

ORDER BELOW EXH.5 IN REG.CIVIL SUIT NO. 206/2010.

01) This is an application 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 city survey no.123/A/2 Area 90.2 square meter situated at Jaysingpur, Tal.Shirol.

03) In short, the case of the plaintiffs is that, the suit property was originally owned by Rajaram Krishnaji Kulkarni and Arun Krishnaji Kulkarni. Rajaram is died and plaintiffs are his legal heirs and accordingly their names are mutated in the revenue record. Arun Kulkarni has sold his share in the above property to the plaintiff no.1 on 24/9/2001. There is one house of R.C.C. construction. belonging to plaintiffs in the suit property. Towards the Eastern side of the suit property the property of defendant bearing city survey no.123/B is situated which is purchased by the defendant in the year 2003. Both these properties are adjacent to each other. In the month of May-2010, on account of vacation, the plaintiffs were out of station. In that period the defendant without obtaining construction permission from the Jaysingpur Municipal Council

and by taking undue advantage of the absence of the plaintiff constructed in their property by encroaching upon the property of plaintiffs from Eastern side. The defendant has constructed one latrine and bathroom in the North-East corner of the plaintiffs property. So also the defendant has constructed a wall on the staircase of the plaintiffs. In order to bring to the notice, the situation prevailing on the suit property, the plaintiffs have filed rough map alongwith plaint. As such when the plaintiffs came back, they came to know about the encroachment made by the defendant. Thereafter the plaintiff asked the defendant about construction, to which the defendant replied that she will remove the encroachment. However, the encroachment is not removed. Therefore plaintiff complained the act of the defendant with Jaysingpur Municipal Council on 23/6/2010. However, the Municipal Council has not taken any action. The defendant is not ready to remove her construction and she has started obstruction to the plaintiffs possession. The construction made by the defendant is without any permission and by committing encroachment on the property of plaintiffs. The plaintiffs have claimed relief of mandatory injunction for removing the encroachment and the construction made by the defendant. It is contended by the plaintiffs that since last eight days the defendant is obstructing their possession and therefore

the plaintiffs sought the relief of temporary injunction by contending prima facie case and balance of convenience in their favour.

04) The defendant by filing her written-statement and say at Exh.17 resisted the application. Say of defendant relevant for this application is that, the defendant has constructed as per law and the Jaysingpur Municipal Council has given the construction permission to her. The defendant has not committed any act of encroachment. The defendant has purchased the property by way of registered sale-deed on 5/8/2003 and on the basis of the sale-deed she has obtained the ownership and possession of the property possessed by her. She has not committed any encroachment nor has obstructed the possession of plaintiffs. Neither the balance of convenience nor the prima facie case lies in favour of plaintiffs and in the event if injunction order will be granted it will be prejudicial the rights of the defendant. On all these contentions defendant prayed for rejection of the application.

05) On the basis of these rival contentions of the parties, following points arises for determination, to which findings are recorded followed by reasons thereunder.

POINTS.

FINDINGS.

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

REASONS.

As to All Points.

06) In support of their claim plaintiffs have placed reliance on the documents filed alongwith list Exh.3,20 and 26. On the other hand the defendant put her reliance on the documents filed alongwith list Exh.24. Heard learned Advocate Shri.U.M.Kulkarni for the plaintiffs and learned Advocate Shri.S.J.Chougule for the defendant.

07) Learned Advocate Shri.U.M.Kulkarni submitted that, admittedly the plaintiffs are the owners and the possessors of the suit property and the defendant is owner and possessor of the Eastern side property bearing city survey no.123/B. Learned Advocate Shri.Kulkarni submitted that, the defendant has constructed by committing encroachment over the suit property and thereby infringed the rights of the plaintiffs. He further submitted that, the documentary evidence and more particularly photographs filed by the plaintiffs on record alongwith list Exh.20 clearly shows that, the defendant has committed encroachment on the property of plaintiffs and has obstructed the plaintiffs.

08) On the other hand learned Advocate Shri.S.J.Chougule appearing on behalf of defendants submitted that, whether the defendant has committed any encroachment or not is the matter to be decided on merits after evidence and at this juncture no inference can be drawn against the defendant as regards of the committal of the encroachment. He further submitted that, the photographs filed by the plaintiff on record itself shows that the entire property of plaintiffs and defendant is separate and there is no chance for the defendant to enter the suit property. He further submitted that the plaintiffs have not

pleaded anything specific as regards to the obstruction made by the defendant. According to Shri.Chougule on the basis of such vague allegations no injunction can be granted.

09) From the pleadings and submissions of both the parties it is clear that, the suit property is belonging to the plaintiffs and the plaintiffs and defendants are the neighbours of each others. It is also an admitted fact that, the defendant has made construction. However, as far as the question in respect of committal of encroachment by the defendant, is the issue which is required to be dealt in the main suit as plaintiffs have claimed the relief of mandatory injunction also. As the issue of mandatory injunction will be decided on its own merits after the trial, it is not required to discuss here.

10) At this juncture the only question is whether the defendant is obstructing the peaceful possession of the plaintiffs over the suit property. In that regard if the pleading of the plaintiffs is perused, it appears that, only it is contended by the plaintiffs that since prior to eight days of filing of this application the defendant is obstructing their peaceful possession. However, the plaintiffs have not described any specific act of the defendant which obstructed their peaceful

possession. More so, as contended by learned Advocate Shri.Chougule, the perusal of the photographs filed on record shows that, the entire property of plaintiffs is closed and there appears no entrance for the defendant from her property in the suit property. From the photographs filed on record it appears that, both the properties i.e. the property of plaintiffs and property of defendant are distinct and independent properties and there is no necessity to use the each others properties for entering their respective properties. In such circumstances it was obligatory on the part of the plaintiff to state as to actually how the defendant is obstructing their possession.

11) At this juncture learned Advocate Shri.U.M.Kulkarni relied on the decision of **Sambhaji Laxmanrao Pawar V/s. Abdul Wahed s/o Rahmatullah, reported in 1995 (1) Mh.L.J.22**, wherein it is held and observed that, where denial of a fact by the defendant in his written statement is not specific but evasive, said fact shall be taken to be admitted. In such case, the admission itself being proof no other proof is necessary. By relying on the law laid down in this case law he submitted that the defendant has not specifically denied the contention of the plaintiff as regards to the obstruction and therefore it needs to be considered as admission on the part of defendant.

12) On the other hand learned Advocate Shri.Chougale submitted that the plaintiffs are claiming the equitable relief of injunction and it is for the plaintiffs to prove their case by standing on their own legs and for proving their case the plaintiffs cannot take the benefit of the weakness of the pleadings of the defendant.

13) No doubt the defendnat has not uttered a single word in her written statement and say about the alleged obstruction, nor she has denied the same. However, it appears that it was obligatory on the part of the plaintiff to describe as to how and what obstruction is caused by the defendant to their possession. As discussed above, as far as the case of the plaintiffs relating to the relief of mandatory injunction, it requires trial and evidence of both the parties. However, as far as the obstruction is concerned, it was expected from the plaintiff that, they should have described the incidence which lead them to seek this equitable remedy of temporary injunction from the court. However,that is not done by the plaintiffs. In all these circumstances no doubt the prima facie case of possession lies in favour of plaintiffs but the balance of convenience definitely goes in favour of the defendant as passing of injunction order against the defendant will lead to curtail her personal liberty.

Therefore in view of the above discussion the points under determination are answered accordingly and following order is passed.

ORDER.

Application stands rejected with costs.

Date.: 05/10/2011.

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