

IN THE COURT OF PRL.CIVIL JUDGE & JMFC-II,

AT KARWAR

Present: Shri.Dhanuraj.S.M
B.A.,LLB.
Prl.Civil Judge and J.M.F.C-II.,
Karwar.

ORIGINAL SUIT No.37/2023

3DATED ON THIS THE 18th DAY OF DECEMBER-2023

Plaintiff/s : 1. Sri. Mukund S/o. Bhikaro Salunke.

[By Sri.N.M.M., Advocate]

V/S

Defendant/s: 1. Sri. Baburay S/o. Bhikaro Salunke & 1
other.

[By Sri.R.L.P., Adv Def No.1]

[By Sri.N.R.D., Adv Def No2]

PARTIES TO I.A.No.I & II

Applicant/s: 1. Sri. Mukund S/o. Bhikaro Salunke.
(Ori.Pltf).

V/s

Opponent/s : 1. Sri. Baburay S/o. Bhikaro Salunke &
(Ori. Defds) 1 other.

ORDER ON I.A.NO.I & II

Plaintiff has filed the I.A.No.I U/O XXXIX Rule 1 and 2 R/W Sec.151 of CPC seeking for an order of ad-interim temporary injunction restraining the defendant No.1, their men, agents, servants or anybody acting on his behalf from constructing the permanent structure in the suit property No.2 till pending disposal of the suit.

2. The defendant No.1 has filed IA No.II after his appearance in the present suit U/o. 39 Rule 4 R/w Sec.151 of CPC seeking for the relief of setting aside the ex-parte interim order of injunction dated: 15-02-2023 passed against the defendant No.1 in the present case.

3. In support of IA No.I, the plaintiff has filed affidavit contending that, he has filed the present suit against the defendants for the relief of declaration and partition and separate possession of his 1/3 rd share in the suit properties and that he is the absolute joint owner of the suit land bearing No.47/1 measuring 00-14-00 area which is situated at Madhewada village of Karwar taluka and that the suit property is the ancestral properties of

the plaintiffs and defendants. He himself and family members are in joint constructive possession and cultivation of the suit properties and that the defendant No.1 and himself got constructed a houses by investing equal share at about 25 years ago and they are residing in the said house and allotted with house No.252 from the concerned Panchayath in the name of first defendant since he is elder brother and that the said building having two portions and that the plaintiff is residing in one portion and the first defendant residing in the another portion since from the construction of the building. When the things stood like this, first defendant all of a sudden demolished his residing portions includig the $\frac{1}{2}$ portion of the house of the plaintiff and that, the first defendant now without obtaining any permission from the concerned Grama Panchayath constructing the new building by encroaching the portion of the house of the plaintiff and the first defendant putting up construction without leaving proper setback area and the plaintiff requested him to not put up construction by encroaching the portion of the house of the plaintiff, and that the first defendant has not heeded the request and hence, he approached the PDO, Grama Panchayath, Asnoti who refused to stop the construction of house and if the defendant is succeeded in

putting up of such construction plaintiff will be put into loss and hardship and that the plaintiff has made out a prima-facie case and hence, he sought for allow the application in question.

4. Per contra, after service of summons, the defendants have marked their presence through their counsel, the first defendant has filed written statement and objection to IA No.1 and he has filed another application U/O.39 Rule 1 and 2 R/w Sec.151 of CPC.

5. The defendant has denied the plaint averments and contended that, the suit of the plaintiff is false, frivolous and not tenable under law and no injunction shall be granted against the co-sharer and that the defendant is not trespasser of the suit property who had undivided share in the suit property he has denied that, the plaintiff is in possession and cultivation of the suit land. However, he admitted that, the Asnoti Grama Panchayath had allotted door No.252 in the name of the defendant No.1 in respect of the house situated therein and specifically contended that, he had constructed the said house out of his self earned money and that the first defendant has renovated the existing house and hence,

