



**IN THE COURT OF 2<sup>nd</sup> ADDITIONAL SENIOR CIVIL JUDGE AT  
MORBI.**

**REGULAR CIVIL SUIT NO.05 OF 2015**

**ORDER BELOW EXHIBIT-05**

1. Read the application & documents produced on record. Heard Ld. Advocate for plaintiff Mr.M.M.Patadia. For defendant Ld. Government Pleader Mr.P.R.Parmar has carried out hearing.
2. Present application is filed by plaintiff seeking order of this Court under Order.39 Rule.1 & 2 of Civil Procedure Code (Herein after referred as C.P.C. for brevity). The property in question is identified as dwelling house, bearing city survey no.3571 of ward no.2 ad-measuring 130.64 square meters. (Herein after referred as "Suit property").
3. By filing this application along-with suit, it is prayed by plaintiff that defendants, his agents, servants, officers & employees may be restrained from carrying out construction by taking support of plaintiff's house wall and may also be restrained from encroaching upon plaintiff's property. It is also prayed that if any construction is carried out by defendants

during pendency of the suit may be ordered to be removed.

4. Notice of this application was served to defendants. Defendant no.1 did not appear before the Court and did not file any written-statement or objections. Defendant no.2 filed written-statement at exhibit-17. In this written-statement plainly facts narrated by the plaintiff are denied. Except accepting duty of defendant no.2 toward stopping illegal construction.
5. Defendant nos. 3 & 4 appear before the Court and filed joined written-statement of plaint as well as this application at exhibit-18. In this written-statement defendant nos. 3 & 4 stated that plaintiff's suit is abuse of process. It is also stated that, defendants are carrying out constitution on their own premises. It is also stated that, they are not encroaching upon plaintiff's property. It is also contended that, construction is being carried out by taking support of common wall of plaintiff and defendants house. It is also stated that as earlier owner denied to sell house to the plaintiff, present suit is filed by the plaintiff with ulterior motive to harass defendants. Facts as to filing suit no.212/2009 is also made one of the ground to attack suit of the plaintiff. It is also stated that as defendants are carrying out

construction on their property and after obtaining permission from the competent authority. Lastly, it is stated that plaintiff's suit is not bona-fide and present application may be rejected.

6. Ld.Advocate for the plaintiff Mr.M.M.Patadia submitted written arguments at exhibit-75. In this arguments it is stated that defendant no.3 & 4 are carrying out construction without permission of defendant no.2. It is also stated that without submitting plan and without following procedure construction is carried out by defendants. He referred to the documents produced on record vide exhibit-04 & 23's list. He referred to the documents produced by defendant vide exhibit-13 & 27's list. It is stated that, at time of injunction application plaintiff is not supposed to prove case by strong proof. He stated that by showing probable case and merits plaintiff can sought for injunction. He stated that ownership of the plaintiff proved by mark-4/1's sale-deed. This sale-deed proves that north side's wall was only of the plaintiff and defendants are not entitle to sue wall situated on north side of the house of plaintiff. It is also stated that despite of suits filed by plaintiff, defendants carried out constitution on the disputed property. Again and again reference

is made to suit no.212/2009. Having reference to the same, it is stated that despite of pending suit constitution is completed by defendants. It is also stated that even other-wise wall considered to be common then also defendant nos.3 to 5 does not get any automatic rights to carry out construction. It is also stated that predecessor in title of the defendant nos.3 to 5 has not followed condition as to carrying out construction upto ground floor only. It is also stated that defendant no.5 is not bona-fide purchaser. Reference is made to sections-26 to 29 of Gujarat Town Planning Act & Urban development Act-1976. He referred to the following judgements to pray grant of injunction order in favour of the plaintiff.

