

CNR : MHKO19-000126-2018

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Reg. Civil Suit No. 30 /2018

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**ORDER BELOW EXH. 19**

This is an application by defendants under order 39 Rule 1 and 2 restraining plaintiff from making encroachment and construction over the Eastern wall of property at C.S.No. 210 admeasuring area 556.5 Sq.Mt. situated at village Ghotawade Tal Radhanagari bounded as under :-

On east : Property belonging to plaintiff at C. S. No. 211  
On west : Property belonging to Ananda Doulu Dongale  
On south : Road  
On north : Road namely Koli lane

2. As per defendants the counter claim property is their ancestral property. As the house in counter claim property is dilapidated and collapsed defendants are not residing there. The Eastern side wall of the house of defendants in C. S. No. 210 is belonging to defendants only. However, encroaching upon the property at C.S.No. 210 plaintiff has removed the said Eastern wall and constructed a wall of 20 Ft. in length and 2 Ft. in height. When defendants resisted the plaintiff and asked him for removal of encroachment, plaintiff preferred the suit. Hence, present application to stop plaintiff from making construction in property at C.S.No. 210 by encroaching upon the same.

3. Vide his say and written statement to the counterclaim at Exh. 23 plaintiff has strongly combated the application. As per plaintiff he is owner of property at C.S.No. 211 situated on Eastern side and

adjacent to the property at C.S.No. 210. Before making any construction plaintiff has got his property at C.S.No. 211 measured through Inspector, Land records on 31/10/2017 vide measurement register No. 139. The construction is being carried out by plaintiff is within four boundaries of property at C.S.No. 211 and plaintiff has not caused any encroachment of what so ever nature in C.S.No. 210. Further, the wall described by defendants as a single wall is in fact not a single. Actually, there are two different walls adjacent to each other. The nature of construction of these walls is also altogether different. Thus it can not be said that the wall described by defendants is belonging to defendants only. Further, as the defendant are not residing in counter claim property, no harm or prejudice is caused to them if application is rejected. Per contra plaintiff has invested huge money on the construction. Thus, he is the plaintiff only who would suffer irreparable loss. Ultimately, plaintiff has prayed for rejection of the application.

4. Heard both sides. Perused record. The points crop-up for determination and reasoned findings thereon are recorded as under :-

<b>Sr.No.</b>	<b>Point for determination</b>	<b>finding</b>
1	Whether defendants have made out prima facie case in their favour?	No.
2	Whether balance of convenience lies in favour of defendants?	No.
3	Whether defendants would suffer irreparable loss if an interim relief as prayed is not granted in their favour ?	No.
4	What Order ?	As per final order

**REASONS****AS TO POINTS NO. 1 AND 2 :**

5. The plaintiff's title and possession over property at C.S.No. 211 and defendant's title and possession over property at C.S.No. 210 is not in dispute. The fact that property at C.S.No. 210 is situated on western side and adjacent to property at C.S.No. 211 is also not in dispute. Further, vide their say/written statement defendants admitted the measurement of C.S.No. 211 dated 31/10/2017 conducted vide measurement register number 139. Moreover, vide their say on the application for status-quo filed by plaintiff at Exh. 21 defendants have submitted to the court that they will not obstruct plaintiff's construction if it is as per the measurement dated 31/10/2017. Thus, it can be said that the defendants have no objection in respect of the measurement dated 31/10/2017.

6. Defendants have come with the specific case that making an encroachment in property at C. S. No. 210 plaintiff has constructed a wall approximately of 20 Ft. in length and 2 Ft. in height having its width of 9 inches. Hence present application to restrain plaintiff from making any further construction over the encroached portion of C. S. No. 210.

7. On the other hand plaintiff has come with the specific case that before making construction he has got his property at C. S. No. 211 measured and said measurement is not disputed by the defendants and the construction being carried out by plaintiff is as per the measurement only.

8. Thus, considering rival averments by both sides it is pertinent to see whether defendants have succeeded to prima facie establish that plaintiff has caused encroachment in property at C S No. 210.

9. In support of their theory defendants have produced on record the photographs at Exh. 31 at Sr. No.1 and 2 and also filed on record the affidavits of witnesses namely Krishnath Balaso Dongale at Exh. 26, Rangrao Shivaji Dongale at Exh. 27, Maruti Sambhaji Dongale at Exh. 28, Sadashiv Shivaji Dongale at Exh. 29.

10. Per contra in support of his case plaintiff has also filed on record the photograph pertaining to construction, the measurement map (Exh. 22 Sr. No. 1), permission for construction granted by village panchayat (Exh. 22 Sr. No. 2), Map of properties at C.S.No. 210 to 215, and has also filed the witness affidavits of Dinkar Dattu Koli at Exh. 30, Pankar Raghunath Koli at Exh. 34 and Shivaji Umrao Sonule at Exh. 33.

11. I have gone through the photographs, maps, and witness affidavits on record. Both parties have filed the witness affidavits supporting to their version. Further, the photographs produced by defendants at Sr. No. 1 and 2 of list Exh. 31 apparently show two different types of constructions adjacent to each other. Consequently, the possibility of existence of two different walls adjacent to each other blinks in the matter.

12. Besides photographs and affidavits the defendants have also produced on record the map of property at C.S.No. 210. However, said map does not show any encroachment in property at C.S.No. 210 at the hands of plaintiff. Consequently, based on the affidavits of witnesses filed by defendants, photographs and the maps on record prima facie it can not be said that plaintiff has encroached upon the property at C.S.No. 210. If that is the case it can not be said that the prima facies case lies in favour of defendants. Hence point No. 1 is answered in negative. As the prima facie case is not in defendants favour, the balance of convenience also automatically leaves their side. Resultantly, point No. 2 is also answered in negative.

**AS TO POINT NO. 3 :**

13. Ld advocate for defendants vehemently argued that if plaintiff is not restrained from encroaching upon property at C.S. No. 210 it may cause irreparable loss to the defendants. However as the defendants have prima facie failed to establish the so called encroachment at the hands of plaintiff in property at C.S.No 210 the arguments advanced by the Ld. Advocate for defendants is devoid of merits. Consequently, no harm or prejudice would cause to defendants if instant application is rejected. Hence point No. 3 is also answered in negative.

**AS TO POINT NO. 4 :**

14. From the aforesaid discussion it is clear that the instant application deserves to be rejected. Hence, in answer to point No. 4 following order is passed :-

**ORDER**

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

Radhanagari.

Date : 29-06-2018.

( M. H. Shitole )  
Civil Judge, Jr.Dn., Radhanagari.

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

Name of the Stenographer	U.S.Telang
Name of Court	Civil Judge, Junior Division & Judicial Magistrate, First Class, Radhanagari.
Date of Dictation	29/06/2018
Order signed by the P.O. On	29/06/2018
Order uploaded on	06/07/2018