

**ORDER BELOW EXH. 22**  
**(Passed on 05-10-2021)**

The plaintiff has filed present suit for partition and separate possession. He has filed present application under Order 39 Rule 1 & 2 of the Code of Civil Procedure for temporary injunction against defendant. In spite of service of notice defendant not appeared.

2. Heard learned advocate for plaintiff. He has filed his written notes of arguments below Exh. 28. Perused the record.

3. It is the contention of the plaintiff that Late Tulsiram @ Khatu Muka Kamdi was grandfather of plaintiff and defendant. He was owner of plot bearing CTS No. 63 area 137.8 sq. mts. and the house constructed thereon situated as Mouza Nagardhan. He had bequeathed his property to his grandson i.e. plaintiff and defendant on 03-01-1973 by executing registered will deed. It was registered on 04-01-1973. Tulsiram @ Khatu Muka Kamdi died on 11-03-1973. After his death name of plaintiff and defendant were mutated on revenue record of plot CTS No. 63. Since then plaintiff and defendant are joint owner of the suit property by virtue of will dated 04-01-1973.

4. This property is yet not partitioned by mets and bound between plaintiff and defendant as per provision of Hindu Law. Both are having equal share in the said property. Defendant is residing in the said property. Plaintiff has many time orally requested to the defendant to effect the partition and deliver his share from the said property. But defendant has avoided to do so. The defendant is deliberately and intentionally avoiding to effect the partition of the said suit property. Therefore plaintiff has filed present suit.

5. During the pendency of this suit defendant has illegally started the construction upon the suit land without the permission of concern department in second week of March 2021. The plaintiff has filed this suit for partition and separate possession. Therefore unless and until partition is affected between the parties defendant has no right to carry out any type of construction upon the suit land. The defendant has no right to change nature of suit property without permission of Court. The matter was reported to Police Station Ramtek and Grampanchayat Nagardhan. But both have not taken in action. Hence, plaintiff has filed present application.

6. The plaintiff has good prima-facie case and balance of convenience also lies in his favour. The plaintiff is owner of the said suit land in respect of his share. Defendant has no right to deprive plaintiff from his legitimate right in the suit land. Defendant is trying to grab the entire suit land by constructing the house. Therefore, it is necessary to pass an interim order restraining the defendant or any other person acting through him from constructing the illegal construction upon the suit land. If the injunction is not granted plaintiff will suffer grave hardship, injustice and irreparable loss which can not be compensated in terms of money. Hence, this application be allowed.

7. The defendant has not appeared and not filed his say to this application inspite of service of notice. Hence, this application is proceeded further *ex-parte* against him.

8. After considering the contentions of both the parties along with supporting documents following points arise for determination. My findings thereon with reasons are recorded as follows:

Sr. No.	Points	Findings
1	Whether plaintiff has <i>prima-facie</i> case?	Yes.
2	Whether balance of convenience is in favour of plaintiff?	Yes.
3	Whether irreparable loss will cause to plaintiff if temporary injunction as prayed not granted?	Yes.

### REASONS

#### As to Point Nos. 1 to 3:

9. All these points are interconnected with each other hence to avoid repetition of reasons all are discussed together. In view of these points learned Advocate for plaintiff has argued that late Tulsiram @ Khatu Muka Kamdi was grandfather of plaintiff and defendant. He was owner of suit land bearing CTS no. 63 area 137.8 sq. Mts. and the house constructed thereon situated at Mouza Nagardhan, Tah. Ramtek, Dist. Nagpur. He has bequeathed his property to plaintiff and defendant by registered will deed dt. 04-01-1973. He died on 11-03-1973. After his death name of plaintiff and defendant were mutated on revenue record of the suit property. They both become joint owner of the suit property by virtue of will deed dt. 04-01-1973. To show the same plaintiff has filed on record extract of property card of CTS No. 63 and Map.

10. The suit property is yet not partitioned between plaintiff and defendant. Plaintiff has many time requested to the defendant to effect the partition but he avoided to do so. Therefore plaintiff has given him legal notice and filed present suit. To show the same he has filed on record office copy of notice, postal receipt and postal acknowledgement.

11. During the pendency of suit defendant has illegally started

the construction upon the suit land without permission of concern department in the second week of March 2021. In spite of knowledge of pendency of this suit defendant has started illegal construction. He has no right to carry out any type of construction upon the suit land. He has no right to change nature of suit property without permission of the Court. The plaintiff has reported the matter to police Station Ramtek and Grampanchayat Nagardhan. To show the same he has filed on record letter given to secretary Gram Panchayat Nagardhan, NC report and photographs. Due to spreading of Corona in the village plaintiff being senior citizen could not be in a position to move anywhere. Therefore, he has filed present application on 06-04-2021. Though there is delay in filing this application but it is beyond his control.

