

KABG040010462020



**IN THE COURT OF THE I ADDITIONAL CIVIL JUDGE AND
JMFC, BELAGAVI.**

PRESENT: SMT. SHARMILA KAMATH .K., B.A. LL.M.,
I ADDL. CIVIL JUDGE & JMFC.,
BELAGAVI.

DATED THIS 25th DAY OF JULY 2023

ORIGINAL SUIT No:522-2020

Shri. Rajendra S/o. Bharamanna Narasagouda
Age: 55 years, Occ: Agriculture,
R/o. 123, Madali Galli, Majagaon
Belagavi.

..... Plaintiff

(By Shri. Amar A. Janagouda, Advocate)

V/s.

1. Mr. Devendra S/o. Neminath Narasagouda,
Age: 66 years, Occ: Agriculture,
R/o.123/1, Majagaon,
Tal & Dist:Belagavi.
2. Mr. Bahubali S/o. Ashok Narasagouda
Age: 38 years, Occ: Agriculture,
R/o. 123/1, Majagaon,
Tal & Dist:Belagavi.

..... Defendants

(By Shri. V. S. Mulimani, Advocate)

ORDERS ON I.A.No.V

The plaintiff has filed I.A.No.V under Order XXXIX Rule 1
and 2 by seeking temporary injunction against defendants from

encroaching further construction on the eastern and western side of suit property at the backside of suit property till disposal of suit.

2. In the affidavit filed in support of I.A.No.V the plaintiff submitted that he is in possession and enjoyment of suit schedule property in house No.123 measuring East-West 16.6 feet North-South 160 feet. The defendants are putting up permanent structure by encroaching upon suit schedule property towards eastern side and western side at the back side of suit property. The defendants removed old structure at the eastern side and under taken that they will not construct any structure by encroaching upon suit property and will not cause any damage to the property of plaintiff. The defendants undertook to take necessary building permission from competent authority. The defendant encroached upon the suit schedule property and put up wall without leaving open space/set back belonging to plaintiff. The defendant not constructed the building as per building permission. The defendants caused infringement of easementary rights of air and light by the plaintiff. The defendant closed the existing the window of

plaintiff's house and started the construction work without leaving any set back area. The defendant by taking undue advantage civil vacation trying grab the property of plaintiff in the open space. If the defendants succeeds in his illegal construction he will be put greater hardship. Hence prays to allow the I.A No.V

3. Per contra, defendants filed objection by denying the claim of plaintiff and contented that the suit of plaintiff itself is not maintainable. It is submitted the proposed construction of the house in backyard in property bearing 123/1 is a open land. It is denied regarding existence of old structure and demolition by defendants. It is denied regrading encroachment by defendants towards eastern and western side. The property No.123/1 is located on the western side of suit schedule property hence the question of encroaching on the eastern side does not arise. The plaintiff by making false allegation filed this application with an intention to harass the defendants. The defendants have made construction by leaving necessary set back and there is no encroachment to western side as well as eastern side of suit schedule property. The proposed construction is going on the

property No.123/1 is located on western side of suit property and then the question of closing existing window of plaintiff's house and causing infringement of right of air and light does not arise. Hence prays to reject the I.A. No.V.

4. Heard on both side.

5. The following points do arise for the consideration.

POINT No.1: Whether the plaintiff has made out prima-facie case to grant temporary injunction as prayed in I.A. No.V?

POINT No.2: Whether the balance of convenience lies in favour of plaintiff?

POINT No.3: Whether the plaintiff will be put to great hardship if temporary injunction is not granted as prayed in I.A.No.V?

POINT No.4: What order?

6. My answer to the above points are:

POINT No.1: In the Negative

POINT No.2: In the Negative

POINT No.3: In the Negative

POINT No.4: As Per final order for the following:

:REASONS:

7. POINT No.1 to 3: Inorder to avoid the repetition of facts point No.1 to 3 are taken together for discussion. It is the case of the plaintiff that he is possession and enjoyment of property bearing No.123 measuring East-West 16.6 feet and North-South 160 feet. The defendants being adjoining owner under took to construct building in the backyard of suit property. It is the case of plaintiff that at the time removing old structure at eastern side the defendants under taken that they will not construct any structure encroaching upon the suit property not cause damage to the wall or property of plaintiff. It is further contention of plaintiff that the defendant after obtaining permission from the competent authority have constructed wall and plaintiff allowed the same. It is submitted that the defendant by violating all the promises and assurance made by them at the time of removing old house encroached upon the suit property and put up construction.

