

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.



REGULAR CIVIL SUIT NO.25/2020.

ORDER BELOW EXH.5.

[1.] The application at Exh.5 is preferred by the plaintiff under Order 39 Rule 1 & 2 of CPC to restrain the defendants from constructing illegal construction on western side of the residential property vide City Survey No 2/3325 and further Northern side of Defendants residential property situated Khambhat; Dist. Anand bearing City survey no.2/3325 which is according to Pleading of plaintiff under the possession of plaintiff. It is the case of the Plaintiff that defendants are constructing Beam which is generally known as " GADAR " in vernacular language situated at western side of City Survey no. 2/3325 which is according to Plaintiff their residential property.

[2.] Plaintiff has filed the present suit for permanent injunction. It is pertinent to note here, that Plaintiff has not prayed for declaration regarding easement right in the prayer clause of plaintiff but has aver in the plaintiff during Para.4 that on western side of the City Survey No. 2/3325, Plaintiff possess easement of way and further easement of air

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

and light as well from open land, described as "Khullo Chok".

[3.] It is the case of Plaintiff that present Defendant possesses residential property vide City Survey No2/3314/A and defendant has taken off the whole premises since last ten days and making attempt to build new construction on same land. Plaintiff further pleads that Defendant is making attempt to keep Iron Beam from Southern to Northern direction outside of their property resulting in encroachment in open land situated at western side of plaintiff's property. Therefore the proposed construction described as above is the disputed property between the parties where in so called construction is in progress; particularly to decide the present injunction application therefore hereinafter known as disputed property.

[4.] It is the case of the plaintiff that, plaintiff and defendants are neighbours and Plaintiff possesses the residential property having easement rights over disputed open place. Further plaintiff has averred that the present Defendants are trying to construct new construction after removing old residential property. The plaintiff has further averred that the defendants are indulged in illegal activities and not obeying the law and further threatening the plaintiff. Therefore; the cause of action arises to institute the present suit and application before this Court.

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

[5] After service of summons, defendant appeared through their advocate and have filed written statement of the plaint and present injunction application vide Exh. 14. The defendant have neither accepted the pleadings of the plaintiff regarding easement rights nor accepted the pleading regarding construction of Iron Beam which results in interference of so called easement rights of Plaintiff. Further the defendant has averred that plaintiff has no right on disputed land.

[6.] Read the whole record and Heard the Ld.Advocate Mr.M.Y.Vhora for the Plaintiff, Ld. Advocate Mr. H.K.Kapdia for Defendant. It is pertinent to note here that looking to pandemic COVID-19, all case papers are kept through e-mail by concerned Advocates, and as per the direction of Hon'ble Gujarat High Court hearing of present application is held through virtual mode accordingly. Therefore, At this juncture; this Court has relied on print copies of the case papers. Hence,Following issues are arisen for final adjudication of present applications.

1. Whether the plaintiff establishes prima facie case?
2. Whether the plaintiff establishes the balance of convenience in his favour?
3. Whether the plaintiff establishes that irreparable loss would be caused to him if injunction would not be granted?
4. What order?

[7.] My finding for above issues is as follows,

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

1. In negative.
2. In negative.
3. In negative
4. As per final order

:- FINDINGS :-

Since Issue No.1, 2 & 3 are co-related with each other for the sake of avoiding repetition all the issues are discussed together.

Issue No.1, 2 & 3:

→ It is a settled law that a party is entitled to an order of injunction only if he is able to satisfy the court that a strong prima facie case has been made out in his favour, the balance of convenience also lies in his favour and that refusal of injunction will cause an irreparable injury to him.

→ Prima facie case means that there is a likelihood of infringement of a legal right of the plaintiff by the defendant. It means that the case of the plaintiff raises a triable issue which needs investigation, consideration and adjudication.

→ The plaintiff is also to establish that balance of convenience lies in

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

his favour. Balance of convenience connotes comparative mischief likely to be caused to either party in case of grant or refusal of relief of injunction.

→ The plaintiff is also to satisfy the court that non-interference by the court would result in an irreparable injury and that there is no other remedy available to him except one i.e. the grant of injunction in his favour. Irreparable injury means an injury which is a material one and one that cannot be adequately compensated by way of damages. Further, it is a settled law that grant of temporary injunction is an equitable relief wherein the plaintiff has to satisfy the court that he has acted bonafidely.

