

ORDER BELOW EXH.5 IN REG.CIVIL SUIT NO. 198/2010.

01) This is an application filed by the plaintiffs under Order 39 Rule 1 and 2 and Section 151 of the Code of Civil Procedure.

02) The suit property is described by the plaintiffs as 2 Gunthas from land Gat.No.522 of village Yadrav, Tal.Shirol and 4 Gunthas land from Gat.No.521 of village Yadrav, Tal.Shirol. The boundaris are also mentioned by the plaintiffs of all these lands in para no.1-A and 1-B of this application.

03) The contention of the plaintiffs is that, the suit land 1-A is the ancestral property of the plaintiffs and defendants and one well, electric motor and pipe line is situated in this land. The plaintiffs and defendants have obtained the electricity connection jointly in the name of Pungonda Dadu Kumbhoje in the year 1977. Accordingly the plaintiffs and defendants are using the electric motor for taking water from the well and giving it to their respective lands. The well situated in this land is jointly owned by plaintiffs and defendants. Further contention of the plaintiffs is that, the suit land 1-B is recorded in the name of defendants no.13 to 15 and 18 to 11. This is a fallow land.

The plaintiffs and all other defendants are using this land for going to the well situated in suit land 1-A and such use and cultivation is going on continuously. Though the plaintiffs are having right to use the 10 feet wide road situated in suit land 1-B for going to suit land 1-A, the defendants no.13 to 15 and 18 to 22 have obstructed the plaintiffs for going to suit land 1-A from the suit land 1-B. So also the defendant no.8 and defendant no.6-B have obstructed the plaintiffs so as to cause inconvenience to them and have obstructed the rights of the plaintiffs. So also the defendants are obstructing the plaintiffs from using the common pipeline installed in irrigating the land Gat.No.439 to 445. Further contention of the plaintiffs is that, the plaintiffs and defendants are the blood relatives of each others and when they were having good relations, the electric motor is taken in the name of Pungonda and pipeline is also installed so as to irrigate their respective lands. However, the plaintiffs filed Reg.Civil Suit No.214/2006 against the Chief Officer of Zilaparishad, Director and Sarpanch Yadrav seeking relief of injunction, which was decreed and the defendants in that suit were restrained from leaving the waste water in the land of plaintiffs. Therefore out of grudge and with an intention to harass the plaintiffs, the defendants are obstructing the use of electric motor by the plaintiffs. Therefore the plaintiffs have

prayed for restraining the defendants from obstructing his right of using the electric motor and the water of the well as per his turn, till the disposal of the suit, by way of order of temporary injunction. The plaintiffs have contended that, the prima facie case and balance of convenience lies in their favour.

04) The defendants have filed their say and W.S. at Exh.12 and resisted the application. The say related to the application is that, the plaintiff is seeking the equitable relief by suppressing the material facts from the court. The plaintiffs have not come with clean hands and true facts before the court. The land Gat.No.522 is a fallow land and the names of plaintiffs are entered to the 7/12 extract of this land being the heirs of Bharmu Kumbhoje. However, the plaintiffs have never taken the water from the well situated in land Gat.No.522. So also the electric motor installed on that well is not recorded in the name of plaintiff. The electric connection on the said well is standing in the name of defendant no.8. The plaintiffs have not taken the water from this well at any time and therefore they are not related to the electric motor, pipeline or the well in any way. The land Gat.No.439 belonging to plaintiffs is situated to the southern side of the well in suit land 1-A. The common well of plaintiffs and defendants is situated in Gat. No.464 and the

plaintiffs are taking water by the pipeline from Gat.No.464. Therefore the question of giving water to Gat.No.439 from the well situated in suit land 1-A does not arise. Further contention of the defendants is that, no such road as alleged by the plaintiffs is situated in suit land 1-B for going to well in suit land 1-A. As there is no road situated in suit land 1-B, the question of obstructing the same does not arise. The plaintiff is taking the water from Gat.No.464 and they are not related to the well situated in Gat.No.522. The electric connection and the electric motor is taken by the defendant no.8 for taking water from the well situated in the suit land. None of the defendant was the party to Reg.Civil Suit No.214/2006 and therefore the decree passed therein is not binding on these defendants. More so the court has given the order of injunction to the Grampanchayat, Zillaparishad only by stating that the road and drainage shall not be prepared without following the due process of law. The plaintiffs have obstructed the preparation of the road and drainage with an intention to harass the defendants, though it was very essential. On all these counts defendants have prayed for rejection of the application.

05) From the above rival contentions of the parties, following points arises for the determination to which the

findings are recorded followed by reasons thereunder.

POINTS.

FINDINGS.

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| 1) Does plaintiffs prove that the prima facie case lies in their favour ? | .. No. |
| 2) Does plaintiffs prove that, the balance of convenience lies in their favour ? | .. No. |
| 3) Whether the plaintiffs will suffer irreparable injury if the injunction order will be refused ? | .. No. |
| 4) What order ? | .. As per final order. |

REASONS.

As to All Points. :

06) Plaintiffs have produced on record various documents such as 7/12 extracts of Gat.No.522 and 521, certified copy of judgment in Reg.Civil Suit No.214/2006, consolidation sheets, map of the suit property, 7/12 extracts of Gat.No.111, 522,521, 463,464 and affidavits from Exh.15 to 18. On the other hand the

defendants have filed affidavits from Exh.26 to 31 and rough map of the suit property, photographs, 7/12 extracts of the Gat.No.439,440,445,440,441. Plaintiffs also filed the documents alongwith list Exh.36 including 7/12 extracts and photographs and one document titled consent deed.

