



ORDER BELOW EXH.5 IN R.C.S. NO. 27/2021

This is an application made by the plaintiffs seeking relief of temporary injunction restraining the defendant from causing interruption to their easementary right of way or causing disturbance to their peaceful possession over block No.749 admeasuring total area 00 H. 10.10 R., situated at village Majgaon Taluka Panhala, more particularly described in para 1 of this application (for brief 'the suit property').

02. It is contended that the defendant has made construction in the suit property admeasuring east-west width 28 feet and sought-north length 42 feet and 8 feet wide east-west area from boundary of Paulas Kambale situated at eastern side of suit block No.749 and remaining area in suit block No.749, is the subject matter of suit. The suit property is ancestral property of the parties and recorded in the name of plaintiff No.1. The suit property is not partitioned or divided between the co-sharers by metes and bounds and no boundaries are fixed yet. The plaintiffs are having occupancy over the suit property since their father.

03. The defendant who is real brother of the plaintiffs, was in Mumbai for job. After retirement, he is residing at village Majgaon. The defendant put proposal before the plaintiffs and another brother Mahadeo in respect of construction of house in the suit property. At that time, the plaintiffs expounded the

defendant that partition of the ancestral and joint family properties is not effected yet. Therefore, firstly get the properties partitioned and then construct the house. It was also agreed between them that while making construction of house, the plaintiffs and defendant should leave 5 feet road to ingress and egress for each other and 3 feet for sewer purpose. It was also agreed that unless effecting partition, no one should make construction in the suit property.

04. However, the defendant without obtaining consent of the plaintiffs and other co-sharers and by neglecting agreement as above, started construction of house in the suit property. The plaintiffs expounded him that unless effecting partition of the suit property, he cannot make construction and if he desires to construct the house, he should obtain consent of all brothers and should make construction by leaving 5 feet road to ingress and egress for each other and 3 feet for sewer purpose. But, the defendant without paying heed to the request of plaintiffs, raised dispute with them and in collusion with co-sharer Mahadeo, started construction in the suit property. On said cause, the plaintiffs and defendant lodged complaints against each other. As such, in order to cause obstruction to occupancy of the plaintiffs, the defendant without leaving space of total 8 feet i.e. for road and sewer, made construction of house in the suit property.

05. Despite knowing fact that the plaintiffs and the defendant being co-sharer cannot obstruct enjoyment of each other, the defendant obstructed enjoyment and easementary right of way of the plaintiffs relating to the suit property. The defendant not only obstructed the plaintiffs as above but also threatened that

he will not allow them to enter upon and enjoy the remaining area of the suit property. Consequently, the plaintiffs constrained to approach the Court to seek mandatory injunction for removal of construction made by the defendant and to free up 8 feet space from eastern boundary of Paulas Kambale for enjoyment of the plaintiffs as agreed between the parties and also not to disturb possession of the plaintiffs over remaining area in the suit property. The plaintiffs have occupancy over the suit property except the area constructed by the defendant. The plaintiffs are taking seasonable crops therein. In such circumstances, possibility of causing obstruction to the possession of plaintiffs at the hands of defendant, cannot be ruled out.

06. It will take much time to decide the suit finally and meantime, the defendant will certainly cause obstruction to possession of the plaintiffs and interruption to their easementary right of way to ingress and egress the suit property for cultivation. As such, the plaintiffs would be deprived from exercising their legal right relating to the suit property. So also, considering upcoming rainy season, the plaintiffs must complete their agricultural work otherwise they will not be able to take yield from the suit property and consequently, put to irreparable loss. If injunction as sought is granted, the defendant would not put to any loss. On the other hand, if injunction is refused, the plaintiffs would put to irreparable loss. Ultimately, the plaintiffs sought relief of temporary injunction restraining the defendant from causing interruption to their easementary right of way or causing disturbance to their peaceful possession over the suit property, till final disposal of suit.

