

CNR No :- MHSI100000772019



-: Regular Civil Suit No.17 of 2019 :-

-: Order below EXH. No. 05 :-

The plaintiff have filed this application under XXXIX Rule 1 & 2 of The Code of Civil Procedure, 1908 (hereinafter referred as "CPC").

2. It is contended that, the suit properties i.e. Survey No. 266, Hissa No. 1 and Survey No. 283 Hissa No. 7 situated at village Talekhol are in joint possession and ownership of plaintiff and other co-owners and that, both these properties are adjacent to each other. That, defendant No. 1 wanted to construct the house in village Talekhol. Hence, he had approached plaintiff. Thereafter, plaintiff sold the area of 0-05-0 H.R. to Defendant No. 1 vide Agreement to Sale dtd. 01.04.2011. Thereafter, Defendant No. 1 obtained permission for construction. However, inspite of making construction in suit property at Sr. No. 1, he made construction in suit property at Sr. No. 2. Several times plaintiff requested the Defendant No. 1 to remove the construction, however, he denied. On 30.06.2019 Defendant No. 1 in collusion with defendant No. 2 to 6 assaulted and threatened plaintiff's son Nakul Dalvi. Thereafter, again Defendant No. 1 to 6 tried to entered the suit property at Sr. No. 2 and tried to plant several trees. It is contended that, Defendant No. 2 to 6 are not concerned with the suit property with any manner. Hence, it is prayed that,

defendant No. 1 to 6 be restrain from disturbing peaceful possession of plaintiff in the suit property.

3. The application is objected by Defendant No. 1 to 6 by filing say at **EXH 19**. It is contended that, the contents in Para No. 2 of the plaint are correct. However, its rest of the contents are false. It is contended that, plaintiff and defendant No. 1 are relatives of each others. Defendant No. 1 had purchased the area of 5 Guntha in suit property from plaintiff by executing Agreement to Sale and on that basis Defendant No. 1 constructed the house in year 2011-2012. While making construction plaintiff was also present and the said house is numbered as 459. When plaintiff again measured his property, it was found that, the said house was constructed on both the suit properties. Thereafter, defendant No. 1 also purchased the area of 100 Sq. Mtr. from suit property at Sr. No. 1 from the plaintiff. As the house is constructed in the year 2011-2012, the plaintiff suit is barred by the Law of Limitation. So also, as per the terms of Agreement to Sale, the present suit cannot be dealt by Civil Court. Hence, it is prayed that, the application be rejected.

4. Perused the application and say. Heard Ld. Advocate for the Plaintiffs and defendant. Following points arise for my determination and I have recorded my findings against each of them for the reasons enumerated below :-

<u>SR. NO.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1	Whether the Plaintiff has made-out prima-facie case ?	Yes.
2	Whether balance of convenience is in favour of the Plaintiff ?	No.
3	Whether the Plaintiff will suffer irreparable loss in the event of refusal of temporary injunction ?	No.
4	What Order ?	Application is rejected with costs

-: **REASONS** :-

5. In support of their claim, Plaintiff's relied upon documents such as 7/12 extract of the Survey No. 266, Hissa No. 1 at **EXH 06**, 7/12 extract of the Survey No. 283, Hissa No. 7 at **EXH 07**, Photocopy of Agreement to sale at **EXH 4/3**, Photocopy of complaint filed by plaintiff against defendant Cr.No.65/2019 in Dodamarg Police Station at **EXH 4/4**.

As to Points Nos. 01 to 03 :-

As all these points are interlinked and in order to avoid repetition of facts, they are dealt with, discussed and decided together.

6. It is argued on behalf of the Plaintiff that he had given portion of 5 gunthas of land in suit property at Sr. No. 1 to the Defendant No. 1 for constructing house. However, Defendant No. 1 constructed the house in suit property at Sr.

No. 2. Thereafter, the Defendants are disturbing the peaceful possession of the Plaintiff in the suit property. The 7/12 extracts of the suit property shows that the Plaintiff is in possession of the suit property. Hence, the Plaintiff has prima facie case, balance of convenience and if injunction is rejected, it would cause him irreparable loss.

7. On the other hand, Ld. Advocate for the Defendant No. 1 argued as per the contents of the say.

8. On perusal of the application, it can be seen that as per the Plaintiff, Defendant No. 1 purchased 5 gunthas of land in suit property 1 from the Plaintiff. However, he constructed the house in suit property at Sr. No. 2. In support of his contention, Plaintiff filed on record the 7/12 extract of both the suit properties at **EXH 6 and 7** which shows the name of Plaintiff as one of the co-sharer in occupant's column. Plaintiff also filed in record the copy of agreement to sale. It appears to be of year 2011. It can be seen that, as per the Plaintiff he is in possession of the suit property. However, vide said agreement to sale, Defendant No. 1 was given 5 gunthas of land in suit property No. 1. It can be seen that as per Defendant No. 1, he made construction with the permission of gram panchayat in year 2011 – 2022 which was within the knowledge of the Plaintiff. He made construction in the area which plaintiff shown him to be sold to him. On this aspect, it can be seen that the Plaintiff has not contended anything in plaint as to when Defendant made construction. So also, he did not mention

anything as to while raising the construction of house, why plaintiff did not object the same. Considering the entire material on record and contents of application and say, it can be seen that, Plaintiff has not made it clear as to why he did not objected Plaintiff for construction of house.

9. Injunction is an equitable relief. The basic principle is the one who seeks equity must do equity. As observed earlier, it appears that, Plaintiff has kept silent from year 2011 – 2012 till filing of the suit in year 2019. The Plaintiff ought to have sought the relief against the Defendant No. 1 then and there itself. One who seeks equity cannot sleep over his rights. Considering the same, though the available material on record shows that admittedly Defendant No. 1 was given portion of land in suit property No. 1 to built house. However, now as per Plaintiff, the house is built in suit property No. 2 which appears to be in joint possession of Plaintiff and other co-owners. Hence Plaintiff has Prima facie case. However, at this juncture, it is necessary to understand that Defendant No. 1 appears to have built house in it. As per the Defendant, it is built in year 2011 – 2012. He appears to be residing the same. On the contrary Plaintiff did not even raise any objection from year 2011 to 2019. Hence under such circumstance, balance of convenience lies in favour of the Defendant No. 1. Furthermore, if the Defendant No. 1 is restrained from entering his house in the suit property, then it would cause irreparable loss to the Defendant No. 1 than the Plaintiff. Hence, considering the entire discussion made above, I answer Point No. 1 in the '**Affirmative**' and

Points No. 2 and 3 in the '**Negative**'.

As to Point No. 04 :-

10. From the discussion made in above points, it is clear that though plaintiff appears to have prima facie case, the balance of convenience is not in his favour. So also, granting of temporary injunction against Defendant No. 1 would cause him irreparable loss. It is settled that, for the purpose of granting temporary injunction, all these three aspects i.e. having prima facie case, balance of convenience and irreparable loss should co-exist. If not, then the temporary injunction cannot be granted. Considering the same, the application is liable to be rejected. Considering the same, in answer to this point, I proceed to pass the following :-

-:: ORDER ::-

Application is rejected with costs.

(Dictated and pronounced in open Court)

Place : Dodamarg.

Date : 29/03/2023.

(Y. P. Bavkar)
Civil Judge (J.D.),
Dodamarg.