

IN THE COURT OF IX ADDL.CITY CIVIL AND
SESSIONS JUDGE AT BANGALORE (C.C.H.5)

Dated: This the 7th day of October 2015

Present: Shri Krishnamurthy B.Sangannanavar,
B.Com.LL.B.,(Special)
IX Addl. C.C & S.J, Bangalore.

O.S. NO.3048/2015

Plaintiff: Bansilal L.Asrani, Aged about 76
years, Son of late Lachmandas
P.Asrani, Residing at No.54, Palace
Road, Bangalore 560 052.

-Vs-

Defendants: 1) Mrs. Maya Shamsundar, major,
W/o. Shamsundar L.Asrani
2) Harish S.Asrani, Major, S/o.
Shamsundar L.Asrani
3) Mrs.Pooja H.Asrani, Major, W/o
Harish S.Asrani
4) Suresh S.Asrani, Major, S/o.
Shamsundar L.Asrani
5) Mrs.Arati S.Asrani, Major, W/o.
Suresh S.Asrani

All are residing at No.53, Palace
Road, Bangalore 560 052.

Orders on I.A.No.1 and 2

The plaintiff named above files these two IAs
u/o.39 R.1 & 2 r/w. S.151 of C.P.C. to restrain the

defendants either jointly or severally or anyone acting under or through them from interfering with his peaceful possession and enjoyment of the schedule property and to restrain the defendants from putting up construction on the schedule property in any manner whatsoever and to seek such relief filed affidavit.

2. The plaintiff files these two IAs in his suit filed against defendants for grant of permanent injunction restraining defendants from encroaching or attempting to encroach upon the schedule property and to direct defendants to remove the illegal structure put up on the eastern side of the schedule property.

3. According to plaintiff, he is the absolute owner of the property bearing No.54 derived rights through a partition deed dated 14.12.2004 executed between himself and his brothers. The property bearing No.53 came to the share of Mr.Shamsundar L. Asrani his brother. This is situated on the eastern side of the suit property. 1st defendant is wife of Mr.Shamsundar L. Asrani, 2nd and 4th defendants are his sons, 3rd and 5th defendants are wives of 2nd and 4th defendants.

Property No.53 gifted to them by Mr.Shamsundar L. Asrani and now, they are in possession of property bearing No.53. Further, he has sworn in, has noticed defendants have surreptitiously put up construction on the eastern side of the schedule property encroaching upon portion of property to an extent of 1300 square feet in the guise of developing their property and they are also making efforts to put up further construction on the schedule property and in this regard the defendants have failed to resolve the issue and persisted their illegal actions, as such he is left with no other alternative, on 3.11.2014 legal notice caused on defendants calling them to remove illegal structure put up by them on the eastern side of the schedule property and to refrain from encroaching or attempting to encroach upon the schedule property and an interim relief to protect the schedule property intact filed these two IAs. The plaintiff in support of these IA's has produced few documents and photographs for perusal of the court.

4. On the contrary, defendants put their appearance through their learned counsel, submitted their objection statement and submitted

written statement along with documents and photographs contending that the description of the schedule property is incorrect. There was an oral partition of the composite properties bearing No.53 and 54. The eastern portion of the said composite properties consisting of main residential building and the said set back of 5 feet on the west and the open parts around the said residential building fell to the share of Mr.Shamsundar L. Asrani. Subsequent to the oral partition, plaintiff got plan sanctioned constructed a building in the said western portion during 1998-2000 and started to live in the said building constructed in the western portion of the composite properties. They deny deriving of rights by plaintiff through partition deed dated 14.12.2004. The defendants have not violated rights of the plaintiff. They never interfered with the possession and enjoyment of the plaintiff's property. Mr.Lachmandas P. Asrani was a petty businessman had 3 sons they are Shamsundar, Bansilal and Ramesh respectively. Plaintiff is a chartered accountant by profession. Mr.Ramesh Asrani moved to Chennai in 1970 and continued his business set up at Chennai by Mr.Shamsundar L. Asrani. The plaintiff and Mr.Ramesh were provided with good education, as

