

MHST160012512024

**Order Below Exh.5 in R.C.S. No.  
260/2024.****(Pratipa Pratap Babar and ors. Vs.  
Rupchand Nivrutti Babar and ors.)**

This is an application filed by plaintiff under Order 39 Rule 1 of the Code of Civil Procedure 1908. Through this application plaintiffs seeking temporary injunction against defendant no.1 to restrain him from encroaching and illegally constructing over the suit property.

**Case of plaintiffs in short is as under:-**

2. Plaintiffs submitted that the suit is for perpetual injunction. Plaintiffs are permanent residents of address mentioned in the plaint. They have their house and land property at there. Land having area 5R out of 37R having block no.935 is owned by husband of plaintiff no.1 vide registered sale deed 1315/1988 dated 17.06.1988. He gave 1R each to his brothers namely Dhansing, Manohar and Satyavan without consideration. He kept 2R land for construction of his house. He constructed the house having village panchayat property no.935 in 1R in the year 2000. There is 0.5R open space towards east and west side. The open space having 0.5R towards east side of plaintiffs house described in para 2 of plaint is the suit property.

3. According to plaintiffs, husband of plaintiff no.1 had constructed house in 880 Sq.mtr. The construction of said house is south-north. Plaintiffs used suit property for parking

and ingress outgress. Defendant no.1 has no concerned to suit property.

4. Plaintiffs further contended that defendant no.1 was doing job till 1992 in Mumbai in department of fire brigade. He retired on 31.05.2023 and permanently resided at address mentioned in the plaint. He purchased 1R area of block no.935 for digging well on 21.01.2006 vide registered sale deed no.236/2006. The mutation entry no.4481 is recorded on 27.06.2006 in this regard. Description of property in said sale deed is wrong. Defendant no.1 has constructed the house having village panchayat no.1129 in the area which is purchased by him for digging well. He did not take any permission from village panchayat for construction of his house.

5. According to plaintiffs now defendant no.1 demolished his house and made RCC construction over the suit property. He encroached over the suit property. Defendant no.1 should measure the suit property and after that he should make RCC construction. He tried to construct RCC pillar in the pits. He kept the material of construction of RCC pillar. On 20.11.2024 plaintiff no.1 asked about it to defendant no.1 but defendant no.1 dig pits over the suit property. Plaintiffs have prima-facie case, balance of convenience in their favour. Similarly irreparable loss caused to them if injunction is refused. Hence, plaintiffs prayed for temporary injunction.

**Case of defendant in short is as follows:**

6. Defendant no.1 filed his say at exh.34. He contended that it should be proved by plaintiffs that suit property is owned and possessed by them. Defendant no.1 has possessed suit property till today. Plaintiff did not have possession of suit property. Plaintiff did not claim declaration hence the suit is not tenable. Co-sharers of suit property have no objection for construction of defendant no.1.

7. Defendant no.1 further contended that, he makes construction adjacent to south side wall of plaintiffs house. Therefore plaintiffs have no concern about it. Plaintiffs have no right to object the documents and possession of property purchased by defendant no.1.

8. Defendant no.1 further contended that his father had purchased 5R property of block no.935 in the name of Pratap Babar on 17.06.1988. Said property was purchased from joint family earnings. Said property is owned and possessed by both plaintiffs and defendant.

9. According to defendant no.1 the father of husband of plaintiff no.1 purchased the suit property for construction of houses jointly. Brothers of defendant no.1 namely Satyavan, Manohar, Dhansing and Pratap have constructed their houses in 5R area purchased by father of defendant no.1. There is construction of tin shed towards east side of 5R by defendants. There are trees in open space. Defendant no.1 has filed annexure-A along with written statement.

10. Defendant no.1 further submitted that his father constructed tin shed for poultry farming. For that he took loan in the year 1991 from Maharashtra State Co-operative Agricultural and Rural Development Bank by mortgaging ancestral properties. The husband of plaintiff no.1 is co-applicant in said loan. The father of defendant no.1 sold 15R area and repaid a loan.

11. Defendant further submitted that there is no possession of plaintiff in 2R area out of 5R. The description of suit property in the plaint is wrong. The husband of plaintiff constructed east facing house in the year 2000. Said construction is 40 ft in length to east-west and 22 ft in width to south-north. House of defendant no.1 is towards southern side of plaintiffs house. There is no open space or house of plaintiffs husband towards southern side of plaintiffs house.

