

**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 12th day of March, 2021.

ORIGINAL SUIT NO 15 of 2020

Between:

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

PARTIES TO I.A.NO.IV

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

The plaintiff has filed I.A.No.IV U/Or.39 Rules 1 and 2 and section 151 of C.P.C. praying to direct the 4th defendant to hand over a key of the house bearing Door No.1-68 of Bailoor Grama Panchayath existing in the suit property and to grant such other relief as court deems fit to grant under the circumstances of the case in the interest of justice and equity.

2. In the accompanied affidavit the plaintiff has stated that she is the co-owner of suit 'A' schedule property consisting a house bearing Door No.1-68, her parents were residing therein till their death. Thereafter, nobody is residing in the said house permanently, but the 5th defendant residing a small shed attached to said house. There is a custom in their family to offer prayers to their deceased ancestors by keeping special food, etc, at the time of Ugadi, Chawthi, during festivals and other occasions which is called as 'Agalu seve' and therefore, it is inevitable for plaintiff and defendants 3, 5, 6, and 7 to go to suit house to conduct said religious offering. It is further stated that the 4th defendant just prior to the suit took the key of said house from 6th defendant and

began to alter it and as such she has changed the lock of said house and now it is under lock and key is with the 4th defendant. At the time of filing of suit filed I.A NoII under 39 Rule 1 and 2 of CPC on apprehension of demolition of said house, which came to be rejected on 15.02.2020. Now the 4th defendant is not allowing the plaintiff and defendants 3, 5 to 7 to enter into said house and she is not ready to give the key of said house to the plaintiff. The 4th defendant is entitled to use said house and offer poojas and conduct religious ceremonies as a co-owner. The 4th defendant is permanently residing at Mumbai, her deceased husband was an employee of Dena Bank and as such her children are also permanently settled at Mumbai. In view of the above conduct of the 4th defendant the plaintiff and other co-owners of suffering great loss and hardship. The plaintiff has no objection to 4th defendant to enter into house and use the same, but she has no right to prevent the plaintiff and other co-sharers to use said house. It is further stated that the 4th defendant is illegal, highhanded, tortious and intended to cause mental agony to the plaintiff and other co-owners.

3. The defendant No. 4 filed has filed objection to the said application denying the averments set out in the affidavit filed by the plaintiff annexed to the application and contended that the order dated 15.02.2020 passed by this court on IA II has not been challenged so far and it becomes final and binding on the parties which leads constructive resjudicata as this is the similar application filed by the plaintiff. It is contended that the mother of parties by name late Meena Pojary belongs to Thevuguri family of Kowdoor Village and the family deities are situated in the said property. The family house of the father of parties by

name Kanthu Pojary is known as Garadimane of Bommarabettu Village of Udupi Taluk. In the suit property there are no family deities and no poojas to the deceased ancestors or to conduct religious ceremonies that is Agalu Seve etc., are performed. It is only to dispossess the 4th defendant from the suit house present application is filed. Admittedly, the suit house was in dilapidated condition, the 4th defendant at her own expenses repaired it by spending more than Rs.30,00,000/-. The plaintiff came before the court with false allegation that 4th defendant has been making attempts to demolish it and later the plaintiff agreed the act of the defendant that she is repairing said house and court has also observed the same in the order passed on I.A II. When such being the case, the plaintiff cannot contend that said house is require to conduct religious ceremonies, before repairing it, the plaintiff and other defendants did not bother about condition or status of said house. The plaintiff and other defendants have their own palatial houses even though the plaintiff filed this application with an intention to dispossess the 4th defendant from the suit house, the court will not help a person who comes before the court with unclean hands by making false allegation. It is further stated that the relief claimed in the application is unknown to the law since co-owner is in possession of suit house, she cannot be asked to deliver the possession of said house to other co-owner and on the other hand, the remedy is available to the other co-owners to seek division of property and to claim rendering of accounts. It is further contended that the passbook to the bank account of 4th defendant, Krushi passbook relating to suit property, medical certificate of 4th defendant issued by the Doctor, Electricity Bill, Tax paid Receipts and copy of Aadhaar Card and necessary repair made by the 4th defendant are shows the 4th defendant is in possession of said

house. The 5th defendant is residing in the shed attached to said house; even prior to suit the 4th defendant has been residing in the said house. Such being the case, if injunction is granted definitely the plaintiff and other co-sharers will dispossess the 4th defendant from the suit house and in that event the 4th defendant being widow will be put to untold hardship and it cannot be compensated in terms of money. The relief claimed in the application is mandatory injunction which cannot be granted before trial and there is no prima facie case in favour of plaintiff to grant such relief.

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.