the question of constructing the permanent structure does not survive for consideration. That the plaintiff is not residing in the suit house. It is specifically contended that, the first defendant was serving in the Indian Military since 1970 who got retired from the service in the year 1985 and later he joined to Statistical and Planning Department under Goa Government and served there more than 25 years. The family of the plaintiff and defendants were residing in a joint family with their cousins at Asnoti jointly and the first defendant got constructed the house in the suit property with the consent of the plaintiff and defendant No.2 and this defendant was allotted with a corner portion of the land. Accordingly, in the year 1995, the defendant No.1 obtained permission from the Gram Panchayath, Asnoti to construct a residential house and accordingly, he got constructed a small tiled roofing house in 1 gunta of land out of total area measuring 00-14-00 bearing house No.252 out of his own income and later he obtained a meter from the electricity department to the said house in his name and the first defendant obtained a agricultural pump in respect of the said house. He is in possession and enjoyment of the same by paying taxes regularly and that at the time of the construction of the

said house the plaintiff had no job and he never contributed anything and even for the marriage of his sisters and that the plaintiff is residing at Mumbai with his family and occasionally he used to visit to Karwar to meet his family. The plaintiff has no right over the said house which is absolutely belonging to the first defendant who is aged about 72 years and retired from military and hence, he sought for dismissal of the IA No.I and also filed IA No.2 U/O. 39 Rule 4 of CPC for vacating the order of temporary injunction passed in the case.

6. On the other hand, in the affidavit filed in support of IA No.II first defendant has raised the contentions urged in the written statement and hence, I refrain myself from re-narrating the said facts to avoid repetition. The plaintiff has filed objection to the IA No.II and contended that, if the IA No.II filed by the defendant is allowed then plaintiff will be put into loss and hardship.

7. Heard the arguments of the learned counsel for both the parties on IA No.s I and II, perused the pleadings and materials available on record placed by the plaintiff and defendants.

8. The points arise for the determination of this court is as follows:

POINTS

1. Whether the plaintiff has made out a prima-facie case?

2. Whether the plaintiff proves that, the balance of convenience lies in her favour?

3. Whether the plaintiffs will be put into irreparable loss and injury, if temporary injunction is not granted ?

4. Whether the defendant No.1 has made out the sufficient ground to allow IA No.II.

5. What order?

9. Finding of this court to the above said points are as here under:-

Point Nos. 1 to 3 : In the Affirmative.

Point No.4 : In the Negative.

Point No.5 : As per final order for the following:-

REASONS

10. Points Nos.1 to 4:- Since these points are interlinked each other and for the sake of brevity and to avoid the repetition of facts and circumstances, these points are took up for common discussion.

As could be seen from the contentions urged in the affidavit filed in support of IA No.1, it can be seen that, the plaintiff is sought for an order of interim temporary injunction restraining the defendant from putting up of construction in suit schedule property No.2 comprised in Sy.No.47/8 measuring 00-14-00 area situated at Madhewada Village and specifically contended that, the suit schedule property are the joint family properties of the plaintiff and defendants. In order to substantiate his allegations against the defendant that, he is trying to put up the constructions in the Sl.No.2 suit schedule property the plaintiff had produced photographs of the said property and that neither the plaintiff nor the defendant has denied as far as status of the parties to the suit and status of the suit schedule properties are concerned during the arguments laid down by both the counsels.

11. That apart, the plaintiff has already obtained an interim order of temporary injunction against the first defendant by this court at the time of institution of the present suit. However, the first defendant in his written statement contended that, they have not constructed by demolishing the house already situated in the suit property. On the other hand, it is the case of the first defendant is that, he is renovating the house already in existence in the suit property. But except taking of such contentions the first defendant has not produced any photographs and documents before the court at the time of his appearance in order to substantiate his contention. Even, he has not produced any license issued by the concerned authority in order to construct or renovating building which is in existence of the suit property. It is pertinent to state here that, the first defendant has not disputed that the suit properties are the joint family properties of the plaintiff and defendants and even he has not disputed that, the suit property was not subjected to partition between the plaintiff and defendants by metes and bounds. Moreover, the Record of Rights and other documents produced by the plaintiff before this Court establishes that, suit properties are the joint family properties of the plaintiff and defendants. Though the

first defendant contended that, out of his self earned income he got constructed house in the suit property, he has not produced any documents in this regard. Furthermore, whether the defendant has constructed the house out of his self earned income or whether the suit house got constructed by the plaintiff and defendants jointly, it requires a full fledged trial.