12. Defendant no.1 further submitted that he purchased 1R area towards southern side of plaintiffs property. Said property is purchased by him from Virsing Pandurang Babar on 21.01.2006. Defendant no.1 used said property for parking and keeping firewood. The construction of house of defendant no.1 is recorded to village panchayat. Defendant no.1 had no other road except suit property to come to his property.

13. Defendant no.1 further contended that he used suit property without obstruction since 2006. He is making

construction in his property. Other co-sharers have not obstructed him from said construction. Defendant no.1 making RCC construction of his house by removing old tin shed and walls of village panchayat property no.1129.

14. Defendant no.1 further contended that plaintiff did not file any document or map regarding his ownership of suit property. Material of defendant no.1 is kept in tin shed of plaintiff. Plaintiff did not take any objection for this. There is no cause of action to file this suit. Similarly defendants are co-owners hence injunction can not be given. If temporary injunction is allowed then there is irreparable loss caused to defendant. Plaintiff do not come to the court with clean hands hence not entitled for equitable relief. Therefore, the application be rejected.

15. Following points arise for my determination and my findings on each of them with reasons are as follows:

<b><u>Sr. No.</u></b>	<b><u>Points of Determination</u></b>		<b><u>Findings</u></b>
1.	Whether plaintiff has prima facie case in his favour ?	-	No.
2.	Whether balance of convenience lies in favour of plaintiff ?	-	No.
3.	Whether plaintiff will suffer irreparable loss, if injunction is refused ?	-	No.

4.	What Order ?	-	Application is rejected.
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16. Documents on which plaintiffs relied -

Sr.No.	Particulars of documents.
1	7/12 extract of block No.935 Exh.3/1
2	Registered sale deed no.1315/1988 by husband of plaintiff no.1 at exh.3/2
3	Copy of mutation entry no.2064 at Exh.3/3.
4	Extract of namuna no.8 of block no.935 at exh.3/4
5	Registered sale deed no.236/2006 of defendant no.1 at exh.3/5
6	Copy of mutation entry no.4481 at Exh.3/6.
7	Extract of namuna no.8 of grampanchayat property no.1129 at exh.3/7
8	Copy of extract of block no.935 of mutation entry no.4078 regarding reduction of load of bank at Exh.3/8.
9	Certificate of Grampanchayat Kikli regarding non giving permission for construction at exh.3/9.
10	Certified copy of resolution of no.5 of Kikli at exh.3/10

11	Photographs of suit property at exh.3/11 and 3/12
12	Copy of power of attorney in favour of plaintiff no.1
13	Grampanchayat Tax receipt no.66 of plaintiffs house at exh.40/1
14	Land revenue receipt of S.No.935 at exh.42/1
15	Grampanchayat Tax receipt no.281 of block no.935 at exh.42/2

17. Documents filed by defendants-

Sr.No.	Particulars of documents.
1	7/12 extract of block No.935 at Exh.37/1.
2	Copy of mutation entry no.3230 at Exh.37/2.
3	7/12 extract of grampanchayat property No.1129 at Exh.37/3.
4	7/12 extract of grampanchayat property No.936B at Exh.37/4.
5	Photographs of suit property at exh.37/5
6	Receipt of photographs at exh.37/6
7	Photograph of suit property and old house of defendant no.1 at exh.37/7

8	Copy of mutation entry no.4598 at Exh.45/1.
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### **REASONS**

#### **Point Nos.1 to 3 :-**

18. Point nos. 1 to 3 are interlinked with each other, hence they are discussed together. In this suit Caveat application no.98/24 is filed.

19. Ld. Advocate of plaintiffs in his argument submitted that the suit is for perpetual injunction. Land having area 5R out of 37R having block no.935 is owned by husband of plaintiff no.1 vide registered sale deed 1315/1988 dated 17.06.1988. He gave 1R each to his brothers namely Dhansing, Manohar and Satyavan without consideration. He kept 2R land for construction of his house. The 7X12<sup>th</sup> extract of block no.935 is at exh.3/1. Similarly, sale deed in this regard is at exh.3/2. Mutation entry no.2064 for recording the name of husband of plaintiff no.1 to suit property at exh.3/3. At exh.3 /4 there is 8A extract of plaintiff no.1. The property number is 935.

20. Learned advocate of plaintiff further argued that defendant no.1 had purchased the property for well. But he did not dig well in said property. The sale deed having registration no.236/2006 in this regard which is at exh.3/5. Mutation entry no.4481 is filed at exh.3/6. In spite that he constructed his house over it. Therefore he makes fraud by not paying stamp. Said construction of defendant no.1 is illegal. He did not take permission for this. Plaintiffs have filed resolution of village panchayat Kikali which is at exh.3/10 in this regard.