6. The learned counsel for the 4th defendant in support of his contention relied on the following citation.

1. AIR 2001 Panjab and Hariyana 253.
2. ILR 2012 KAR 2240.

3. AIR 2005 SC 1444.

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. The present application is filed by the plaintiff praying to direct the 4th defendant to hand over key of house situated in the suit property who is residing therein to perform family deities such as agalu seva for deceased ancestors of plaintiff and the defendants in the said house.

9. The learned counsel for plaintiff in his written arguments has submitted that the 4th defendant being co-owner of suit property estopped from claim exclusive possession over house situated in the suit property, in order to claim it she has to plead ouster of other co-owners and prove it. Admittedly, father of parties resided in the said house and died therein and therefore all are entitled to use it as co-owners. The 4th defendant cannot prevent the plaintiff to enter into house to offer agalu seva. As held in the decision reported in AIR 2001 P & H 253 an injunction can be granted against ouster of co-owner. The ratio laid down in the decision reported in ILR 2012 KAR 2240 is not applicable to the case in hand for the reasons no such arrangement made by the parties in the instant suit as of arrangement made the by co-owners in

the decision. The plaintiff is not claiming right over suit house on the ground that she does not have any house, she being a co-owner of suit house and entitled to perform religious ceremony therein for deceased parents. If she is ordered to hand over key of suit house, no hardship will be caused to her because the plaintiff will never prevent her to enter into house and use it.

10. As against this, the learned counsel for 4th defendant in his written arguments submitted that the 4th defendant has been residing in the suit house prior to suit house it is evidenced by Adhar card, she repaired it by spending more than Rs.30,00,000/- out of her own funds as it was in dilapidated condition, the has been observed in the order passed on IA II. The parties are governed by aliyasanthana family; plaintiff can perform religious ceremony in the aliyasanthana family house of the father situated at Bommarabettu. Moreover, there is no family deity in the suit house; the alleged agalu seve is a created phenomenon to disturb the peaceful possession of 4th defendant. The settled law is the relief of mandatory injunction during pendency of suit cannot be granted unless strong prima facie is made out and damage must be so high if injunction is not granted. Granting of interim mandatory injunction for delivery of possession during pendency of suit is not sustainable as it would amounts to pre-trial decree as held in the decision reported in AIR 2005 SC 1444. The plaintiff has been residing in a big house, in which the plaintiff and other defendants can perform their religious ceremony, such being the case, the plaintiff has come before court with malafide intention to perform pooja only in suit house. If mandatory injunction is granted everybody will come to house and cause hardship to 4th defendant because of the plaintiff and other

defendants are in one side, the 4th defendant alone is one side. If mandatory injunction is granted it amounts to dispossession of 4th defendant from suit house, in support of his contention relied decisions reported ILR 2012 KAR 2340 and AIR 2005 P & H 253.

11. 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 grandfather 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 co-owners of suit property having equal right therein. It is also not in dispute that the plaintiff, defendants 1 to 3, 6 and 7 are residing at different places, the defendant No.5 residing in the shed attached to suit house and suit land has not been partitioned among the parties.

12. The copy of Adhar card, medical certificate issued by the doctor, Electricity Bills, Endorsement issued by town police, Agriculture pass book, Bank Pass book of 4th defendant and other materials placed by 4th defendant prima facie shows the 4th defendant has been in possession of suit house and she repaired it by spending her own funds as observed in the order passed on IA II and the same is also not denied by the plaintiff. Such being the case, the question would arise for consideration is whether possession of suit house by 4th defendant would be a her exclusive possession?, if so, does such a possession of 4th defendant would amounts to ouster the other co-owners. Further, such a possession of 4th defendant could be protected by the other co-owners

till partitioned unless substantial or material injuries caused to other co-owners. In this regard, it would be worth to refer the decision held in case of **Sant Ram Nagina Ram v/s Daya Ram Nagian Ram and other** reported **AIR 1961 P H 528**, wherein the question referred for consideration was *'If in spite of protest by one co-owner, another co-owner raises a building on a portion of joint land, not exceeding his own share therein can the aggrieved co-owner obtain a decree for demolition of that building without proving special damage or substantial injury to him'?* The Hon'ble High court after referring several decisions of Hon'ble High Courts answered said question as follows, it is necessary to reproduce relevant paras of judgment, which is as follows:

36. In ILR 8 Cal 708, a Bench of Calcutta High Court said that there was a considerable difference between a case in which the other co-sharers acting with diligent watchfulness of their rights, seek by an injunction to prevent the erection of permanent building; and a case in which, after a permanent building has been erected all considerable expense, he seeks to have the building removed. In such a case, the settled principle was that though the Court had a discretion to interfere and direct the removal of the building, the discretion was not to be exercised necessarily in every case and should not be exercised unless the plaintiff was able to show that injury had accrued to him by reason of the erection of the building; and perhaps further, that he took reasonable steps in time to prevent the erection.

