

**IN THE COURT OF THE PRL. CIVIL JUDGE AND J.M.F.C.,
KARKALA**

Present: - Sri. Puttaraju, B.A., LL.B.,
Prl. Civil Judge & J.M.F.C., Karkala.

Dated this the 15th day of February, 2020.

ORIGINAL SUIT NO 15 of 2020

Between:

Smt. Shakunthala R. Suvarna.	And	.. Plaintiff.
Sri. Suresh Kumar and others.		.. Defendants.

PARTIES TO I.A.NO.II

Smt. Shankunthala R. Survarna,
Aged about 60 years,
D/o late Kanthu Poojary,
W/o of Ramesh N. Survarna,
R/at 'Vikranth'. No.633,
4th cross, 'A' Block,
Sahakara Nagar,
Byatarayanapura, Bengaluru – 92. .. Applicant/ Plaintiff.

(By Sri. H. Shekhar Madivala, Advocate.)

- AND -

1. Sri. Suresh Kumar,
Aged about 66 years,
S/o late Kanthu Poojary,
C/o Sri. N. Muddappa,
No.1649, Rama Mohan Pura,
2nd Main Road,
Bengaluru – 560055.
2. Smt. Manorama S. Poojary,
Aged about 58 years,
D/o late Kanthu Poojary,

W/o S.M. Poojary,
Room No.12,
Dena Ganesh Society,
Thane (East), Maharastra State.
Now Staying at
C/o Sri. Veerappa Poojary,
'Padma Ayurvedic',
Near Bailoor High School,
Bailoor Village and Post,
Karkala Taluk, Udupi District. .. Opponents/Defendants.

(By Sri. G. Muralidhar Bhat, Advocate)

: ORDER ON I.A.NO.II :

The plaintiff has filed I.A.No.II U/Or.39 Rules 1 and 2 and section 151 of C.P.C. praying for grant of temporary injunction restrain the defendants No.1 and 4, their men, servant, agents and all persons claiming through or under them from demolishing the house situated in the suit 'A' schedule properties from making any material alterations in the suit properties from interfering in any manner in the use and enjoyment of the said house by the plaintiff as a co-owner till the disposal of suit.

2. In the accompanied affidavit the plaintiff has stated that the suit properties were bequeathed to their father by name Kanthu Poojary as per the Will dated 15-12-1969 executed by his father Padma Poojary, after the death of Padma Poojary the said Will came to be acted upon and Kanthu Poojary succeeded to the suit properties as its absolute owner, the

Kanthu Poojary has been in possession and enjoyment of suit properties as its absolute owner till his death. The revenue records relating the suit properties stands in the name of late Kanthu Poojary, After the death of Kanthu Poojary herself and the defendants being his children have succeeded to the suit properties as per the Hindu Succession Act. Further stated that she and all the defendants are entitled to $1/8^{\text{th}}$ share each in the suit properties, the suit properties have not been partitioned as far. There is a house in the suit properties where Kanthu Poojary and his wife Smt. Meena K. Poojary and the plaintiff and defendants had been residing. Now the 5^{th} defendant is residing in a small shed attached to the said house, the plaintiff and defendants No.1 and 4, 6 and 7 are now residing at different places. However we have been coming and staying in the said house during the life time of their parents and also now whenever they visit the suit properties, the defendant No.4 is staying in Mumbai, now she has come down to native, the defendant No.1 and 4 colluded together and they are planning to demolish the said house without any justifiable reasons and to cause loss and hardship to her and other sharers. The defendants No.1 and 4 are not entitled to do so, though she objected the said illegal act of the them, they have decided to implement their plan of demolition of the said house the defendants No.1 and 4 have already started to remove the tiled roof the the said house, thus they are acting detrimental to the

interest of herself and other sharers. Therefore, she requested the defendants to agree for amicable partition of the suit properties for which they are not agreeable, therefore, she has decided to seek partition of suit properties through the court. It is further stated that the defendants No.1 and 4 are allowed to demolish the house situate in the suit properties, she and other co-owners will suffer irreparable injury, hardship and loss which cannot be compensated in terms money, it may also lead to multiplicity of judicial proceedings. Therefore they are liable to be restrained by means of a temporary injunction from demolishing the house situated in the suit properties, from making any material alterations to the suit properties and from interfering in any manner to enjoyment of the said house as a co-owner pending disposal of this suit.

