

Order passed below Exh.5 in Regular Civil Suit No.118/2015.

This application is filed by the plaintiff for grant of interim injunction restraining defendant No.1 from making construction in the suit property, restraining alienation of the property or creation of encumbrance thereon and he also prayed for grant of interim mandatory injunction directing defendant No.1 to demolish illegal construction made in the suit property.

2. Northern 53 feet x southern 60 feet area in western side of C.S. No.283 admeasuring 581.9 square meters situated at Mouje Haroli, Tal: Shirol, District : Kolhapur is the subject matter of present suit. Said property is hereinafter referred as the “suit property” for the sake of convenience and brevity.

3. Plaintiff is averting that C.S. No.283 is ancestral property of plaintiff & defendants. Predecessor of plaintiff and defendants have partitioned it and half share was allotted to predecessor of plaintiff and half share was allotted to predecessor of defendant No.1. Plaintiff has also given genealogy of plaintiff & defendants. Defendant No.1 is forcibly and without authority making construction in the property more than his share as per partition. Defendant No.1 has not

carried out measurement by government agency. C.S. No.283 is not of square or rectangle shape. Eastern & western side portion in C.S. No.283 was allotted to predecessors of plaintiff. But, defendant No.1 is making construction in more than half area of C.S. No.283. Plaintiff had filed Regular Civil Suit No.88 of 2015 for partition. Application at Exh.5 in that suit is rejected by the Court on the ground that partition has already taken place. Said suit is withdrawn by plaintiff with permission to file fresh suit on same cause of action. Now, defendant No.1 is taking undue advantage of said order. Defendant No.1 had not filed sanction plan of his construction. He is not having any concern with western portion in C.S. No.283. Plaintiff requested defendant No.1 to carry out measurement of suit property by government agency, but he declined. Therefore, he filed present suit for perpetual injunction and mandatory injunction. With these averments, he prayed for grant of interim injunction restraining defendant No.1 from making additional construction in the suit property, restraining alienation or creation of any encumbrance on the suit property and also prayed for interim mandatory injunction directing defendant No.1 to demolish illegal construction made in the suit property.

4. Written Statement & say of defendant Nos.1

to 5 is at Exh.13. They denied all adverse pleading of plaintiff. Defendant No.1 contended that plaintiff has not given description of the suit property sufficient to identify it and therefore, there is a bar to this suit under Order VII Rule 3 of the Code of Civil Procedure. Plaintiff has given evasive description of suit property. In the western side of C.S. No.283, plaintiff's property/share is situated and on its eastern side property/share of defendant No.1 is situated. There are boundary stones on the boundary of plaintiff & defendants' property. Said boundary stones are fixed before 1966. But, plaintiff has suppressed these material facts. This position is admitted by heirs of Rau Bhosale except plaintiff. Plaintiff has not made specific case of encroachment by defendant No.1. Defendant No.1 is making construction by leaving 2 feet area from the boundary stones. He has also obtained building permission from Grampanchayat. Plaintiff has previously filed Regular Civil Suit No.88 of 2015 for partition and injunction and said was later on withdrawn with permission to file fresh suit on same cause of action mischievously. Plaintiff is in habit of filing suits. Exh.5 in said suit was rejected on merit and therefore, bar under Section 11 of Civil Procedure Code is applicable. Defendant Nos. 1 to 3 were residing in the suit property with their families. Said house was old and therefore, defendant No.1 decided to make construction of new house and accordingly, obtained

permission. His construction is not illegal. Grampanchayat is necessary party to this suit. Defendant No.1 has made huge investment in the material of construction and same is lying on open land. He will suffer irreparable loss if injunction as prayed is granted. This Court is having no jurisdiction to try this suit. With these contentions, he has prayed for rejection of application with compensatory costs.

5. On perusal of application, say and record and hearing advocate for plaintiff and defendant No.1, following points arise for my consideration and I am recording my findings thereon for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether plaintiff proves prima facie case? ...	No.
2. Whether plaintiff proves that balance of convenience lies in his favour? ...	No.
3. Whether plaintiff proves that he will suffer irreparable loss if interim injunction as prayed is refused? ...	No.
4. What order? ...	As per final order.

REASONS

6. It is not disputed that C.S. No.283 is

ancestral property of plaintiff & defendants and predecessor of plaintiff & defendant No.1 had given half share each in C.S. No.283. Relations of plaintiff & defendants are also not in dispute. It is also admitted that plaintiff has filed R.C.S. No.88 of 2015, Exh.5 in said suit was rejected on merit and said suit is later on withdrawn with permission to file fresh suit on the same cause of action.

