

ORDER BELOW EXH. 5 REG. CIVIL SUIT No. 608/2021

(CNR No. MHST07-0023872021)(Decided date- 11/01/2023)

Dilip Baban Korde Vs. Sampat Dattatray Suryaanshi

Adv. S.V.Chavan for plaintiffs and Adv. S. A. S. Mulla for defendant no.1.

The plaintiffs have filed an application under Order XXXIX rule 1(c) of Code of Civil Procedure to temporarily restrain defendant no. 1 from constructing in the suit property as mentioned in the plaint till the final disposal of the suit.

02. It is case of the plaintiffs that, suit property is an ancestral property and joint family property.

03. It is further case of the plaintiffs that, suit property is yet to be partitioned among the member of plaintiff's family.

04. It is further case of the plaintiffs that, the forefather of the plaintiffs namely Sakhubai has $\frac{1}{4}$ share in the suit property.

05. It is further case of the plaintiffs that, recently defendant no. 1 purchased portion of defendant no. 2 in the suit property and started construction in the suit property without consent of plaintiffs and partition being effected. Therefore, under these circumstances, plaintiffs are constrained to file present application.

06. On the other hand, defendant no. 1 has filed his say below Exh. 51 stating that, contents of the application are false. Suit is hit by the law of limitation and non joinder of necessary parties. The genealogy of the family of plaintiffs and defendants is incomplete.

07. It is further case of the defendant no.1 that, he has not started new construction in the suit property. The plaintiffs have no

prima-facie case therefore, present application may be rejected.

08. Heard learned advocates of the plaintiffs and defendant no. 1. I have gone through documents, available on record.

09. The following points arise for determination of this application and I have recorded my findings against each of the point thereon, along with reasons to follow :-

Sr. No.	Points	Findings
1.	In whose favour prima-facie case has been made out ?	defendant no. 1
2.	In whose favour balance of convenience lies ?	defendant no. 1
3.	Who will suffer irreparable loss if injunction is granted ?	defendant no. 1
4.	What order ?	Application (Exh.5) is rejected.

REASONS

AS TO POINT NOS. 1 TO 3 :

10. Considering nature of the contentions, all points are required to be considered together.

11. It is settled law that while passing an interim order of injunction under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908, the Court is required to consider three basis principles, namely (a) Prima facie case, (a) balance of convenience and inconvenience and (c) irreparable loss and injury. In addition to the above mentioned three basis principles, a Court, while granting

injunction must also take into consideration the conduct of the parties. It is also established law that, the Court should not interfere only because the property is a very valuable one. Grant or refusal of injunction has serious consequences depending upon the nature thereof and in dealing with such matters, the Court must make all endeavors to protect the interest of the parties.

12. With the above principles, let us consider the claim of both parties.

13. It is contention of the plaintiffs that, suit property is yet to be partitioned among family members of the plaintiffs and defendant no.1 started construction in it without partition being effected in respect of it. Whereas, it is contention of the plaintiffs that, suit is hit by the principle of non joinder of necessary parties.

14. While considering contention of both sides, I must mention here that, plaintiffs have not filed suit for partition and separate possession therefore, in my opinion, mere suit for pre-emption and perpetual injunction is not maintainable in the eyes of law.

15. It is seen that, plaintiffs have not made sister (Sushila) of defendant no. 1 as a party to the suit. In my opinion, sushila is a necessary party to the suit as suit is for pre-emption.

16. It is further seen from the pleading of the plaintiffs that, there was a suit i.e R.C.S no 496/1988 being filed by forefather of the plaintiffs i.e Sakhubai. However, same suit was not conducted by the Sakhubai as defendant no. 1 assured to give her share in the suit property. But, it is seen that, since 1988, present plaintiffs have not

taken steps to get their right in the present suit property till today. Even in the present suit, plaintiffs have not claimed relief of partition and separate possession. Thus, it is seen that, the grievance of the plaintiffs is not genuine and material one at this stage.

17. It is required to note here that, plaintiffs have not mentioned specifically in their application that, what loss would they suffer if injunction is refused. It is settled position of law that, Unless and unless there is a specific case regarding irreparable loss, interim relief can not be granted. Herein I may take recourse to the ratio laid down in the case of – **Sardari Lal Gupta Vs Siri Krishna Aggarwal, AIR 1984 P& H 439**, in this case, honorable, High Court has held that, only because the plaintiff is co-sharer, he cannot restrain the other co-sharer from making construction on the joint property, unless he can specify that, he would suffer damage if the injunction is refused.

18. Moreover, it is also settled position of law that, the a co-owner can seek relief of temporary injunction against another co-owner if value of property is diminishing. In the instant case, plaintiffs have no such a case.

19. Learned advocate of plaintiffs has argued that, defendant no. 1 is not a family member of the plaintiff's family, therefore, he is not entitled to be remained in the possession of suit property as per section 44 of transfer of Property Act. While considering this argument, I must mention here that, whether defendant no. 1 is a family member of plaintiff's family or not is a question of trial and same can not be considered without evidence at this stage.

20. It is required to note here that, as per the case of the plaintiffs, defendant no. 1 was a party to the R.C.S no. 496/1988 and they withdrew that suit as defendant no. 1 assured to give share of Sakhubai. If it is so, then in the instant suit, plaintiffs can not take stand that, defendant no. 1 is a stranger person. Therefore, under these circumstance, case of the plaintiffs can not be considered without evidence at this stage.

21. The contentions raised by the plaintiffs are purely question of trial and same can not be considered without evidence at this stage.

22. Thus, considering, foregoing discussion, I am inclined to hold that, plaintiffs have no prima-facie case and balance of convenience in their favour at this stage as their contentions are not supported by the documents.

23. Therefore, under these circumstances, if an injunction is not granted to the plaintiffs, they will not suffer irreparable loss or injury at this stage. However, if an injunction is granted to plaintiffs, defendant no. 1 will suffer irreparable loss or injury at this stage and same can not be compensated later. Therefore, interest of defendant no. 1 is required to be protected at this stage. Hence, I answer all the points in favour of defendant no. 1.

AS TO POINT NO. 4 :

24. While considering the above discussion, application below Exh. 5 is required to be rejected. Hence, I proceed to pass following order.

ORDER

1.	Application below Exh. 5 is hereby rejected.
2.	Cost in cause.

Date :- 11.01.2023

(S.M. Sarode)
Jt. Civil Judge, Junior Division, Karad