3. The defendant No. 4 filed her written statement and adopt the same as counter to I.A II by filing memo, the defendant No. 2 is also adopt the written statement filed by 4th defendant by filing memo. In the written statement as well as counter to I.A II, it is stated that all the properties mentioned in the registered Will dated 14-09-1969 are not included in the suit 'A' schedule property and hence suit is liable to be dismissed for partial partition. Further, it is contended that the 4th defendant has been residing in the house of Karmbujaddu which is situated in the suit properties, to show the said fact placed passbook of Syndicate Bank, Bailoor Branch, Krishi

passbook, Medical certificates relating to address of the 4th defendant, Electricity bills paid by 4th defendant in respect of suit house, tax paid receipts. All these documents clinchingly shows the 4th defendant is residing in the said house. Even during the life time of father and mother of 4th defendant, she used to stay along with them in the said house to look after her parents. Moreover, since the 4th defendant suffering from Asthama, she has been residing in the said house as the climate of that area is convenient to her health and she also effect improvements in the suit properties by spending huge amount. It is further contended that the 5th defendant is unmarried and he was in Bangalore for some years, since some years he has been residing in the separate room and not along with the 4th defendant in the suit house. He has been mentally harassing the 4th defendant by abusing her in filthy language and it is also learned that the 5th defendant was imprisoned for time due his criminal activities and he has no hesitation to commit any illegal acts, due to which it is very difficulty for 4th defendant to lead her life peacefully, in fact he shall be prevented from interfering with peaceful possession and enjoyment by the 4th defendant. It is also further contended that the 4th defendant is not demolishing the suit house as falsely alleged by the plaintiff, in fact the said suit house is very old and delapidated condition, requires immediate repair and hence she replaced old roof of said house covered with plastic and broken tiles and

placed mettled sheet roof by spending more than Rs.3,00,000/- and also led slabs to the floor besides making necessary repairs by given support to the walls where ever required. Such is the case, the plaintiff has approached this court with unclean hands by making false allegation against the 4th defendant, if 4th defendant is prevented from carrying out repair, she will be put to untold hardship as the house is likely to fall and there is danger to the life of 4th defendant who resides therein. It is also further contended that the 3rd defendant is residing in Vidhyavara, 2nd defendant residing at Bailoor Village having his own property, 7th defendant is not residing in the suit property. For these reasons prayed for dismissal of application.

4. On the rival contentions of the parties, following points arise for consideration:

1. Whether the plaintiff made out prima-facie case and balance of convenience lies in favour of the plaintiff?
2. Whether the plaintiff will be put to irreparable loss and injury if order of Temporary Injunction is not granted?
3. What Order?

5. Heard the arguments of both the counsel and perused the documents produced by both the parties. The

learned counsel for the plaintiff filed written argument and in support of his contention relied on the following citation.

AIR 2011(3) SC 569

6. The learned counsel for the defendant in support of his contention relied on the following citation.

AIR 2001 Panjab and Hariyana 112

AIR 1999 SC 2272

7. The findings on the above points are as follows :-

Point No.1 :- In Negative.

Point No.2 :- In Negative.

Point No.3 :- As per final order, for the following:

: R E A S O N S :

8. **Points No.1 and 2:-** Both these points are taken up together for discussion in order to avoid repetition of facts.

9. Before advertng the facts of the case it would be worth to what are principles to be bear in mind while deciding the application filed under order 39 Rules 1 and 2 of CPC. It is held by the Hon'ble Apex Court in the decision reported in **1995(5) SCC 545** in the case of **Gujarath Electricity Board, Gandhi Nagara V/s Mahesh Kumar and Co., Ahmadabad**, that the court should be satisfied that there is serous question to be tried at the hearing, and there is probability of plaintiff

obtaining the relief at the conclusion of trial, on the basis of the materials placed before the court. In this background, requires to peruse materials on record.

10. The present application is filed by the plaintiff seeking an order of temporary injunction restrain the defendant No.1 and 4, their men, servants, agents and all persons claiming through or under them from demolishing the house situated in the suit 'A' schedule properties, from making any materials alterations in the suit properties and from interfering in any manner in the use and enjoying of said house by the plaintiff as co-owner till the disposal of suit, it means plaintiff has seeking the relief against the defendant No.1 and 4 restrain them from demolish the house and its materials alterations and also sought the relief restraining them from interfering in any manner to use and enjoyment of said house by the plaintiff.

11. While arguing, the learned counsel for the plaintiff has submitted the the present application is filed against the defendant No.1 and 4, since defendant No.1 is not appear before the court, the plaintiff do not wish to press the I.A No.II against the defendant No.1 for present and filed memo in this regard.

12. Further, so far as relief with regard to demolition of house by the defendant No.4 is concerned, while arguing, the learned counsel for the plaintiff has submitted the said relief is sought on the apprehension that defendant No.4 is going to demolish the said house, now after written statement filed by 4th defendant it came to know that the 4th defendant is not going to demolish the suit house and hence, the plaintiff do not wish to press the relief of temporary injunction regarding restrain the 4th defendant from demolish the house. Therefore, it is not necessary to discuss plaintiff's prima facie and balance of convenience in respect of said relief.

13. As for as material alterations of said house by the 4th defendant is concerned, the learned counsel for the plaintiff relying on decision reported in AIR 2001 Punjab and Haryana 112 has argued, 4th defendant has been in exclusive possession of suit property residing in the said house situated therein, since it was in dilapidated condition, she repaired it by spending more than Rs.3,00,000/-, and to show her exclusive possession, placed her passbook relating her bank account in Syndicate Bank, Krishi passbook relating suit property, her Medical Certificate issued by the Doctor, Electricity

bills relating to Electricity connection of said house, Tax paid receipts. These documents prima facie shows exclusive possession of property by the 4th defendant, admittedly plaintiff is not residing in the suit property, when such being the case, in view of ratio laid down above decision, an injunction cannot be granted in favour of plaintiff against the 4th defendant when she is in exclusive possession of suit properties.