- a) **AIR 1993 SC 276.**
- b) **1990 GLHEL-SC 34537.**
- c) **AIR 1995 Gujarat 60.**
- d) **199(1) G.L.H.812.**
- e) **AIR 1999 MP 205.**
- f) **AIR 1985 Delhi 293.**
- g) **AIR 1991 SC 1453.**
- h) **AIR 1974 SC 2177.**
- i) **1997 GLHEL SC 17206.**
- j) **2009 GLHEL SC 44411.**
- k) **2009 GLHEL SC 47771.**

- l) Dipakkumar Mukherjee Vs. Kolkata Munci. Corporation in Civil Appeal No.7356 of 2012.**
- m) AIR 1990 SC 867.**
- n) 1985 G.L.T.18.**
- o) AIR 1989 Bombay 247.**
- p) AIR 1973 J & K HC 63.**
- q) 1983 G.L.H.632.**
- r) 2012(3) G.L.R.2139.**

**6.2.** Per contra, Ld.Advocate Mr.P.R.Parmar carried arguments of this application. He stated that to have injunction order in his favour, plaintiff was supposed to prove three necessary ingredients namely, Prima-facie case, balance of convenience and irreparable loss/injury. He stated that, plaintiff failed to prove any of the ingredients. He stated that earlier suit filed by the plaintiff is decided on merits by the competent Court. He also submitted that appeal filed against order rejecting plaintiff's injunction application is also dismissed. He also stated that against that order till today further proceedings is carried out by the plaintiff. Thus, he argued that order of trial Court attained finality. He also stated that parties in this suit as well as parties of that suit no.219/2009 are the same. He also argued that cause of action as well as prayer of that suit and present

suit is also same. He also stated that in this suit, plaintiff is not entitled for any relief as sought for. He also argued that defendants are carrying out construction in their property. Hence, plaintiff has no right to stop such construction. He also argued that during pendency of this suit construction is completed. He argued that present application has become meaningless as construction is already completed. Thence, he lastly prayed to reject application. He relied upon following judgements.

**a) AIR 1990 SC 53.**

**b) Shiv kumar Sharma Vs. Santosh Kumari delivered in Civil Appeal No.4341 of 2007.**

**c) 1975 G.L.R. 824.**

**d) AIR 2021 Kerala 2**

**e) AIR 2020 P & H HC 195.**

**f) AIR 2020 Gauhati 33.**

7. Having heard both sides, this Court has gone through record of the suit. Before passing any order in present application it would profitable to state herein that, general proposition of law has been laid down by Hon'ble Supreme Court as well as Hon'ble Gujarat High Court that in order to claim prohibitory (temporary or permanent) injunction, it is necessary for the plaintiff prove prima-facie case, apart from establishing

other two ingredients, namely, balance of convenience and irreparable loss/injury. It required to be noted that, The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests – (i) whether the applicant has a prima facie case; (ii) whether the balance of convenience is in favour of the applicant; and (iii) whether the applicant would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

8. Having above settled principles in mind, this Court has to find that whether plaintiff's prayer falls within ambit under which this Court can extend benefit of order of injunction in favour of plaintiff.

8.1. It is admitted fact on record that plaintiff is owner of the suit property. It is also required to be noted that as per pleadings of plaintiff as well arguments of plaintiff's Advocate, originally defendant nos.3 & 4 were owner of the suit house and now defendant no.5 is owner.

8.2. It is also admitted position that plaintiff's earlier suit no.212/2009 was filed against Nurubhai Ismailbhai and Alibhai

Kasambhai Ghanchi. After that considering subsequent developments Raziyanu Daudbhai Ghanchi, Mohsinbhai Daudbhai Ghanchi, Alibhai Kasambhai Ghanchi came to be added in that suit.

**8.3.** All those persons are also parties of the present suit as defendant nos.3/1 & 4. Thus, parties of this suit as well parties of this are same, except Government and Chief officer of Morbi Wankaner Urban Development Authority.

