 2 to 12 have not taken any objection to the possession delivered to defendant no. 13. Neither they have challenged the said sale deed bearing no. 4072/2003 or initiated any proceeding to cancel it. Even after the execution of sale deed in favour of defendant no. 1 in the year 2018 till the institution of this suit, the plaintiff has not taken the objection to the possession of the defendant no.1 in respect of the portion of the suit property. Also, the plaintiff has failed to explain any just and cogent reasons in that behalf.

13. Further argued that, the recitals in the sale deed bearing no. 1302/2018, the documents of measurement carried out in the year 2020 clearly shows that, the possession of the portion in the suit property rest with defendant no. 1. The defendant no.12 has given consent to the said measurement. Therefore, the copy 'C' of the said measurement was effected. Also, the documents of scheme of Gharkul relied by defendant no. 1 are in support of her contention of possession of the suit property. On the contrary, the plaintiff has failed to show any reason for not initiating any proceeding to challenge the measurement

report, if he has objection to that. Therefore, the contention of plaintiff in respect of measurement of suit property in collusion with officers is not true and correct. In such circumstances, the citation relied by plaintiff is not helpful in the circumstances of this case.

14. Further argued that, the contention of plaintiff that, the partition of suit property is not effected, is not correct. Already, the partition was effected in the year 1995. The defendant no. 12 was one of the party to the said partition. The document of the said partition clearly reveals that, the all parties to that document have admitted their respective portion and the possession of such portion, as stated in that document. Therefore, the Dadabhau was legally entitled to execute the sale deed in favour of defendant no. 13. In accordance to sale deed bearing no. 4072/2003, the defendant no. 13 was also legally entitled to execute registered sale deed in favour of defendant no. 1. In such circumstances, in accordance to recitals in the said sale deed, it is clear that, defendant no. 1 is in possession of the respective portion in the suit property.

15. From above reasons and documents relied by defendant no. 1, it is clear that, plaintiff has no prima facie case and balance of convenience in his favour. The alleged construction in the portion of suit property is not illegal. The defendant no. 1 is legally entitled to make such construction as she exclusively owned the property. Therefore, such alleged construction will not cause irreparable loss to plaintiff, as contended by him. Therefore, the plaintiff does not deserve any relief as claimed. Hence, prayed to reject the application.

16. Both parties are claiming their possession on the suit property in para 1B of the plaint. But, document i.e. agreement to sell bearing no. 3127/2001 relied by defendant reveals that, the transaction was entered into between the Dadabhau and Vitthal Ananta Daundkar in the

year 2001 to transfer the suit property in para 1B of the plaint in favour of Vitthal Ananta Daundkar. Also, the another document i.e. sale deed, the copy of the sale deed bearing no. 4072/2003 clearly reveals that, it was executed in accordance with terms and conditions of agreement to sell bearing no. 3127/2001 in favour of Vitthal Ananta Daundkar. The consent was given to the said execution of sale deed bearing no. 4072/2003 by Balasaheb i.e. defendant no. 12, Kusum Bhau Borhade defendant no. 6, Tukaram and Vimal Govind. The said sale deed reveals that, the possession of the portion which is subject of transfer was hand over to the purchaser i.e. Vitthal Ananta Daundkar. The said possession of Vitthal Ananta Daundkar in respect of the suit property in para 1B is also supported by the document i.e. 7/12 extract relied by the defendant no. 1 and even by the plaintiff himself. In accordance to section 157 of Maharashtra Land Revenue Code, the presumption can be drawn in respect of possession of the said suit property in portion 1B until contrary is proved. But, plaintiff has failed to establish any contrary facts as to such alleged possession and presumption.

Further, the sale deed executed by Vitthal Ananta Daundkar in favour of defendant no. 1 also reveals the actual delivery of possession in favour of defendant no. 1. Also, the copy of 7/12 extract attached with such sale deed shows that the name of Vitthal Ananta Daundkar was entered into the revenue record and 7/12 extract. In spite of it, the plaintiff contended that, Vitthal Ananta Daundkar or defendant no. 1 were never in actual physical possession of the said suit property in para 1B of the plaint. But, in accordance to section 157 of Maharashtra Land Revenue Code there is presumption which can be rebutted only after proving the contrary. But, plaintiff failed to establish on record any cogent material oral or documentary in that behalf. Therefore, the contention of plaintiff in that respect is not correct.