they were good at academics pursued higher education and Mr.Shamsundar L. Asrani remained a business man. The composite premises No.53 and 54 consisted of dwelling house, out-houses, garage and open space. Since 20 years, the family of Shamsundar residing separately. During 1996, plaintiff mooted the idea that he be given a portion which is to the west of the dwelling house on which separate house could be built as in the house in which he was living was a very old construction and he wants to live in a newly built house to suit his professional standards for which Mr.Shamsundar L. Asrani acceded and accordingly, oral partition took place in 1996 and in the said oral partition, portion of the western side of dwelling house setting aside a space of 5 feet East to West, running from southern edge to northern edge in between the dwelling house and the western portion, as a lung space of the home of Mr.Shamsundar L. Asrani was given to the plaintiff. Mr.Shamsundar also provided substantial money to plaintiff to build a house on the said western portion out of the filial affection. The plaintiff built a house there, moved out of the 1st floor of old and original dwelling house to the new house in 2000, started living there with his family

in the new building constructed on the western portion. The plaintiff also left a lung space of about 10 feet and constructed a compound wall bifurcating the properties. There was no joint family nucleus or joint ownership after partition. In 2004, plaintiff advised Mr.Ramesh Asrani had already expressed his willingness not to take any share and further, it would be better to have a written record of the relinquishment of Ramesh and that he will get a document done. Mr.Shamsundar L.Asrani blindly agreed to his suggestion as he always agreed to his suggestions and was guided by his advice being learned brother. The plaintiff got prepared a document by his regular legal consultants and advised Mr.Shamsundar L.Asrani and Ramesh to sign on the same. Believing his words, virtually they signed on the dotted lines on 14.12.2004. The partition deed dated 14.12.2004 is the result of the misuse of trust and confidence of Mr.Shamsundar L.Asrani and his children reposed to him. It is not a voluntary act.

The defendants have not added a single wall to the old house in which they are dwelling since more than 40 years. The claim of plaintiff that defendants are surreptitiously encroached upon

1300 square feet of plaintiff's property is utterly false. The defendants are residing in their dwelling house require repairs as there is water seepage from the roof due to rains and the electric lines are also worn out and there is danger of electric mishap to the defendants. The sanitary and water lines also require immediate repairs as they are in precarious conditions. In order to effectively use and enjoy the dwelling house and to stay in the dwelling house without any damage to human life and safety, repairs and upkeep are very much necessary for more than 50 years of old building. Further, they have submitted that plaintiff has not made out a prima facie case in his favour much less balance of convenience and the irreparable loss which would be caused to him by not granting temporary injunction as prayed. They also placed few documents and photographs for perusal of the court consider the existing situation of the property bearing 53, 54 and the disputed portion of the property.

5. In view of the rival contentions of the learned counsels for plaintiff and defendants, now the following points arise for consideration of this court:

(1) Whether plaintiff has made out a prima facie case to seek interim reliefs as prayed in I.A.Nos.1 and 2, in respect of disputed 1300 square feet of property alleged to have been encroached by defendants surreptitiously?

(2) Who would be put to irreparable loss or legal injury in case of grant or refusal of temporary injunction as prayed in the IAs?

(3) In whose favour, balance of convenience is tilting?

(4) What order?

6. The findings on the above points are recorded as under:

Point Nos.1 to 3: Recorded against plaintiff since recorded undertaking given by the defendants in writing.

Point No.4 : As per final order, for the following:

REASONS

7. **Point Nos.1 to 3:** From the pleadings and the contents of the affidavits sworn in by the parties to the suit, this Court would like to make mention of the fact that schedule property, as described by the plaintiff is originally bearing site

No.2-B, Plot No.17, presently bearing Corporation No.54, Palace Road, Bangalore-560 001 admeasuring on the East 100', on the west 100', on the North 84' and on the South 68', totally measuring 7600 square feet or 844.44 sq. yards, together with a residential house and bounded on the East by Plot No.53, West by Property of V.C.Mudaliar, North by Plot No.55, South by Plot No.52 and for this property, he has sought for grant of permanent injunction restraining defendants from interfering with his peaceful possession and enjoyment of the property, further he also sought for mandatory injunction directing defendants to remove the illegal structure put up on the eastern side of the schedule property.

8. In order to seek such reliefs in respect of the above such property, in plaint para-5, he has pleaded, that he has noticed defendants have surreptitiously put up construction on the eastern side of the schedule property, encroaching upon his property to an extent of about 1300 square feet of the schedule property, in the guise of developing their property. If we examine plaint, could found cause of action to sue defendants for the relief of permanent injunction, mandatory injunction arose

on 3.11.2014 when he got issued a legal notice to the defendants, who have attempted to disturb his possession and attempt to put up illegal construction on the schedule property and as on 10.11.2014 when defendants got issued a frivolous reply.