12. It is pertinent to note that, a co-owner though in possession of the joint property has no right to change the user of that property without the consent of the other co-owners and that if the aggrieved co-owner comes to the court with due promptness seeking for restraining the defendant from raising the building on the joint family property, the court can passes an order of temporary injunction against the defendant from putting up of such constructions. However, a co-owner cannot alone to cause prejudice to the other co-owner by putting up substantial construction during the pendency of the suit for partition filed by the other co-owner.

13. It is pertinent to state here that, if the temporary injunction is not granted to the plaintiff then it may amounts to compulsory partition and if the co-owner

is let to put up further constructions it may adversely effect the interest of the other co-owner. Therefore, the proper recourse of this type of situation in my considered opinion is to pass an conditional order of temporary injunction by imposing the restraint on the defendant No.1 from putting up of further construction from the date of this order till pending disposal of the suit.

14. It is clear that, prima facie case is not a prima-facie issue, but an opinion that there exists a triable issues, it requires recording of evidence and decision on merits. In the decision reported in **1992(1) SCC 719 (Dalpat Kumar and Others Vs Prahlad Singh)**, the Hon'ble Apex Court has observed as follows:-

“Prima-facie case is not be confused with prima-facie title, which is to be established on evidence at the trial. Only prima-facie case is a substantial question rise, bonafide, which needs investigation and a decision on merits”.

15. In view of above, as there exists a triable issues, a prima-facie has made out. However, the plaintiff has filed some photographs of the suit properties wherein it could be seen that, the first defendant has completed the

construction work till foundation and raises columns for the construction of pillars. Hence, it is sufficient to amount injunction not to put up further constructions in the No.2 of the suit schedule property to protect the interest of the plaintiff against any further constructions and to balance the interest at the same time, thus the equity can be met with. The defendant shall not be pleaded equity merely he put up construction in the Sl.No.2 suit schedule property, unless he succeeded in the suit.

16. On careful perusal of the materials available on record the plaintiff has produced certain photographs before the this court showing the constructional activities before filing of the suit and from the documents available on record it could be seen that, the first defendant constructing the said house in the joint family property which is not subjected to partition as admitted by himself in his written statement as well as objection of IA No.1 and I am of opinion that, those photographs will help to show that prima facie case in favour of the plaintiff and the balance of convenience lies in his favour and if the injunction is not granted then the plaintiff will be put into loss and hardship since the plaintiff has established a

prima-facie, he has entitled for the temporary injunction as sought in the application in question. However, the defendant has not made out a case to allow IA No.II and to vacate the injunction order already. Therefore, by considering the facts and circumstances of the case, this court answers the **Point under consideration Nos. 1 to 3 are answered in the Affirmative and Point No.4 is the answered in the Negative.**

17. **POINT NO.4:-** In view of the above discussion and answers to the above points, it is just and proper to pass the following:

ORDER

IA No.I filed by the plaintiff U/O 39 Rule 1 and 2 R/w Sec. 151 of CPC is hereby allowed. The defendant No.1 is hereby restrained from putting up of further construction of house in the suit schedule property No.2 till pending disposal of the suit.

IA No.II filed by the defendant No.1 U/O 39 Rule 4 R/w Sec.151 of CPC is hereby dismissed.

The parties are hereby directed to bare their respective costs.

For compliance of sec 89 of CPC By 05-01-2024

(Dictated to the stenographer directly on computer, typed by her, corrected and then pronounced by me in open court on this 18th day of December - 2023).

**Prl.Civil Judge and J.M.F.C-II,
Karwar**