

Order below Exh.5 in R.C.S. No. 93/2022

(Asha Kherade vs. Mangala Ganorkar)

By this application the plaintiffs have sought temporary injunction against defendant under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 to restrain them from disturbing their peaceful possession.

2. According to the plaintiffs, the landed property bearing block No. 82 ad-measuring 0H 81 R out of which 0H 41R land situated at Ganoja, Tal. Chandur Bazar and Gram Panchayat property No. 127 (survey No. 136) ad-measuring 800 sq.ft. situated at Sonori, Tal. Chandur Bazar were belonged to one Marotrao Gangaram Ganorkar. (Here in after referred as suit land and suit house for the sake of brevity.)

3. Plaintiffs No. 1, 2 are daughters, plaintiff No. 3 is wife and defendant is daughter-in-law of deceased Marotrao. On 12.06.2019 Marotrao has executed registered gift deeds of suit land and suit house in favour of plaintiff No. 1 and 2. He has also handed over possession same properties to plaintiff No. 1 and 2. Defendant's husband Mohan Marotrao Ganorkar died on 29.05.2019. Thereafter, defendant drove away Marotrao and his wife from the home. Therefore, they were residing with plaintiff No. 1 and 2. Meantime, Marotrao has been died. The defendant was trying to interfere peaceful possession of the plaintiffs over suit land. Plaintiff No. 1 and 2 had sown Cotton and Tur in the suit land. However, defendant is trying to damage said crops. Defendant is no way concern with the suit land and suit house.

4. Mother of Marotrao Ganorkar i.e. Shevantabai had purchased suit land from Narayanrao Gopalrao Singore by virtue of registered sale deed dtd. 24.04.1957 and she has also purchased suit house from one Shivramji Raghoji Radake by virtue of sale deed dtd. 27.01.1969. The suit land and house devolved upon Marotrao after the death of his mother

Shevantabai. The defendant has filed RCS No. 58/2022 for cancellation of gift deeds executed by deceased Marotrao. After filing the said suit the defendant is repeatedly disturbing peaceful possession of plaintiffs over suit land and suit house. Hence, The plaintiffs have filed present application to restrain the defendant from obstructing their peaceful possession.

5. The defendant has resisted the application and filed her written statement cum say at Exh. 11. According to her, Marotrao was having one son by name Mohan and two daughters i.e. Plaintiffs No. 1 and 2. They had been already married before 30 years and are residing at their matrimonial homes. They are no way concern with the suit property. Marotrao is died on 30.07.2021. Deceased Marotrao was old aged person having no understanding prior to three years before his death. During his life time defendant and her husband were residing in suit house and cultivating the suit land. In 2019 Marotrao was very weak and bedridden person. Unfortunately husband of defendant died on 29.05.2019 leaving behind his legal heirs i.e. his wife Mangala (defendant) and mother Chndrakala (plaintiff No. 3). After the death of defendant's husband, within fifteen days plaintiff No.1 and 2 get executed two gift deeds on 13.06.2019 by excluding defendant and plaintiff No. 3. The suit land is ad-measuring 41R which is fragment, therefore, without taking the permission of concerned officer gift deed can not be executed. After the knowledge of execution of gift deeds defendant objected for mutation entry in the revenue record. Said mutation is also challenged by defendant before SDO, Achalpur. Plaintiff No. 1 and 2 get executed two gift deeds of ancestral property which are invalid. The defendant is in possession of suit land and she is also residing in suit house. The defendant has also filed RCS No. 58/2022 for cancellation of gift deed and partition in the suit property. The defendant has sown the Cotton and Tur crops in the suit land. She is co-owner of the suit land. If injunction is granted against her the repairable loss will be caused to her. Hence, she prayed to reject the application.

6. Heard, Ld. Advocate Shri. R. B. Joshi for plaintiffs and Ld. Advocate Shri. S. R. Ghulaxe for defendant at length.

7. Following points arises for my determination. I have recorded my findings thereon as under.

S.N.	Points	Findings
1.	Whether plaintiffs have prima facie case ?	No.
2.	Whether balance of convenience tilts in favour of plaintiffs?	No.
3.	Whether irreparable loss will be caused to plaintiffs, if temporary injunction is refused ?	No.
4.	What order?	As per final order.

REASONS

As to Points No. 1 to 3 : -

8. All these points are intermingled with each other, therefore, they are taken together for discussion.

9. Ld. Advocate for the plaintiffs submitted that deceased Marotrao Gangaram Ganorkar who was father of plaintiffs No. 1 and 2 who executed two sale deeds dtd. 12.06.2019 of suit land and suit house in favour of plaintiffs No. 1 and 2. At the same time he had also handed over possession of the properties to the plaintiffs. The delivery of the possession is by way of registered instrument then it should be presumed that possession is actually handed over. Therefore, plaintiffs are entitled for temporary injunction against defendant.

10. On the other hand ld. Advocate for the defendant submitted that, deceased Marotrao had executed two gift deeds behind and back of defendant. He has not mentioned any reason for exclusion of defendant from the suit property. Defendant is still in possession of the suit land and suit house. In order to defeat rights of defendant, plaintiffs No. 1 and 2 get

executed sham and bogus deed in their favour. Hence, application is liable to be rejected.