9. Thus, to seek reliefs, foundation could be the above pleadings and he similarly sworn in his affidavit accompanying the I.As in the matters to restrain defendants stop any type of constructions on the disputed property. If we examine valuation slip enclosed to the plaint, could see about valuation of the suit on Rs.2,000/- and he has paid court fee u/s.26(c), at Rs.25/- each on each of the reliefs, namely on respect of the permanent injunction and another in respect of the mandatory injunction and it is as per Article 1(i) of schedule-1 of K.C.F. & S.V.Act, 1958. At the very outset since we are at the initial stage and not that the defendants have encroached the said property had encroached during pendency of the suit proceedings as such, court has to observe here that for recovery of possession of 1300 square feet of property alleged to have been encroached by defendants, required to pay court fee on market

value or at least guideline value fixed by the government and certainly not at Rs.1000/- as if for the relief of injunction only at Rs.25/-. No doubt, to observe here that matter of court fee entirely different and it is open to the plaintiff to pay and seek relief, however under such guise in the opinion of this court that in the present suit when plaintiff is definite that the defendants have encroached upon the disputed property of 1300 sq.ft. of area belongs to him and when he has sought for mandatory injunction which in the opinion of the court is nothing but recovery of possession of the said property as such, he cannot seek interim relief in aid to the final relief. In other words to say that when he has not paid court fee on the final relief sought for recovery of possession cannot seek interim relief.

10. In the above such view, now this court has to examine, whether such relief could be granted in favour of the plaintiff at this stage in appreciation of contentions of learned counsels on record for the parties.

11. Admittedly, the plaintiff is not in possession of the disputed 1300 sq.ft of property

and as on the date of suit same is possessed by defendants 1 to 5. They are none other wife of his elder brother Shamsundar, his sons and their wives, which also not in dispute. According to plaintiff, he is absolute owner to property bearing No.54 admeasuring 7600 square feet and he derived title to the said property through registered partition deed dated 14.12.2004. In this regard, learned counsel for plaintiff strongly contends that so far this partition deed is not challenged either by Shamsundar or Ramesh or defendants herein and this 1300 square feet is part of schedule property. To find support of such contentions learned counsel for the plaintiff contends that as the plaintiff has placed best evidence before the court and contends that very document itself is placed before the court which excludes the secondary evidence. On the contrary, learned counsel for the defendants submit that how a property which is situate adjacent to Mount Carmel College in Bangalore city, that too when the plaintiff being neighbour to defendants could surreptitiously encroached in the guise of development of their property and contends that the alleged encroachment is not one or two foot but to an extent of 1300 square feet and submits that

between property of plaintiff and defendants, a big compound wall is built and the width of the compound wall is one and half feet, would show theory of surreptitious encroachment is nothing but an invention of cause for the suit to sue the defendants. The most important factor to be noted here that the plaintiff either in his plaint or in his affidavit has not specified as to how these defendants encroached upon 1300 square feet. Further not pleaded as to how the compound wall lying in between these two properties was built. Even he has not pleaded that the said compound wall which could be seen from the photographs is newly built and not pleaded that the house in which the defendants are residing is a new house or an old one. It is therefore, learned counsel for the defendants is right in contending that only after issuance of legal notice, plaintiff has developed this case and not on the alleged encroachment. He contends that there is no encroachment as such, plaintiff has not mentioned any date either in the plaint or in his affidavit would be decide only during the course of trial in case of the plaintiff paying court fee on the disputed property.

12. Learned Counsel for the defendants submits that it was a composite property and they did not derive title under partition deed but much earlier to the alleged partition deed, as they derived the composite property from erstwhile owners. However, the property of plaintiff is new one, which could be making out from the width of the compound wall. No doubt, the court can see such compound wall from photographs produced. He submits that it was an old construction of 40 years and the defendants are residing in the said property. It is to be noted here that all such submissions would be the matter of trial, as the case has to be tried by the court for the relief sought by the plaintiff subject to observation made above as the payment of the court fee.