In a suit for permanent injunction while the Court is considering an interlocutory application, the Court is not called upon to decide the real disputes between the parties. The Court is called upon to see whether the party who has approached the Court has a plausible case and whether there is a possibility of such case succeeding at the trial. If that test is satisfied then it is the duty of the Court to see whether the damages the plaintiff is likely to suffer for the action of the defendants complained of can be compensated in money and if so whether there is a standard for ascertaining such compensation. If such compensation can be ascertained and afforded in money then the interlocutory order of injunction should normally be refused. But if, on the other hand, the Court is of the view that such compensation cannot

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

be ascertained and afforded in money then it is the duty of the Court to see the balance of convenience and inconvenience of the parties. If the balance of convenience is in favour of grant then the Court shall normally issue an interlocutory order of injunction upon undertaking of the plaintiff to compensate the defendant against whom the order of injunction is passed if at the trial it is held that the plaintiff is not entitled to such permanent injunction. On the other hand, if it is found that the balance of convenience is against passing of such order, the Court will normally refuse to pass interlocutory injunction. The aforesaid are broadly the principles on which the Court acts while exercising discretion in deciding an interlocutory application for temporary injunction made in a suit for permanent injunction.

[8.] With this legal prospectus; if we consider the facts of case on hand here in the present case, the plaintiff has prayed relief to restrain the defendants from constructing illegal construction on western side of the residential property vide City Survey No 2/3325 and further Northen side of Defendants residential property situated Khambhat;Dist. Anand bearing City survey no.2/3325 which is according to Pleading of plaint under the possession of plaintiff. It is the case of the Plaintiff that defendants are keeping Iron Beam to construct new structure which results in to encroachment in open place. Looking to the Para -07 of the present application; the plaintiff has prayed to restrain the defendants from constructing or removing the property

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

situated in the western side of the residential property of Plaintiff . Plaintiff has submitted list of documents vide Ex.3. Looking to the documents it seems that Plaintiff is in possession of City Survey No.2/3325., which is residential property. Further going through the written statement the defendants have not denied about the present occupancy of the plaintiff particularly for residential property vide City Survey No2/3325. Plaintiff has further produced photographs of alleged construction made or in progress vide City Survey No.2/3313/A. It seems from the photographs that present defendants has removed the old structure from disputed land. It is the case of Plaintiff that the defendants are keeping beam/"gadar" on open land which is neither under ownership of plaintiff nor under the ownership of present defendant. Further going through the pleading it transpire that so called beam/"Gadar " are on the open space which are connected to the street way joining to the Northern side of disputed property. As so called disputed open space, where iron beam are kept or proposed to be kept is situated ad-joining to open way, it seems that said open space is under the ownership of local authority. It is a duty of Plaintiff to join the real owner of the disputed open land particularly when Plaintiff is claiming easement rights. In the present case Plaintiff has not joined nor declare any body as the owner of the disputed land. It also reveals that Plaintiff has not joined the Khambhat Nagarpalika , who seems real owner of the particular land; though Plaintiff may be full knowledge that "Khambhat Nagarpalika" is proper and necessary party to be joined

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

as a defendant in present suit. Plaintiff has not produced any document which prima facie establish that Plaintiff has any easement right on the western side wall particularly through the windows which opens in the open land of "Khambhat Nagarpalika". Further Plaintiff has also not produced a single documents which leads this Court to believe that the construction made on open land is affecting the easement rights of Plaintiff. Certain Photographs are produced but for getting clear idea of disputed place ; local inspection report seems more reliable which is on record vide Ex.12/1 to 12/3.

(9) While going through the local inspection report, it comes on record that open land situated at western side of the residential property, present defendants are constructing some structure which also include Iron Beam/"Gadar" . Further more,it seems that there is a space of 8 feet between the disputed Iron Beam/"Gadar". Further more looking to the written statement filed by defendant ; it seems that other neighbour have also made identical construction which leads to encroachment on open place of Local Authority. Of course, it does not make the present construction legal one untill competent authority grant such permission in favour of present Defendant. It is pertinent to note here that present Defendant has not produced any construction permission for recent development. Therefore; prima facie the construction made on the said open land do not found accordance with law at this juncture. Further, present Plaintiff has declare

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

measurement of possession of their residential property. As per the Map-Tracing of disputed property it seems vide Mark 3/4 that there is open space between the western wall of City Survey No 3325 and disputed construction site, which is approximately of Eight foot accordingly. Further if we compare the above said Map-Tracing with Local Inspection Report & Map vide Ex.12/3, It clears the scenario of present dispute. It reveals from the Map vide Ex.12/3 that after western wall of the residential property of Plaintiff, there exists eight foot of open space and there after the disputed construction is made.

(10) Expression '*prima facie case*', refers to the likelihood of the applicant to ultimately succeed in establishing his case.