11. The claim of temporary injunction, made by the plaintiffs needs to be considered by Court in view of provisions laid down under Order 39 Rule 1 and 2 of Civil Procedure Code. Order 39 Rule 1 of Civil Procedure Code opens with the wording, “Where in a suit, it is proved by affidavit, or otherwise temporary injunction may be granted by the Court.” prima facie case, balance of convenience and irreparable loss are the factors which required to be taken into consideration by the Court while considering application for temporary injunction. So far material is concerned, the Court can resort to affidavit filed by the party or otherwise. The expression otherwise refers to various other circumstances. While considering prima facie case, in case of temporary injunction the Court has to record as to whether the plaintiff has established prima facie possession over the suit property. Such possession, again to the referable, either to the title of the property or some lawful right vested with the plaintiff. After fulfilling the test of prima facie case, the Court has to turn to consider the question of equity between the parties. Irreparable loss to the plaintiff is also material while considering such application for temporary injunction.

12. Now, on the pleadings of the parties and the respective submissions of their counsels, it is necessary to see the documents placed on the record in order to appreciate rival submissions. The plaintiffs are claiming injunction on the basis of registered gift deeds dtd. 12.06.2019. The plaintiffs have filed said two gift deeds at Exh. 4/4 and 4/5. It shows that, deceased Marotrao has executed gift deeds dtd. 12.06.2019 in favour of plaintiffs No. 1 and 2. It is specifically mentioned in the gift deeds that, possession of the suit land and suit house is handed over to them. The plaintiffs have also filed sale deeds of Shevantabai Gangaramji Ganorkar at Exh. 4/6 and 4/7. Both the sale deeds shows that, mother of Marotrao i.e. Shevantabai had purchased the suit property by way of registered sale

deeds dtd. 27.01.1959 and 24.04.1957 respectively. It is admitted fact that the names of plaintiff No. 1 and 2 are entered in the record of rights of the suit land and suit house on the basis of registered gift deeds dtd. 12.06.2019. The defendant has also stated that she has preferred appeal against said mutation entries before SDO, Achalpur.

13. Now, it is necessary to see the documents placed by the record on behalf of defendant. After going through the record it shows that defendant has filed various documents at Exh. 18. The defendant has filed extract of mutation entry No. 209 at exh. 18/1 which shows that due to the death of Shevantabai Gangaram Ganorkar the names of her legal heir i.e. Sahebrao Gangaram Ganorkar and Marotrao Gangaram Ganorkar are entered in the revenue record of the suit property. She has filed another extract of mutation entry No. 301 which shows that sons of deceased Shevantabai get partitioned suit land between them. By virtue of said partition among 81R land, 41R land came to the share of Marotrao and 40R land came to the share of Sahebrao. The defendant has also filed death extract of Marotrao at Exh. 18/3 and death extract of Mohanrao at Exh. 18/5. She has also obtained heir-ship certificate by filing RMJC No. 336/2019 which is at Exh. 18/6. The defendant has filed copy of RCS No. 58/2022 at Exh. 16. She has filed affidavits of Surendra Ramkrushna Ambadkar and Bhimrao Shripadrao Tayade. She has filed Gaon Namuna No. 7-B at Exh. 18/17 showing that she is in possession of suit land.

14. It is admitted fact that deceased Marotrao Ganorkar had executed two gift deeds in favour of plaintiff No. 1 and 2. Both the gift deeds are under challenge in RCS No. 58/2022. According to section 122 of Transfer of Property Act, 1882 gift must be accepted by or on behalf of the donee. The acceptance may either be express or implied. Acceptance is implied if it is inferred from the conduct of the donee and surrounding circumstances. When the donee takes possession of the property or of the title deed there is acceptance of deed. Where there was a clear recital in the

gift deed that the doner was transferring his possession over his land and that be gift be accepted by the donor. The donee had the right to get the property registered in his name in the revenue record. Now in the present case the plaintiff is claiming possession on the basis of registered gift deeds. He also relied on recitals of the documents regarding delivery of possession.

15. In paragraph 357 of Mulla's Hindu Law (twenty first edition by S.A. Desai) it is stated as follows;

"(1) A gift under pure Hindu Law need not be in writing. But a gift under that law is not valid unless it is accompanied by delivery of possession of the subject of gift from the donor to the donee. Mere registration of a deed of gift is not equivalent to delivery of possession; it is not therefore sufficient to pass the title of the property from the donor to the donee. But where from the nature of the case physical possession cannot be delivered, it is enough to validate a gift if the donor has done all that he could to complete the gift, so as to entitle the donee to obtain possession.

(2) As regards Hindu gifts to which the Transfer of Property Act, 1882, applies, the rule of pure Hindu Law that delivery of possession is essential to the validity of a gift is abrogated by Section 123 of that Act. Under that Act delivery of possession is no longer necessary to complete a gift, nor is mere delivery sufficient to constitute a gift except in the case of movable property."