**8.4.** If reliefs claimed in this suit are identical to the reliefs claimed in earlier suit. It is also required to be noted that Regular civil Suit no.212/2009 came to be rejected. It is also admitted position that order passed below exhibit-05 came to be challenged by plaintiff by filing MCA.No.12/2012. This Misc.Appeal came to be rejected and order of trial Court qua injunction order came to be affirmed.

**8.5.** This suit is based on the same set of facts. Hence, due weightage required to be given such orders which are affirmed by Appellate Courts.

**9.** In this suit plaintiff approached this Court seeking permanent injunction along-with declaratory reliefs. Along-with suit, present application for temporary injunction. In this

suit it is admitted position that, plaintiff as well as defendants ownerships are not dispute. Only dispute is with regard to carrying out construction on the wall situated on north side. Sale-deed executed in favour of plaintiff is produced vide mark-3/1. This sale-deed is relied upon by the plaintiff to claim her rights in survey no.3571's property. On perusal of this sale-deed it appears that there's house of defendants on north side of plaintiff's house. In this sale-deed there is clear mentioning as to wall will be common between plaintiff and defendants house. Even other-wise mark-3/1 clearly proves that north side's Karo was supposed to be common. It also transpires from this document that south side karo upto plinth level was to be considered as common. After that remaining karo of South was also be to be taken carried out as common. Bare perusal of mark-3/1 clearly demonstrates that, plaintiff claims that dispute wall is not common and it's her absolute wall. While document produced by plaintiff herself clearly proves that karo situated on north side of plaintiff's house is in defendants property. It also transpires that it is decided by parties that this also to be considered as common wall. Plaintiff failed to produce any document by which it can be proved that this wall

is not common and only belonging to plaintiff. In this suit plaintiff herself is producing confusing pleadings as to common wall being independent or common wall. Even otherwise documents produced on the record clearly shows that wall is common and not independent of the plaintiff's ownership. Plaintiff's pleading is not supported by document to show that wall was her independent wall.

**10.** It also appears that in this suit whole construction is completed. Photographs of the same are also produced on record. Further, it will be too early to say that construction carried out defendants are illegal. This requires leading of evidence. It is also required to be noted that in this case, plaintiff herself carried out construction by extending this common wall. Now, plaintiff claims that defendants are not entitled to carry on construction by using this wall. Attitude of the plaintiff clearly states that after gaining benefit from this common wall and carrying out construction now plaintiff wants to restrain defendants from carrying out construction. This fact runs against interest of the plaintiff. Even say of the plaintiff with regard to defendants are not having any right to carry on construction by using this wall is not at permissible.

**11.** Further, it also appears that defendants are only taking support of the wall which is already constructed by plaintiff. When wall is proved to be common of plaintiff and defendants, defendants can't be restrained from carrying out construction of the house. Be it noted that by afflux of time, this application has also become infructuous. Because, during pendency of this application, entire construction is completed. Hence, this Court believes that plaintiff has failed to prove first ingredient namely prima-faice case.

**12.** In this case, even otherwise this application is not granted then also plaintiff will not suffer any irreparable loss/injury. Because, if ultimately plaintiff's suit is allowed after full fledged trial, then illegal encroachment if any done by defendants will face the consequences. Same will also apply to the balance of convenience. As entire construction is completed, balance of convenience will not be in favour of the plaintiff.

**13.** For fore-going reasons, this Court believes that, plaintiff has failed to prove any of the ingredients namely, prima-facie case, balance of convenience and irreparable injury/loss. Thence, this Court firmly believes that, this is perfect case in which plaintiff's application seeking

injunction can be rejected. Hence, following order is passed.

**ORDER**

- 1.Present application is hereby rejected.
- 2.Cost of the present application will follow the final outcome of the suit.

**Order signed & pronounced in open court today.**

**Date:02.01.2023**

**(Vikram Karsanbhai Solanki)**

**Morbi.**

**2<sup>nd</sup> Additional Senior Civil Judge.**

**Morbi.**

**Judge Code :- GJ01099**