(11) As per the submission of Ld.Advocate Mr.Vhora and going through the pleading, Plaintiff is claiming easement rights on disputed open space and further apprehension is expressed that defendants intend to keep Iron Beam i.e. Gadar. As a matter of fact, looking to the inspection report the defendant has already kept open place of Eight foot between the western side wall of residential premises of Plaintiff and newly made construction. Therefore; it seems that the windows (if any) on western wall remains open even after this new proposed construction. It is pertinent to note here that , Plaintiff has not prayed for declaration of Easement rights in Plaint Ex.1. In such circumstances at a prima facie stage Plaintiff has not produced any

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

evidence which shows that the defendants are constructing wall adjoining to the wall where easement rights of Plaintiff are infringed. The construction shown by Plaintiff is at a distance of 08 foot from the western side wall of City Survey No2/3325. Plaintiff has also not averred in the plaint regarding availability of alternative source of light and air. It also reveals from the Commissioner Report that the disputed construction may not disturb any easement rights of Plaintiff; if exists. In absence of prayer of declaration of easement right, it is admitted fact that the open place wherein the window opens from disputed wall, is under the ownership of local authority i.e. Khambhat Nagarpalika. Without giving opportunity of hearing to concerned authority , prime facie the rights of the plaintiff can not be decided. Further the alleged construction cannot be declared illegal without gathering evidence from both the sides. Easement rights are special rights which are assigned to the person who are not owner of the property against the true owner. In such circumstances; injunction against true owner can not be passed in absence of such party.

It is fundamental that Interim orders should not be passed indiscriminately and without application of the mind, particularly where the effect would be to allow the plaintiff to enjoy the fruits of his illegal action such as unauthorized possession or alternative remedy is available.

It is pertinent to note that, In the case of Prabhu Nath v. Dharam Nath reported in 2002(1)Civ LJ 300(P&H) ,it was held that

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

court can grant an injunction only if right conferred on plaintiff is duly established, in absence of such conferment of right on plaintiff, Court cannot grant injunction.

Thus, without making any final observations on this aspect, at least prima facie it can be inferred that the plaintiff has concealed certain material facts from the court regarding the Easement Rights attached with disputed residential house and further absence of pleading regarding non-availability of light and air as alternative source and further by not joining the local authority as a party. Further Plaintiff has not clearly mentioned the name of real owner of the land, where in Plaintiff claim their easement rights. Plaintiff has also not given any statutory notice to concerned local authority before filing present suit. Therefore it can be said that Plaintiff has not come to the court with clean hands. It is the settled legal position that an applicant must come with candid facts and " pure breast". If he approaches the court with 'soiled hands', suppress material facts or makes misrepresentation, the court would not consider his case for grant interim relief. Further, an applicant also cannot pick and choose the facts he likes to disclose and the facts he likes to suppress or conceal. It is also acceptable for a court for its own protection must insist that every applicant seeking equitable relief of injunction should come with clean hands and pure heart and neither abuses the process of court nor pollutes the stream of justice.

At this juncture, as the present suit is only for the permanent

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

injunction and declaration and not regarding declaration of any easement rights; I am of the view that prima facie plaintiff should established that he has some legal ownership rights or direct legal interest over the land or property which is under ownership of local authority or under the ownership of some one else. Further, when plaintiff has approached the court for injunction against the defendant to enjoy the benefits of the land adjoining their premises, the plaintiff shall prime facie show their legal rights or title or interest in the property wherein the defendants interfere illegally; which enable the court to believe the plausible case of the plaintiff. In the present case plaintiff has not joined the real owner of the said disputed land. Further, Plaintiff has also not prime facie convince the court regarding existence of easement rights. Plaintiff has not prime-facie convince the Court that there is imminent danger to their legal easement rights. Therefore, Plaintiff cannot be granted any injunction against the present defendant, particularly, when the relief claimed is defective .

At this juncture, at the stage of deciding the application for temporary injunction, the court is not required to go in to the merits of the case in detail but on a careful consideration of the factual position presented in the instant case and looking to the documents produced by both the parties and after going through the arguments advanced by the Ld. Advocate from Plaintiff side, as plaintiff / applicant is failed to established prima facie case, therefore balance of convenience and irreparable loss are not in favour of plaintiff, hence the issues no 1 to 3

Dineshbhai Chhotalal Prajapati V. Parulben Dineshbhai Dabgar.

are held negative and following final order is passed in the interest of justice.

ORDER

- The application at Exh.5 is hereby rejected.
- Parties shall bear their own cost.

Pronounced & signed in the open Court on th of July, 2020.

K H A M B H A T.

Date: .07.2020.

(Neerav R. Vyas)

Additional Sr. Civil Judge & ACJM;
KHAMBHAT.

[UIC01060]