21. Learned advocate of plaintiff further argued that the property must be measured by person who makes construction. Similarly, the injunction can not be given to co-owner if the property is not ancestral. Plaintiffs have filed tax receipt regarding open space 1R. Therefore, it is clear that there is 1R open space and the house in 1R.

22. Per contra learned advocate of defendant no.1 has argued that it is necessary to see that whether the defendant no.1 has constructed in his property. Since 2006 plaintiffs have no objection regarding entry of defendant no.1. The property purchased by father of husband of plaintiff no.1 and defendant no.1. Therefore the father of husband of plaintiff no.1 had given 1R to each brother of plaintiff. Plaintiff has not filed map regarding encroachment. Description of suit property in sale deed and plaint are different.

23. Learned advocate of defendant no.1. has further argued that there is no document as how 2R land came to plaintiff. Defendant no.1 has filed 8A extract of property no.1129 which is in his name. Learned advocate of defendant no.1 has argued that there is 12X7.5 area in front of his house. Therefore defendant no.1 has constructed in his property. Plaintiff has not filed any document which shows that this area is of him. Similarly, defendant no.1 is co-owner of the suit property. Hence injunction can not be given to co-owner. Plaintiff did not file any document that the suit property is not of ancestral.

24. I perused record of the case. It is the contention of plaintiff that defendant no.1 had purchased property for digging well. But he did not dig well in the same. In spite that he constructed the house in it. Hence said house is illegal. From 8A extract of property no.1129, it reveals that the construction of house of defendant no.1 is in the year 2008. It is seen that plaintiffs did not take objection at the time of construction of the house. Hence his contention is not acceptable.

25. I perused 8A extract of property no.935 and 1129. On perusal of 8A extract of 935, at exh.3/4 the description of suit property is 40X22, the construction of bricks cement in 880 sq.ft., floor with T angel with WC. Similarly, on perusal of 8A extract at exh.3/7 the description of suit property is RCC construction facing east side 29.3x21.11 with WC 10X4 the open space in front of house is 12X7.5 with borewell.

26. Perused tax receipts which are at exhs.42/1 and 42/2. Plaintiffs have paid tax of his house. These are documents showing plaintiffs have paid tax for house only. It is seen that in 8A extract of property no.1129 there is open space in front of defendant no.1's house. Property no.935 which is of plaintiffs have no such open space.

27. Similarly, plaintiffs did not file any document or map which shows the encroachment committed by defendant no.1. It is taking into consideration that plaintiffs have submitted that he gave 1R to each brother without consideration. Defendant

no.1 had purchased 1R out of block no.935 in the year 2006. Therefore, defendant no.1 is co-owner of suit property. It is settled law that injunction can not be granted against co-owner.

28. According to Order XXXIX Rule 1 of Code of Civil Procedure 1908 temporary injunction may be granted, that any property in dispute in a suit is in danger of being alienated by any party to the suit then court may by order grant temporary injunction to restrain such act or preventing the alienation until disposal of the suit or until further orders.

29. Learned advocate of defendant no.1 relied on the following authorities:-

**1. Rohit Dhawan V.s G.K. Malhotra and anr. AIR 2002 Delhi 151.**

30. I have gone through this authority. In this case parties entered into an agreement under which the defendant company was to manufacture two Herbal medicine for diabetics. Hence, with due respect the facts of this case are not applicable to present case.

**2. Prakash S. Akotkar and ors. Vs. Mansoorkha Gulabkha and ors. AIR 1996 Bom-36**

31. I have gone through this authority. The suit property belong to one lady. She had four sons. Defendant no.1 who was her son contending that he is in exclusive possession of the property executed an agreement to sell in favour of plaintiff. The plaintiff was put in possession of entire property. Hence,

with due respect the facts of this case are not applicable to present case.

32. From above discussion it is seen that, prima-facie suit property is possessed by both plaintiffs and defendants. plaintiff have no prima-facie case. It is also seen that prima-facie case follows balance of convenience. If injunction is granted then irreparable loss caused to defendant no.1. Hence, I answer point no. 1 to 3 are in negative.

33. Considering above discussion in answer to point no. 4, I pass following order.

**ORDER**

1. The application is rejected.
2. Status quo against defendant no.1 is vacated.
3. Parties to bear their own cost.

Date : 18.12.2024  
Place : Wai.

(S. S. Palsule)  
3<sup>rd</sup> Jt. C.J.J.D, Wai.