

R.C.S.No.07/2016**ORDER BELOW EXH.5.**

Present application has been filed by the plaintiffs under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908.

02. Suit property i.e. Gat No.160 at Sukhawadi, is their ancestral, as well as purchased property. Plaintiff No.1 has 5 and 4 pai hissa as ancestral property. Predecessor in title of plaintiffs No.2 and 3 has purchased 20.66 R from Dattatraya Laxman Kokate on 09-02-1996. Thus, each plaintiff is having his 5 and 4 pai hissa in suit property. Thus, entire Gat No.160 is owned by plaintiffs. They have purchased suit property for approach road to their Gat No.170, which is at the northern side of Gat No.160. In suit property there are houses, shed, etc. of the plaintiffs. It is north-south strip. At eastern side in Gat No.160, there is 14 feet wide road. In partition dated 14-09-1998 the plaintiffs have kept 14 feet wide road at the eastern side of Gat No.160 and they are holding possession of east-west strips for the sake of convenience.

03. In such situation, on 07-01-2016 defendants who are having their property Gat No.180 and 181 at the eastern

side started construction by demolishing old house. For that purpose they have constructed RCC column and dug ditches. They are not at all concerned with 14 feet wide road. However, by erecting RCC column and iron rods in said road they are encroaching in suit property. They are not ready to listen. If the defendants succeed in constructing on road, then plaintiffs will suffer irreparable loss. Plaintiffs have prima-facie case. Balance of convenience lies in their favour and they will suffer irreparable loss, if injunction is not granted. Hence, application may be allowed.

04. Defendants have filed their say at Exh.16 submitting that, the road which is at the eastern side of Gat No.160 is public road and at eastern side of said road there are their houses. Defendant No.2 has not carried out any construction. Brother of defendant No.1 has demolished old house and at its place he has constructed new house. At the western side of the said house, road is in existence. Defendant No. 3 has never constructed on road. At the northern side of property of defendant No. 1 there is property of Lalasaheb Yadav. Who has demolished western side wall for construction. Hence, they are necessary party. Their names are also entered into record of Grampanchayat. Houses of the defendants are very old. They have purchased material for construction and repair. They have invested huge amount and reconstructed in their own land. If

they are restrained from constructing then they will suffer irreparable loss. They have not constructed on the road. Hence, there is no prima-facie case. Balance of convenience does not lie in favour of plaintiffs and if injunction is granted then defendants will suffer more hardship. Hence, application may be rejected.

05. In view of above said facts, following points arise for my determination and I record my findings thereon with reasons as follows :-

Sr.No.	Points	Findings
1	Do the plaintiffs prove that, they have prima-facie case in their favour ?	<i>In the affirmative.</i>
2	Do the plaintiffs prove that, the balance of convenience lies in their favour ?	<i>In the affirmative.</i>
3	Do the plaintiffs prove that, they will suffer irreparable loss, if temporary injunction is not granted ?	<i>In the affirmative</i>
4	What order ?	<i>As per final order.</i>

REASONS

AS TO POINTS NO.1 TO 4 :

(To avoid repetition, points No.1 to 4 are discussed together.)

06. Heard both the sides.

07. Learned counsel for the defendants argued that, if the plaintiffs have come with case of encroachment then as per Order VII Rule 3 of the Code of Civil Procedure, map is necessary. He also pointed out that, if case of the plaintiffs is of encroachment, then they are required to file suit for declaration and possession. As per Section 41 of the Specific Relief Act, equally efficacious remedy is available, hence injunction cannot be granted. He also argued that, plaintiffs have admitted that, houses of defendants are there. Photographs show that, old houses are there, as well as there is no encroachment on road. Plinth is already completed and construction work is going on since August 2015. However, plaintiffs have not approached with clean hands. Hence, application may be rejected.

08. He has placed his reliance on – 'SHAILAJA KAMALAKAR LIMAYE AND OTHERS V/S. NILKANTH GANESH PETHE AND OTHERS', [2010(4) MH. L.J. 160] In which Hon'ble Bombay High Court has upheld the order of refusal of injunction in view of facts of that case. However, in present case facts are different.

09. On the other hand, learned counsel for the plaintiffs argued that, there is no dispute regarding ownership of plaintiffs, as well as existence of road. Documents produced by the plaintiffs prima-facie show that, for approaching Gat No.170 they have purchased Gat No.160 and vide partition deed, 14 feet land was kept open. Photographs prima-facie show that, iron rods are coming on the road. Even 7/12 extract show that, defendants are constructing in field property, thus they are constructing without obtaining any permission. He also argued that, if construction is going on since August 2015 then it would have been completed upto slab level, but that is not the case.

10. Perused record. 7/12 extracts and sale-deeds produced by the plaintiffs prima-facie show that, Gat No.160 is owned by them and Gat No.170 which is at the northern side of Gat No.160 is also owned by plaintiffs. Sale-deed prima-facie shows that, for approaching Gat No.170, gat No.160 was purchased. Partition deed also prima-facie shows that, at eastern side in Gat No.160, 14 feet wide land was kept open for using as road. Hence, prima-facie it is clear that, disputed road is owned by plaintiffs. As per say of the defendants, the road is public road. Hence, there is substance in the argument of the plaintiffs that, defendants are denying their ownership of the road.

11. Plaintiffs have also produced photographs on record. Some photographs are also produced by defendants. Those, photographs prima-facie show that, adjacent to the road at eastern side construction work is going on. Some material like soil, etc. is lying on road. Learned counsel for the defendants argued that, receipts prima-facie show that, construction material was purchased in August 2015. Hence, since then construction is going on. However, photographs produced by the defendants show that, only there are columns. It is not at all case of the plaintiffs that, defendants have constructed on road. However, it is case of the plaintiffs that, for construction defendants have dug ditches, erected columns and iron rods are put alongwith the ground. Admittedly defendants are not concerned with the road. There is no substance in the argument advanced on behalf of the defendants that, photographs show that, there is one trolley and by the side of that trolley there is road available, hence from the road two vehicles can pass at a time. However, it is crystal clear that, defendants are not at all concerned with the road.

12. In such situation, if by placing iron rod, or erecting column any obstruction is caused then definitely plaintiffs will suffer irreparable loss. There is no harm in carrying construction in their own land by the defendants. However, they have no right to obstruct the plaintiffs by placing their material on road

owned by the plaintiffs. Hence, from the record it becomes clear that, defendants are carrying construction and some of their material is coming on the road. There is ample evidence to show that, plaintiffs are using that road for their agricultural activities. Hence, there is prima-facie case in favour of plaintiffs. As defendants have denied ownership of the plaintiffs regarding the road, the balance of convenience lies in favour of plaintiffs. If any obstruction is caused by placing material on the road, then plaintiffs will suffer irreparable loss. **Hence, I answer Points No.1 to 3 in the affirmative and to answer Point No.4, I proceed to pass following order.**

ORDER

1. The application is allowed.
2. Defendants No.1 to 3, their agents, servants, etc and anyone claiming through them, is hereby restrained from carrying any construction on the road, which is at eastern side in Gat No.160, till final decision of suit.

Palus.
Date: 21-01-2016

(Smt. A.K. Mandavgade),
Civil Judge,J.D. Palus.