07) Heard learned Advocate Shri.D.D.Patil for the plaintiffs and learned Advocate Shri.M.N.Mane for the defendants. Learned Advocate Shri. D.D.Patil submitted that plaintiffs are using the way in suit property 1-B for going to the well situated in suit land 1-A. Since long time and they are using the water of the well situated in suit land 1-A for irrigating their lands in Gat.No.463, by turn. He further contended that, the plaintiffs have executed their legal rights by filing in Reg.Civil Suit No.214/2006 and as per the decree passed in that suit,the defendants therein were restrained from constructing road and drainage to the property of plaintiffs. Therefore the defendants in order to harass the plaintiffs have started obstruction to the rights of the plaintiffs. It is his further contention that the plaintiffs are having rights to use the water from the well situated in Gat.No.522 and using the way in Gat.No.521.

08) On the other hand learned Advocate of defendants Shri.M.N.Mane submitted that, the plaintiffs are neither entitled to use the water nor the way in the suit lands, nor they are using the same at any time. According to Shri.Mane the land Gat.No.439 belonging to the plaintiffs is situated to the southern side of the well in the suit land 1-A. The plaintiffs are taking water from the well, but situated in Gat.No.464 and for that purpose the plaintiffs have installed pipeline. He further submitted that, the affidavits filed by the plaintiffs on record can not be believed because this affidavits are of the persons who are not having any knowledge about the factual situation and deponents of these affidavits are not residing near by the suit property nor they are having any property besides the suit properties. On the other hand, according to him, the affidavits filed by defendants are of the persons who are having opportunity to see the suit lands every now and then. He further contended that, the real brother of the plaintiffs Shri.Jangonda Bharmu Kumbhoje is having the knowledge of each and every thing,has filed his affidavit while supporting the contention of the defendants.

09) In this background, if the contentions of the plaintiffs are look into, it appears that, the plaintiffs are contending that,

the well situated in land Gat.No.522 and the way situated in land Gat.No.521 is jointly owned and used by the plaintiffs and defendants. In this regard if the 7/12 extracts of these Gat numbers are perused, it appears that, in land Gat.No.522 one well is situated and it is hold by all the shareholders of Gat.No.522 jointly. However, the perusal of 7/12 extracts of Gat.No.521 shows that, the plaintiffs are neither the owners nor the possessors of the land Gat.No.521. Though the plaintiffs are trying to rely on the decision of Civil Court in Reg.Civil Suit No.214/2006, it appears that, the Reg.Civil Suit No.214/2006 is filed in respect of the land Gat. No.463 and 464. More so, the present defendants are not the party to that suit. In such circumstances the decision in Reg.Civil Suit No.214/2006 will not be applicable or useful for the plaintiffs in proving their rights in respect of the present suit properties.

10) It is specifically contended by the plaintiffs that, they are having right to use the water of the well situated in suit land 1-A as per the turn which comes on 13th day. However, there is no single document on record produced by the plaintiffs to support this contention. So also there is no document on record to substantiate the contention of the plaintiffs in respect of the way situated in suit land 1-B and the rights of plaintiffs therein.

11) Here if the affidavits filed on record by the plaintiffs are perused. It appears that, deponents Shamrao Kakde, Babu Sheikh, Balaso Zotal, Parisa Upadhye have nowhere stated the reason as to how they are having personal knowledge about the suit lands. All of them have consistently stated that, they are having opportunity to go to the suit lands and therefore they are having knowledge about the same. However, it is not the contention of the any of the deponents that either their land or house situated besides the suit lands and therefore they are having opportunity to witness the factual position of the suit land.

12) On the other hand the witnesses who has filed their affidavits in support of the contentions of defendants have also stated the similar things. However, the witness Shri.Jangonda Kumbhoje who has filed his affidavit at Exh.30 in support of the contention of the defendants, has stated that he is real brother of the plaintiffs and he is also one of the shareholder in Gat.No.463 and 464. He has supported the contention of the defendants that the plaintiffs are taking water from the well situated in Gat.No.464 and at no time they were required to take water from Gat.No.522.

13) No doubt the statement made by these witnesses in the affidavits are not testified as the witnesses are not cross-examined. However, in view of the provisions of Order 39, in order to conclude as to whether the prima facie case lies in favour of the plaintiffs or not, the affidavits can be relied on. More so as stated above the witness Shri. Jangonda Kumbhoje being the member of the family of the plaintiffs and defendants and having opportunity to witness each and every thing happening in the family of the plaintiffs and defendants, his affidavit can be relied on. More so, as there is nothing on record to substantiate the contention of the plaintiffs in support of their rights in the suit properties, prima facie, it appears as just and proper to rely on the affidavit of witness Shri.Jangonda.

14) In such circumstances prima facie it appears that, the plaintiffs are not using the water in the well situated in Gat.No.522 nor using the way in Gat.No.521. If at all, the plaintiffs are having any right of use the suit properties, for that purpose the parties will be required to produce their evidence. However, at this stage there is nothing on record to infer the rights of plaintiffs. Hence the points no.1 is answered in the negative in respect of the prima facie case.

15) As the plaintiffs have failed to prove prima faice case in their favour, consequently the balance of convenience goes in favour of the defendants. So also as the prima faice case and balance of convenience is not in favour of the plaintiffs, there appears no irreparable loss or injury in the event of refusal of the injunction order in their favour. Therefore, by answering the points under determination in the negative following order is passed.

ORDER.

The application stands rejected.

Cost in main cause.

Date.: 24/05/2011.

Sd/-
(D.P.Kasat.)
Jt.Civil Judge Jr.Dn.,
Jaysingpur.