13. On the contrary, learned counsel for plaintiff repeatedly, submits that plaintiff derived his right over schedule property only through partition deed and the plaintiff has produced the same before the court for perusal and contends that so far, none of the parties questioned the validity of the deed suffice to hold that plaintiff has a case to go to trial would be acceptable only after payment of the court fee as stated above. It is

submitted by learned counsel for defendants that plaintiff is only the learned member of their family and still defendants have high respect for him as he is a chartered accountant and they always respect him and do respect. Further, submits that they always obeyed his advice being learned member and he played fraud upon them, as he has made to believe to his words signing in a dotted place marked in the document. He contends that the partition deed is nothing but created and manipulated, by the plaintiff for his wrongful gain and to cause wrongful loss to the defendants.

14. If we examine positive photographs produced along with the statement of objections, we could see an old construction and a big compound wall, having width of one and half feet, prima facie show about bifurcating the houses of plaintiff and defendants respectively. If we see the photos could see the property of plaintiff, lung space, boundary wall separating two houses and openable manhole for drain from the said house and see sewerage of house belonging to defendants. Further we could also see house property of defendants, gate belonging to the residential house of plaintiff which is erected on

the wall of the houses of the defendants, electric panel and meter of house belonging to defendants on the western wall of the property which could be said of the decade years of age. According to defendants, meters were installed over 30 years ago, which would be the matter of trial. Further the defendants have placed photos to show as to how repair works are urgently required for their house. They have shown as to how close up of water seepage and shown about undertaking of repair works by the defendants in the said space in their house.

15. The most important factor to be noted here that defendants filed a memo signed by all the defendants on 6.6.2015 which is recorded in the order sheet of the suit proceedings, wherein defendants have undertaken that although they do not agree to any of the claims made by the plaintiff in their plaint or in the IA or affidavit, in order to have the real issues to be resolved, they undertake not to put up any construction in the area of 1300 square feet which is the western portion of the defendants property. In the said 1300 square feet, there is an open passage and western portion of the dwelling house. They have undertaken not to

put up any structure on the said western portion of the dwelling house. However, defendants will undertake only repairs of the seeping roof, relay worn out electricity, water and sanitary lines, replaster the walls in the said western portion of the dwelling house. With regard to the remaining part of the defendants' property, there is no dispute and the same is not the subject matter of the suit or any other litigation. Further, they have also submitted photographs evidencing the present situation and the fact that dwelling houses require urgent repairs to make habitable. They also undertaken to produce the photographs, soon after the carrying out of the repairs, so as to assure the Court that they have not put up any construction on the said 1300 square feet area on the western portion of the dwelling house. It is therefore, the Court has recorded their undertaking given by defendants 1 to 5, which would be sufficient to keep the property intact so as to go to trial subject to the observation made above as to the payment of court fee. In other words to say what more require for the plaintiff to seek the reliefs, when the defendants themselves have undertaken in writing as stated above, to seek for recovery of possession

of the alleged encroachment of his property from the defendants.

16. In the above such circumstances, in view of the relief sought in the main suit and similar such relief sought as an interim relief by plaintiff without seeking relief of recovery of possession by proper valuation and payment of court fee thereon, this Court is of the opinion that undertaking given by defendants being recorded by the Court would meet the ends of justice and it is not necessary to restrain defendants from putting up construction in their property other than the property admeasuring 1300 square feet which according to plaintiff is disputed property in view of their undertaking signed by defendants in writing and the plaintiff herein under the guise of this suit cannot request the Court to direct them to maintain status-quo or restrain the defendants not to put up any construction either repair works or alike in their house property and closed property and if it would be restrained certainly it would put the defendants to suffer irreparable loss and legal injury which cannot be compensated in terms of money as they are residing in the said house. On the contrary, no legal injury or harm would be

cause to plaintiff by refusing to grant interim order as prayed in the I.As, since defendants have undertaken not to put up any construction in disputed property as per their written undertaking given to the court is now become matter of record in the judicial proceedings. In this view of the matter, this court could not find any factual or legal substance in any of the contentions urged by learned counsel for the plaintiff; as such findings on all these points would be record without saying against plaintiff.

17. **Point No.4:** In view of the above findings and in the result, this court passes the following:

O R D E R

(a) I.A. Nos.1 & 2 filed by plaintiff u/o.39 R.1 & 2 r/w. S.151 of C.P.C. are hereby disposed of in view of recording written undertaking signed by defendants given to the Court dated 06.06.2015.

(b) Cost of these IAs shall be the cost in the cause.

(Dictated to the Judgment Writer, transcribed by her, corrected and then pronounced by me in the open court, on this the 7th day of October 2015).

(Krishnamurthy B.Sangannanavar)
IX Addl. City Civil & Sessions
Judge, Bangalore.