12. The plaintiff has good *prima-facie* case and the balance of convenience also lies in his favour. The plaintiff is owner of the suit land in respect of his share. The defendant has no right to deprive the plaintiff from his legitimate right in the suit land. The defendant is trying to grab the entire suit land by constructing the house on the suit land. It is necessary to restrain the defendant from constructing the illegal construction of the suit land. If injunction is not granted the plaintiff will suffer grave hardship and irreparable loss which can not be compensated in terms of money.

13. Learned advocate of plaintiff has placed his reliance on ***Ram Niwas Vs. Jay Ram @ Tej Ram (2000) 3 Civ C C 379 of Hon'ble Punjab and Haryana High Court.*** It was discussed that it is well settled law that co sharer is not entitled to change the nature of suit property by way of raising the construction without getting the suit land partitioned. It was also discussed that a co owner who is not in possession of any part of

property is not entitled to seek an injunction against another co owner who has been in conclusive possession of common property unless any act of person in possession of property amounts to ouster, prejudicial or adverse to interest of co owner out of possession. In this case defendant were enjoined upon raising any construction of joint property till disposal of suit as the parties were co owners. In present case in hand the defendant has started illegal construction of the suit property. Therefore plaintiff has apprehension regarding his share in the suit properties being co owner.

14. On *Balbir Singh Vs. Lamber Singh (2004) 138 PLR 84 of Hon'ble Punjab Haryana High Court*. In this case defendant was restrained from selling the land more than his share or from raising any construction over any part of suit land or from changing nature of suit. It was held that co sharer can not raise constructions or change nature of land without consent of other co sharer.

15. On *Laxmikant Diliprao Garje Vs. Shrikant Diliprao Garje Writ Petition No. 6849 of 2020 of Hon'ble Bombay High Court*. In this case also the property was joint property of both the parties which they have received as a gift from their grandfather. Temporary injunction was sought against the co owner. That application was rejected by trial court, allowed by Additional District Judge and sustained by this Court. On ground that if the property still continuous to be joint such attempt of sell a specific portion of the suit property in possession would be certainly be detrimental to the principal of Joint ownership.

16. On *Ashok Kapoor Vs. Murtu Devi of Hon'ble Himachal Pradesh High Court*. In this case it was discussed that it is well settled

that if a co sharer is in established possession of any portion of an undivided holding, not exceeding his own share, he can not be disturbed in his possession until partition. It was also discussed that in joint property co owner has no right to change nature without consent of other co owner. If exercise of right is inconsistent with the right of co owner then it can not be granted.

17. After considering the submission of the plaintiff and on perusal of record it appears that as per his contention the suit property was bequeathed to him and defendant by their grandfather namely Tulsiram @ Khatu Muka Kamdi. Therefore, they become joint owner by virtue of will deed dt. 04/01/1973. The plaintiff wanted his shares saperately. Therefore, he had demanded defendant to effect the partition but he had avoided to do so. The defendant is in possession of suit property and he had started illegal construction over the suit property without permission of concern office. The plaintiff has filed on record extract of property card of CTS No. 63 which shows his name alongwith name of defendant. Therefore, plaintiff has also title over the suit property. He had given complaint to Police Station and Gram Panchayat, Nagardhan against illegal construction of defendant. But they have not done any. To show the same plaintiff has filed on record that letter and NC report. It shows apprehension of plaintiff regarding his right in the suit property. Therefore, I come to conclusion that plaintiff has *prima-facie* case in his favour.

18. As per contention of plaintiff he is co owner of the suit property along with defendant. He had filed present suit for partition and separate possession of the suit property as partition was not taken place. Therefore, plaintiff has joint share over the suit property. Hence, balance

of convenience is in favour of plaintiff. Though defendant is in possession but as per citation discussed above he can not raise construction until the area is determined by affecting the partition of the suit property. At this stage if defendant is not restrained plaintiff will suffer irreparable loss which cannot be compensated in terms of money in spite of having title in his favour. The *prima-facie* case and balance of convenience is in favour of the plaintiff. Therefore, I come to the said conclusion and answer Point No. 1, 2 and 3 in the affirmative respectively.

19. After considering the available material on record at this pretrial stage it appears that plaintiff has established his *prima-facie* case. Balance of convenience is also in his favour. The same way plaintiff will be put to irreparable loss if temporary injunction is not granted. Therefore, holding the same accordingly in the interest of justice I proceed to pass the following order-

**Order**

- 1) The application below Exh-22 is hereby allowed.
- 2) The defendant, his servants and anybody on his behalf are hereby restrained from doing any construction over suit property CTS No. 63 situated at Mouza Nagardhan, Tah. Ramtek, Dist. Nagpur till the final disposal of the suit.

Sd/-

(Kum. V. P .Dhurve)

Civil Judge Junior Division, Ramtek.

Date : 05/10/2021.