17. Further, material document established by defendant no. 1

i.e. copy of measurement carried out on 24/11/2020 which is decided on 30/06/2021. From this document, it infers that, after the execution of sale deed in respect of suit property in para 1B in favour of defendant no. 1, she has taken steps to measure the respective portion by TILR. Accordingly, the portion i.e. suit property in para 1B was measured and boundaries of it were fixed. The contention of plaintiff that, defendant no. 1 has carried out such measurement in collusion with officers is without merit. Also, according to plaintiff, due notice was not issued to neighborers at the time of such measurement. Also, the forged signature in the name of defendant no. 12 was effected at the time of such measurement. In fact, defendant no. 12 always used to give thumb impression. He never make sign the document. But, the notes of measurement bears the signature of defendant no. 12. Also, the defendant no. 12 in the present case has given his thumb impression in his written-statement. According to plaintiff, it shows that, defendant no. 1 in collusion with officers obtained report of measurement in respect of suit property in para 1B of the plaint. But, the plaintiff since the date of such measurement or even after getting knowledge of alleged measurement, not taken objection to such measurement. Also, he has failed to exhaust remedies to challenge the alleged measurement carried out by defendant no. 1 in respect of suit property stated in para 1B in accordance to provisions of Maharashtra Land Revenue Code. Also, failed to explain any cogent reason in that behalf.

18. Further, according to the plaintiff, partition of suit property in para 1A of the plaint is not effected till date. But, from the document relied by defendant no. 1 vide list at Exh. 29/1 it appears that, it is the document of partition effected on 05/12/1995. It bears thumb impression of defendant no. 12. It reveals that, the said document and the written-statement of defendant no. 12 bears thumb impression. Therefore, there is no inconsistency regarding the fact that defendant

no. 12 was one of the party to the partition and the party to the document executed in that behalf. In such circumstances, the citation *2007 DGLS (SC) 266 in A. V. Papayya Sastry and Ors. Vs. Government of A. P. and Ors.* relied by plaintiff is not helpful. Facts in the case cited are different. The case of land owners in it was that advance possession was taken over by Port Trust Authorities in August, 1972. The subsequent facts and letter by Chief Engineer of Port Trust in 1985 clearly revealed that, it was not so. Possession of land was never with the land owners and was not given to Port Trust Authorities. From the record it is clear that, neither the land owners nor the Port Trust Authorities were in actual or physical possession of land. For these reasons, the contentions of defendant no. 1 is supported with material document. However, the plaintiff failed to bring any oral or documentary material to support his contention as to partition. Although, the said document of partition relied by defendant no. 1 is not registered document, however, it shows prima facie that, parties to the said document are in physical possession of their respective portion in the suit property stated in para 1A of the plaint.

19. Further, according to plaintiff the defendant no. 1 is carrying out illegal construction on the basis of sale deed in her favour in respect of suit property in para 1B. Also, she is trying to encroach in the portion in suit property para 1A of the plaint. The plaintiff has relied on photographs filed on record. But, the plaintiff failed to show any specific portion of the suit property in para 1A of the plaint on which defendant no. 1 is carrying out the alleged construction. Even otherwise, from the sale deed executed in favour of defendant no. 1 bearing no. 1302/2018 it appears prima-facie that, the said defendant no. 1 is in actual physical possession of the suit property. Also, it prima facie appears that, on the strength of such sale deed she is carrying out the construction. Therefore, the contention of plaintiff in respect of

illegal construction on the suit property without merit. On the other hand, the claim of defendant no. 1 in respect of her possession is supported with material documents i.e. sale deed bearing no. 1302/2018, documents of measurement of the suit property para 1B, other 7/12 extract etc. The plaintiff failed to explain the alleged encroachment in any specific portion of the suit property. Also, failed to explain any just and cogent reason as to his failure to initiate proceeding to restrain Dadabhau from executing sale deed in favour of Vitthal Ananta Daundkar and subsequent to the Vitthal Ananta Daundkar from executed sale deed in favour of defendant no. 1. For these reasons, it infers that, plaintiff has no prima facie case in his favour as alleged. Hence, I answer point no. 1 in negative.

As to point no. 2 -

20. From the pleadings of plaintiff and defendant no. 1 along with their documents, it appears that, the contention of defendant no. 1 in respect of possession prima facie supported with relevant document of sale deed no. 1302/2018. It is the registered document which carries presumption in accordance with the provisions of Indian Registration Act until proved contrary. It is also supported with the measurement report and document of partition of suit property. Therefore, it infers that, there is no balance of convenience in favour of plaintiff, as contended by him. Hence, I answer point no. 2 in negative.

As to point no. 3 -

21. Further, while asking relief of temporary injunction, plaintiff must prove that he will suffer irreparable injury if the injunction as prayed, is not granted and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. In the present case, plaintiff has failed to establish even the prima-facie case and balance of convenience in his favour. Also, it

appears that, the alleged construction work by defendant no. 1 is carrying out on the portion which is subject matter of the sale deed bearing no. 1302/2018 in favour of defendant no. 1. Therefore, the question of irreparable loss as contended by plaintiff does not arise. Hence, I answered point no. 3 in negative.

As to point no. 4 :-

22. In the present case, in view of negative findings of point no. 1 to 3, it is clear that, the plaintiff has failed to fulfill the triple test to grant temporary injunction, as prayed. Hence, the order.

ORDER

1. Application at Exh. 5 is rejected.

Date- 16/02/2023

Smt. J. V. Maske
3rd Jt. Civil Judge, Jr. Div.
Khed-Rajgurunagar