As to point Nos. 1 to 4 :-

7. These points are inter-connected, and therefore, for convenient consideration, I am taking them together.

8. As stated above, admittedly plaintiff has filed R.C.S. No.88 of 2015 against defendant No.1 for partition & perpetual injunction restraining him from making construction in the suit property and Exh.5 in said suit is rejected on merit. In that suit, plaintiff has pleaded that partition between plaintiff & defendants of C.S. No.283 had not taken place by metes & bounds and defendant had pleaded that there is previous partition between predecessors of plaintiff & defendants. Now, plaintiff has pleaded that there was partition between plaintiff & defendants' predecessor as alleged by the defendants in R.C.S. No.88 of 2015.

9. Advocate for the defendant No.1 argued that plaintiff is suppressing the facts and making contrary pleadings. However, it is pertinent to note that said R.C.S. No.88 of 2015 was withdrawn by plaintiff with permission to file fresh suit on same cause of action. Still this suit is not filed on the same cause of action of R.C.S. No.88 of 2015. Further, if in the present suit plaintiff is admitting theory of defendants about partition, he can very well do so because it is not the case of withdrawal of admission previously given. This is the case of making admission against his previous pleadings which is permissible. For showing previous partition and admissions about that, defendants had filed judgment in R.C.S. No.60 of 1996 and its decree, judgment in Regular Civil Appeal No.75 of 1999, its decree, judgment in R.C.S. No.161 of 2006 and the certified copy of evidence of plaintiff in R.C.S. No.60 of 1996. However, in my view, it is not necessary to refer these documents in view of specific admission of plaintiff about the partition in present suit.

10. Advocate for defendant No.1 also vehemently submitted that plaintiff has not made out the case of specific encroachment by defendant No.1 and specifications about the encroachment are also not given and plaintiff has also not filed sketch showing approximate location and extent of encroachment as

per Order VII Rule 3 of Code of Civil Procedure. On the other hand, advocate for plaintiff submitted that it is not necessary to specifically use the word “encroachment” in the pleadings and it is sufficient if the pleadings describe alleged encroachment. Plaintiff has also given measurement of alleged construction, and therefore, description of the suit property is correct. I do agree with the submission of advocate of plaintiff that the word “encroachment” is not required to be specifically used and the pleadings are required to be considered as a whole. However, plaintiff has not given sketch showing approximate location and extent of encroachment as required under Order VII Rule 3 of the Code of Civil Procedure, and therefore, this aspect is required to be considered against plaintiff.

11. It is pertinent to note that defendant No.1 has specifically pleaded that there are boundary stones on the boundary of plaintiff and defendants' share in C.S. No.283. Said stones were fixed in 1966. On the other hand, main grievance of plaintiff is that defendant No.1 is making construction beyond his share and in the share of the plaintiff. But, the photographs produced by defendant No.1 at Exh.27/1 & 2 prima facie depict that there are boundary stones visible on the boundary of plaintiff and defendant No.1. Therefore, prima facie, averment of plaintiff that

defendant No.1 is making construction in his share do not seem to be correct. On the other hand, defendant No.1 has filed copy of building permission and his construction is also not beyond the boundary stones of boundary between plaintiff and defendant No.1's share. Therefore, in my view, plaintiff has not proved prima facie case and balance of convenience and principle of irreparable loss are also not in his favour.

12. Advocate for the defendants submitted that court has to critically examined the pleadings and in support placed reliance on the judgment of the Hon'ble Supreme Court in **“A.Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, 2013(3) ALL MR 946 (S.C.)”**. In this judgment the Hon'ble Supreme Court held that pleadings need to be critically examined by judges both before issuing ad-interim injunction and/or framings issues. There can be no dispute about this exposition of law.

13. He has also placed reliance on judgement of the Hon'ble High Court of Bombay in **“Ajay Bhalchandra Nandedkar Vs. Mrunali Prabhakar Gadgil, 2015(2) ALL MR 134”**. In said judgement, the Hon'ble High Court held that, prayer clause cannot be read in isolation, but they have to be read in

conjunction with pleadings in plaint. In present case though plaintiff has prayed for interim injunction restraining defendant No.1 from alienating or creating an encumbrance on suit property, there are no specific pleadings about the same in plaint. Therefore, on this ground also interim injunction of that nature cannot be granted.

14. Furthermore, plaintiff has also prayed for interim mandatory injunction directing defendant No.1 to demolish illegal construction made in the suit property. But, plaintiff has failed to prove that defendant No.1 had made illegal construction in plaintiff's share. Therefore, in my view, plaintiff is not entitled to interim injunction as prayed. Hence, for the reasons stated above, I answer point Nos. 1 to 3 in the negative and in answer to point No.4, pass following order.

ORDER

Application is rejected.

Sd/-

Jaysingpur.

(Mahesh T. Patankar)

Date:05.08.2015.

Jt.Civil Judge, Jr.Dn., Jaysingpur.

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

Name of the Stenographer	Shri.D.R.Joshilkar, (L.G.)
Name of Court	Jt. Civil Court & J.M.F.C. Jaysingpur.
Date of Dictation	05/08/2015.
Judgment/order signed by the P.O. on	07/08/2015.
Judgment/order uploaded on	07/08/2015.