8. It is settled principle of law that discretion of the Court while granting order of temporary injunction in favour of the plaintiff must meet following requirements:

(i) Existence of prima-facie as pleaded necessitating protection of rights of issue of temporary injunction.

(ii) When the need for protection of plaintiffs rights is compared with or weighed against the need for protection of defendants rights or material infringement of defendants rights, the balance of convenience in favour of the plaintiffs or defendants.

(iii) Clear possibility of irreparable injury being caused to the plaintiffs if the temporary injunction is not granted. In addition the temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiffs conduct is free from blame and he approaches the Court with clean hands.

9. Inorder to show existence of wall to the eastern side of plaintiff, the plaintiff has not produced any document. The extent of suit schedule property East-West 16.6 feet and North-South 160 feet. As per the boundaries mentioned in the plaint the towards the eastern and western side the property of defendants situated. It is the specific contention of plaintiff that

defendants by encroaching on the eastern side and on the western side of suit schedule property have illegally put up construction. Admittedly on the eastern-side and western side of suit schedule property the properties of defendants situated. As per schedule of plaint towards west the property of defendants bearing No.123/1 is situated and towards eastern side property of defendants bearing No.122 is situated. It is contended in the plaint that the defendants without leaving 3 feet setback towards eastern-side trying to construct structure by demolishing the eastern wall of suit schedule property by encroaching upon window and setback area. It is pertinent to note that the plaintiff by mentioning same grounds of this I.A filed I.A No.1 but not stressed on I.A No.1 through this court land P/E and when the case posted for cross examination of PW-1 he come up with this I.A by advancing the case. It is not the case of plaintiff that defendants constructing their building without any permission. It is pertinent to note that on perusal of evidence of PW-1 it is pertinent to note that he has not got marked any documents. On perusal of documents produced by plaintiff along with plaint the plaintiff produced property tax

assessment of property No.123 dated 11.09.2019 wherein the extent of plot and constructed area is mentioned as 1200 sq.ft., and no vacant land left. Admittedly 123 is property of plaintiff and as per property extract produced by plaintiff no set back left by plaintiff.

10. The plaintiff counsel while argument in order to show the extent of suit schedule property relied on gift deed dated 02.07.1961 but said gift deed is not got marked during the evidence of PW-1 only to extent of prima-facie case on perusal of gift deed the extent mentioned in gift deed and extent mentioned in the schedule of property are one and the same. On perusal of gift deed and on perusal of property extract produced by plaintiff there is variation so as to extent of measurement of property No.123. In order to grant temporary injunction as prayed in I.A No.V the plaintiff has to prove prima-facie case regarding encroachment. The plaintiff not pleaded what is the extent of encroachment made by the defendant. On perusal of affidavit filed in support of I.A there is no specific mention so as to which of the defendant out of 2 defendants made an

encroachment and construction as alleged by the plaintiff. It is pleaded in the plaint that plaintiff approached City Corporation, Belagavi on 19.03.2020 and as the City Corporation not taken any action against defendant. It is not the case of the plaintiff that again he approached City Corporation, Belagavi for alleged construction by violating building permission if any by the defendants. On perusal of contents of affidavit, objections raised by the defendants and material available on record the balance of convenience at this juncture tilts towards the defendants. The plaintiff at this juncture failed to made out prima-facie case regarding encroachment. As per prayer column there was already wall towards the eastern-side of suit schedule property and plaintiff sought for demolition of wall existing towards eastern-side of suit schedule property. It is the case of the plaintiff as per affidavit sworn to the I.A that there is construction towards eastern and western side of suit property. If the temporary injunction is not granted no hardship would be caused to plaintiff rather it is defendants who will suffer irreparable loss if temporary injunction is granted. Hence I answer point No.1 to 3 in the Negative.

11. POINT No.4:- It is made it clear that any observations made herein above in point No.1 to 3 are meant for disposal of this I.A only and has no bearing on the merits of the suit. The plaintiff failed to establish prima-facie case, balance of convenience and irreparable loss if temporary injunction is not granted. In the result, I proceed to pass the following:

:ORDER:

The I.A.No.V filed by the plaintiff under Order XXXIX Rule 1 and 2 R/w Section 151 of C.P.C is hereby rejected.

No order as to cost.

(Dictated to the Stenographer directly on computer, typed by her, corrected by me and then pronounced in the open Court on this **25th** day of **July 2023**)

Sd/-

(Sharmila Kamath. K.)
I Addl. Civil Judge & JMFC,
Belagavi.