07. The defendant filed say at Exh.19 and resisted contentions made in the present application. It is specifically averred by him that after death of his father, the suit property bearing block No.749 is divided into four equal portions by his mother and since then area of 1/4 portion out of the suit property is in possession of the defendant. As such, the suit property is ancestral and 1/4 portion is in occupancy of the defendant. Accordingly, the defendant is cultivating the said area. Plaintiff No.1 is elder brother of the defendant. Therefore, his name is recorded to all the ancestral agricultural and house properties including the suit property. Though the defendant was in Mumbai for service purpose, he used to come frequently at village Majgaon for cultivating and taking crops in his 1/4 portion out of the suit property.

08. The defendant is real brother of the plaintiffs and co-sharer in the suit property. He has constructed a house in the area possessed by him. When the defendant was repairing his house, plaintiff No.1 along with his family members entered upon area of the defendant and abused his wife also assaulted him. Therefore, the defendant lodged complaint with the police. The defendant never obstructed the plaintiffs while having ingress and egress into the suit property. There was no written or oral agreement between the parties about leaving total 8 feet space i.e. 5 feet for road and 3 feet for sewer, as claimed by the plaintiffs. Rather, 5 feet public road is available for the plaintiffs to ingress and egress and by using said road, the plaintiffs are cultivating the suit property. Moreover, the plaintiffs did obtain consent of the defendant at the time of repairing old ancestral house or before constructing new

house.

09. In presence of other two brothers and after measurement, plaintiff No.1 himself given certain area to the defendant for construction of house. At that time, villagers namely, Mahadeo Krishnat Salavi, Atmaram Krishnat Chougale, Govind Chopade and Mahadeo Kedari Kambale were present. In the presence of said villagers, the plaintiffs suggested and consented to keep 5 feet vacant space for ingress and egress. In such circumstances, if injunction is granted against the defendant, he would put to irreparable loss and amount of depriving legal rights.

10. The plaintiffs purposefully instituted suit for injunction only. The plaintiffs and the defendant are real brothers and they are co-sharers in ancestral and joint family properties including the suit property. The plaintiffs yet not allotted share to the defendant in other common ancestral properties. However, the plaintiffs given houses and agricultural lands to other brothers for cultivation. As such, the plaintiffs illegally grabbed entire share of the defendant. The defendant has made application to the Deputy Director, Land Record, Pune against the plaintiffs. Out of said grudge, the plaintiffs instituted this false suit of injunction. The defendant has no house to reside. In such circumstances, if injunction is granted, the defendant would put to irreparable loss. Ultimately, the defendant urged for rejection of application with costs.

11. Heard both the learned advocates for the parties. From the pleadings and documents on record, following points

arise for consideration. I have given finding to each point for the reasons to follow:

Sr.No.	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether prima facie case exist in favour of the plaintiffs ?	No.
2.	In whose favour balance of convenience lies?	In favour of the defendant.
3.	To whom irreparable loss would be caused if temporary injunction is granted ?	To the defendant
4.	What order ?	Application is rejected.

REASONS

As to points No. 1 to 3 :

12. All the above points are interlinked with each other. Hence, to avoid repetition, those are taken together for discussion.

13. To ascertain as to whether the plaintiffs have made out prima facie case in their favour, it is necessary to have regard to relevant documents on record and to see as to whether there is prima facie evidence on record which could sufficient to grant relief in favour of the plaintiffs. Simultaneously, it is also necessary to see rebuttal evidence of the defendant if any, to adjudicate the present application on merit. Both parties have placed certain documents and photographs on record. The relevant documents are referred during next discussion.

14. As per contention and argument of the plaintiffs, the suit property is ancestral property of the defendant and themselves. The suit property is not yet partitioned or divided between the co-sharers by metes and bounds. In such

circumstances, the defendant without leaving 8 feet space for road and sewer, constructing house in the suit property. As such, the defendant is causing obstruction to possession and easementary right of way of plaintiffs to ingress and egress into the suit property. Therefore, injunction may be issued against the defendant.