37. In ILR 9 All 661, Mahmood J. said that "the mere circumstance of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient to entitle such co-owners to obtain the

demolition of such building unless they can show that the building has caused such material and substantial injury as a Court of equity could not remedy in a suit for partition of the joint land."

39. In 4 Cal LJ 198, Mukerjee J. said at p. 205: "Now, as was pointed out in Mohesh Narain v. Nawbut Pathak, 1 Cal LJ 437, although in the case of immoveable property, jointly owned, each co-owner is in theory interested in every infinitesimal portion of the subject-matter, and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with the others, yet it does not follow, that one joint-owner is entitled to maintain an action in ejectment against a co-owner, merely on the ground that the latter has taken exclusive possession of a portion of the joint property. Such exclusive occupation may, under certain circumstances, be perfectly legitimate and may not constitute an invasion of the rights of the co-sharer if there is no assertion of a hostile title, no exclusion or ouster, an action in ejectment cannot lie, I am not prepared to hold, that an exclusive appropriation by one co-owner of a part of the joint land to his own use by the erection of a permanent structure, is necessarily evidence of an ouster;"

48. Another Division Bench of Lahore High Court in 60 Ind Cas 531, refused to order demolition of the building where a joint owner of the land without obtaining permission of his co-owners had built upon such land in the absence of proof of material and substantial injury as could not be remedied by partition of the joint land.

49. Moti Sagar, J., in AIR 1926 Lah 52, expressed the view that the mere circumstance of a building erected on common land without the consent of the co-sharers and despite their protest even is not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected unless it could be

shown that the erection of that building had actually caused such material and substantial injury as could not be remedied on a partition of joint land.

79. This is a case which attracts the application of proposition No. 4. From what has been stated above, the question referred by the learned Single Judge will be answered as follows:

"If, in spite of protests by one co-owner, another co-owner raises a building on a portion of joint land, not exceeding his own share therein, the aggrieved co-owner cannot obtain a decree for demolition of that building without proving special damage or substantial injury to him unless the other co-owner who has raised the building has done so by asserting an exclusive title in himself and by denying that of the other co-owners."

13. In another case of **Prem And Ors vs Ram Chand And Ors** decided on 25 March, 2019, the Hon'ble Panjab-Haryana High court has held that A co-sharer in exclusive possession of part of joint land is entitled to protect his possession by filing suit for injunction against other co-sharers till partition defendant cannot interfere in the possession of plaintiff illegally and forcibly, except in due course of law. It makes clear from the law laid down in the decisions above, the possession of co-owner some portion of joint land is his exclusive possession; he is legally entitled to protect such possession until the joint land is partitioned and it cannot be held that such an exclusive possession by one co-owner of a part of the joint land to his own use, is necessarily evidence of an ouster;"

14. In the instant case, the 4th defendant is in possession in suit house by repairing it for her use as it was in dilapidated condition as observed earlier as well as in the order passed on IA II, the possession of suit house

by 4th defendant does not exceeds her share in the suit property if she would entitled share at partition and such possession of 4th defendant becomes her exclusive possession in view of law laid down in the decisions(supra) and her possession should be protected unless suit land partitioned. The plaintiff claiming key of suit house only for performs agalu seve in the house, under such circumstances, if injunction is not granted no hardship will be caused to plaintiff.

15. The ratio laid down in the decision reported in ILR 2012 KAR 2240 is not applicable to the case in hand for the reasons no such arrangement made by the parties in the instant suit as of arrangement made the by co-owners in the decision aforesaid. In the decision reported in AIR 2001 P and H 253 reliance placed by the learned counsel for 4th defendant the purchaser who purchased portion of joint property by one co-owner behind other co-owner was in exclusive possession of portion of such land and he is entitled to protect his possession until joint properties partitioned. In the instant case, no such sale transaction is taken place and hence the ratio laid down in the decision is not applicable to the case in hand. The ratio laid down in another decision reported in AIR 2005 SC 1444 is grant of interim relief of mandatory injunction directing the defendant to hand over possession to plaintiff in a suit for possession until decide issue whether plaintiff is entitled to possession is not proper, wherein the defendant was in possession as licensee. In the instant case, since the plaintiffs claimed to be joint owner of suit land, it is therefore, the ratio laid down in the above decision is not applicable to the case in hand.

16. Therefore, if carefully examined the case of plaintiff in the above perspective manner, the considered opinion is of the court that the plaintiff

has failed to make 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 would be put to hardship. Accordingly, answered the above points in the Negative

17. **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.IV 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 12th day of March, 2021.)

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