14. As against this, the learned counsel for appearing for plaintiff has submitted argument that mere payment of Electricity bill, payment of tax by the co-owner does not show that such a co-owner is in exclusive possession of suit properties, if the 4th defendant is in exclusive possession of suit properties, certainly she might have produced Aadhaar Card, Voter Card relating to suit property, but no such material documents are placed, in the absence of such material documents to show the specific address of 4th defendant, mere relying on tax paid receipts and Electricity bills, Medical Certificate and Kruishi passbook relating to suit property, it cannot be said that the 4th defendant is in exclusive possession of suit properties.

15. Perusal of materials on record in the light of submission made above, it reveals that admittedly, no dispute with regard to fact that suit properties along with suit house situated therein has been bequeathed by the grand father of plaintiff and the defendant in favour of their father Kanthu Poojary and he died on 13-01-2013 leaving behind the plaintiff and the defendants as successor and as such the suit properties are joint right properties of plaintiff and defendants and they are having equal right said properties. It is also not in dispute that the plaintiff, defendants 1 to 3, 6 and 7 are residing at different places.

16. The settled position of law is, in a suit for partition, possession of one is possession of all, no co-owner has definite right, title and interest in any particular item or portion thereof, on the other, he has right, title and interest in every part and parcel of the joint property. When such being the position of law, injunction against the one co-owner to interfere the possession and enjoyment of the joint property cannot be granted, similarly, injunction in favour of other co-owners against the one co-owner cannot be granted from dispossessing the one co-owner from joint property by the other co-

owners. In this context, since the suit properties are joint right properties of plaintiff and defendants and they are having equal right over the same, an injunction against the 4th defendant in favour of plaintiff restraining her from interfering the use and enjoyment of suit properties by the plaintiff cannot be granted because of the reasons that 4th defendant has also having right to enjoy each and every part of suit properties unless her share is determined and divided by metes and bounds. If an injunction is granted in favour of plaintiff against 4th defendant restraining her to enter into suit properties, she will be put hardship, if an injunction is not granted, no hardship would be caused to plaintiff. For the reasons aforesaid, the plaintiff has not made prima facie case and balance of convenience is not lies in her favour relating to relief of restrain the 4th defendant from interfering with use and enjoyment of suit properties by plaintiff.

17. So far as relief of material alterations of suit house is concerned, perusal of Krishi passbook, bank passbook, Medical certificate of 4th defendant along with tax paid and Electricity bills payments receipts, it appears that, the address of 4th defendant shown in her bank passbook and medical certificate of Karmabujaddu, Krishi

passbook, tax paid receipts and Electricity bills shows tax payment and electricity payment relating to the suit land and the house situated therein. These documents prima facie does not show that the 4th defendant is in exclusive possession of suit properties, as contended by the learned counsel for the plaintiff, the 4th defendant should have produce her Aadhaar Card and Voter Card relating to address of suit properties, but no such document is placed by the 4th defendant, in the absence of same, mere relying on those documents produced by the 4th defendant, it cannot be said that the 4th defendant prima facie shows she is in exclusive possession of suit properties.

18. Perusal of ratio laid down in the decision reported in 2011(3) Punjab and Haryana 112 relied on 4th defendant, wherein, it is held that a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster. In the case in hand, as discussed above, since the 4th defendant is not in exclusive possession of suit properties, the ratio laid down in the aforesaid decision is not applicable to the present case.

19. The photos of suit house placed by the 4th defendant prima facie shows she has been repairing the suit house which is dilapidated condition and same is still in progress by spending huge amount, of course she might have been claiming said house to her share on equity ground since she made improvement in the said house, that will be considered after full pledged trial. However, repairing of dilapidated condition's house by one co-owner does not amount loss to other co-owners and it cannot be said that it will be detrimental to the rights of plaintiff or loss, in fact, house will be a in good condition and helpful for all co-owner to enjoy the same conveniently, in this context, if injunction is not granted, no hardship will be cause to plaintiff.

20. Therefore, for the reasons aforesaid, the considered opinion is of the court that the plaintiff has failed to made out prima face case and balance of convenience not lies in her favour. If injunction order is not granted no hardship will be caused to plaintiff, on other hand, if injunction order is granted, the 4th defendant and other co-owner would be put to hardship. Accordingly, answered the above points in the Negative

21. **Point No.3:-** In view of my above observation on points No. 1 and 2, I proceed to pass the following:

ORDER

The I.A.No.II filed by the plaintiff under Order 39 rules 1 and 2 and Section 151 of C.P.C. against the defendant No.4 is hereby rejected.

(Typed to my dictation by the Stenographer directly on the computer, corrected by me and then pronounced in the open court on this 15th day of February, 2020.)

(Puttaraju)
Prl. Civil Judge & J.M.F.C.,
Karkala.