16. It is defence of defendant that, though it is written in the documents that possession is handed over to plaintiff No. 1 and 2, the actual possession is still with defendant. Deceased Marotrao, his wife Chandrakala, son Mohanrao and daughter in law Mangalabai were residing in suit house and cultivating the suit land in the life time of Mohanrao. It is pertinent to note that both plaintiff No. 1 and 2 were residing at their respective matrimonial homes. It is highly impossible that the actual possession of the suit land and suit house is with plaintiff No. 1 and 2. He

has specifically drawn my attention towards the date of death of Mohanrao and date of execution of gift deeds. Mohanrao is died on 29.05.2019 and gift deeds were executed on 12.06.2019. According to defendant within fifteen days from the death of Mohanrao, intentionally and fraudulently plaintiff No. 1 and 2 get executed respective gift deeds. He has also drawn my attention towards the document issued by Talathi, Sonori which states that, the disputed suit land is in possession of defendant.

17. The validity of gift deeds is not challenged before me in this suit. However, it is necessary to mention here that the suit land and suit house was originally purchased by mother of deceased Marotrao. After the death of his mother the suit land and suit house came to his share. The defendant had also filed mutation entry No. 301 which shows that by view of partition between two brothers the suit land came to the share of deceased Marotrao. It means that the suit land and suit house are not the separate properties of deceased Marotrao. He has acquired right in the suit properties by way of succession. Mohanrao who is son of deceased Marotrao died in the life time of Marotrao. As per the Hindu Law the succession opens when any of the co-parceners dies. Obviously, after death of Mohanrao his wife Mangalabai became his heir and ultimately she has right title interest in the suit properties. In such circumstances it prima facie shows that, deceased Marotrao has no absolute right in suit land and suit house. No doubt it can be decided in the separate suit which is filed by the defendant.

18. In view of above discussions it shows that, though the gift deeds discloses that the possession is handed over in favour of plaintiff No. 1 and 2. The documents issued by Talathi, Sonori and affidavit filed by Surendra Ambadkar and Bhimrao Tayade shows that defendant is in possession of suit land and suit house. It means that plaintiffs No. 1 and 2 failed to prove that possession of suit land and suit house are transferred to them. It is not their case that they are residing at the place of suit land as

well as suit house. It may be possible that after the death of Mohanrao in order to defeat the rights of his wife the gift deeds have been executed.

19. It is well settled that, a party would be entitled to relief under Order 39 Rules 1 and 2 provided it satisfies the Court that it has a prima facie case; that balance of convenience is in his favour and that irreparable loss and injury would be caused to him if interim relief is not granted. The aforesaid three phrases, as emphasized time and again, are 'not rhetoric phrases but elastic words to meet a wide range of situation in given set of facts and circumstances'. The burden is always on the plaintiff/applicant to satisfy the Court that a prima facie case exists in his favour. The court must further satisfy itself that non-interference by the Court would result in irreparable injury to a party seeking relief.

20. In the present case plaintiff is burdened to prove that both suit land and suit house are in their possession by way of gift deeds. The plaintiffs have filed one panchanama(Exh.) dtd. 15.11.2022 for showing that since last four months defendant Mangalabai is in possession of the suit land. However, said panchanama also discloses that in the life time of Marotrao the suit land is cultivated with the aid of one Sukhadev Ganorkar and who has sown Cotton and Tur for the year 2022-2023 in the said land. The defendant has also issued one notice dtd 09.06.2022 before filing of this suit to Sukhadev Manik Ganorkar who was aiding to the defendant and his family for cultivation at Exh. 18/10. All the documents prima facie shows that the possession is actually not handed over to plaintiff No. 1 and 2 on the basis of gift deeds. Though it is written in the gift deeds regarding possession it may not be actual possession.

21. The plaintiff has relied on **Ram Charan v Girijanandini, AIR 1966 SC 323** in which it is observed that where the recitals clear and the operative part is ambiguous the recitals govern the construction. It is regarding partition and family settlement. So also, in **Sadashiv Chander**

Bhamgare vs. Eknath Pandharinath Nangude, (2004) AIR (Bombay) 378. In this case it is held that, suit simplicitor for injunction seeking protection under Section 53A of the Transfer of Property Act is maintainable. Both the cases are not applicable to case in hand. The plaintiffs have failed to prove their case by prima facie proof. They also failed to establish balance of convenience in their favour. The plaintiffs also failed to prove that they will suffer irreparable loss if injunction is not granted. Hence, I answer points No. 1 to 3 in the 'Negative'.

As to Point No.4 : -

22. It is made clear that the observations made are prima facie. The suit will be decided on its own merits after recording evidence of the parties without getting influenced with the observations made herein. In view of my aforesaid findings to points No.1 to 3, the application is liable to be rejected. The costs of the application be decided as per the final decision of the suit. In the result, in answer to point No.4, I pass the following order.

ORDER

1. Application is rejected.
2. Costs in cause.

Chandur Bazar
Date: 07.12.2022

(G.M. Nadaf)
Civil Judge (J. D.), Chandur Bazar.