15. On the other hand, it is plea and argument of the defendant that after death of father, the suit property divided into four equal portions by his mother and since then area of 1/4 portion out of the suit property is in possession of the defendant. He has constructed a house in the area possessed by him. There was no written or oral agreement between the parties about leaving total 8 feet space i.e. 5 feet for road and 3 feet for sewer, as claimed by the plaintiffs. Rather, 5 feet public road is available for the plaintiffs to ingress and egress into the suit property. Likewise, the defendant is real brother of the plaintiffs. Hence, injunction cannot be granted against the defendant being co-sharer in the suit property.

16. In context to submissions of both sides as above, perused documents on record. Both parties have filed affidavits of witnesses in support of their claim. They filed copies F.I.R. registered against each other. They also filed certain photographs on record showing position of constructed area, road and remaining suit property. The 7/12 extract of the suit property block No.749 showing sole name of plaintiff No.1 Santaram. It is the case of plaintiffs that though sole name of plaintiff No.1 is entered to revenue record of the suit property, partition of the suit property is not effected yet.

17. The plaintiffs alleged that without partition of the suit property, the defendant is constructing house in the suit property. In this regard on perusal of plaint it appears that the plaintiffs sought only reliefs of mandatory and perpetual injunction against the defendant and they have not sought partition of the suit property. Thus, the plaintiffs have not availed remedy of partition available to them. In view of provisions under Section 41 (h) of the Specific Relief Act, an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. Thus, in view of said provision, the plaintiffs could avail remedy of partition and get their share separated in the suit property with ancillary reliefs of mandatory and perpetual injunction against the defendant. However, they have not done so.

18. The Hon'ble Apex Court in **Kochkunju Nair vs Koshy Alexander And Others, 1999 (3) SCC 482** held that "*If the other co-owner objects to the construction of a homestead he can get the co-ownership property divided by partition, and if the other party is not readily willing to that course it is open to him to get it partitioned through suit. These are various remedies available to the co-owner in respect of his land.*" Thus, in view of aforesaid ratio, if the plaintiffs in present suit are having objection to the construction of the defendant, they must get their share separated. But they have not made prayer of partition in the present suit with other necessary requirements.

19. One another stand of the plaintiffs that the defendant is causing interruption to their easementary right of way to ingress

and egress the suit property. However, the plaintiffs have contended that no partition is effected between the defendant and themselves. If the suit property is not partitioned or divided between the plaintiffs and defendant, the plaintiffs cannot claim right of easement by necessity over the alleged road as contemplated under Section 13 of the Indian Easements Act. It is pertinent to note here that as per the plaintiffs, they are in joint possession along with the defendant. The right of easement by necessity can be claimed only in respect of the land belonging to another. Under this circumstances, the plaintiffs cannot claim easementary right over the suit property which is joint between the defendant and themselves.

20. Furthermore, as a matter of fact, the plaintiffs and defendant are co-owners in the suit property. It is well settled principle of law that the co-owner cannot claim an order of injunction against another co-owner with regard to the property owned and possessed jointly. For the said reason also the plaintiffs are not entitled for injunction in their favour. One another important aspect to consider is that the plaintiffs have not filed any document to prima facie establish that the defendant agreed to leave total 8 feet space for road and sewer. In absence any such agreement and for the reasons as discussed above, the plaintiffs are not entitled for relief of temporary injunction as sought.

21. Thus, in aforesaid circumstances, the plaintiffs failed to establish that the defendant is causing interruption to their easementary right of way or causing disturbance to their peaceful possession over the suit property. Consequently, it is hold that the plaintiffs have not made out prima facie case in their favour to

grant injunction. At this juncture, balance of convenience not lies in their favour but lies in favour of the defendant. If temporary injunction as sought by the plaintiffs is granted, the defendant would put to irreparable loss. On the other hand, no loss would be caused to the plaintiffs if injunction is not granted. For the reason, the plaintiffs are not entitled to get the relief of temporary injunction in their favour. Accordingly, points No. 1 to 3 are answered in the negative and to answer point No. 4, following order is passed.

ORDER

1. Application is rejected.
2. Status quo order passed below Exh. 13 is vacated.
3. Costs in cause.

Kale-Kheriwade.
Dt. 22/06/2021.

(V.V.Khulape)
Civil Judge, Junior Division,
Kale-Kheriwade.