

**IN THE COURT OF CIVIL JUDGE & JMFC
HUKKERI**

**PRESENT; SMT. BHAGYAMMA
B.COM. LLB.,
CIVIL JUDGE & JMFC, HUKKERI.
O.S.No. 17/2019**

Dated this 24th day of June 2019

1. Sri. Bashiraheamd S/o Abdulazim Attar and others
.... Plaintiffs

V/s

1. Sri. Gulam S/o Tavkalsaheb Attar and others.
..... Defendants

PARTIES TO I.A.NO.I

1. Sri. Bashiraheamd S/o Abdulazim Attar and others
.... Plaintiffs

V/s

1. Sri. Gulam S/o Tavkalsaheb Attar and others.
..... Defendants

ORDERS ON I.A.NO.I

The I.A. No.I filed by the plaintiffs U/O.XXXIX Rule 1 and 2 r/w Sec. 151 of CPC against the defendants for grant of temporary injunction restraining the defendant Nos.1 to 3, their agents, servants or any other persons on their behalf from raising further construction on the Northern wall of the suit property and

fixing the windows, doors without leaving proper set back as per law and extend their slab by encroaching over the suit property till the disposal of suit.

2. In the sworn affidavit annexed with IA No.I, the plaintiff No.1 stated that this affidavit filed by him is for himself and on behalf of defendant Nos. 2 to 7. Further he has stated that they have filed this suit against the defendants for seeking the relief of declaration and consequential relief of permanent and mandatory injunction in respect of suit property. The suit property is the Southern side small passage to an extent East-west:50 ft, South-North:5 feet which is part and parcel of VPC No.1162 and VPC No.1163 situated at Pacchapur village, Tq: Hukkeri. Further the plaintiff No.1 contended that the defendant Nos.1 to 3 fixed the windows and doors, extend their slab over the suit property without permission of concerned authority to put up the construction over the VPC No.1164 and they have not ready to give proper set back. The suit property is the exclusively belongs to the plaintiffs, the defendants have no manner of right, title and interest over it. In spite of several requests and submitted objections before the PDO Pachapur, the defendants have not heeded their request and giving threats that they will raise their

construction by encroaching the suit property. Further the plaintiff No.1 asserted that if the ad-interim injunction as prayed in the accompanying application is granted, no loss or hardship will be caused to the defendants, otherwise they will be put great loss and hardship. Hence, the plaintiff filed suit along with IA No.I for grant of temporary injunction against the defendants.

3. On the other hand the defendants who appeared through their counsel filed objection to IA No.I stating that application is not maintainable either in law or on facts. In the objection they denied the entire contents of affidavit and application. They have contended that they are owners in possession of VPC No.1164 towards northern side, they have purchased the property to an extent of 40X6 feet passage in which they used it as road. The said property is part and parcel of VPC No.1164. The boundaries of said passage/road as east by- Government road, west by- the property of defendants at VPC No.1066, north by - VPC No.1162 and 1163, South by - VPC No. 1164 of defendants property. The plaintiffs have no manner of right in the said passage. That the defendants have used the said passage/road to go to VPC

No.1066 to VPC No.1164 and also to provision shop. Except defendants, nobody has right in the said property. Earlier suit in OS No.210/1949 adjudicated in respect of VPC No.1164 before the Civil Judge Court, Hukkeri, which came to be disposed by virtue of compromise. In the said suit, the father of defendant No.1 namely, Tavakalsaheb Hameedsahed Attar was defendant and one Shankar Balaji Prabhu was plaintiff. After the disposal of said suit, the present defendants purchased VPC No.1164, since then the defendants used the passage as road. Despite of it, the plaintiffs caused obstruction to the use of said passage to the defendants. When the partition took place on 02-02-1902 through registered Deed between the grand father of plaintiffs and his brothers, the plaintiffs' grand father was party No.6. In the said partition, it was shown that VPC No.1164 exists towards southern side of VPC No.1162 and 1163 since the passage is part and parcel of VPC No.1164 and the plaintiffs are never in possession of said property. That the defendants constructed red tiled house and complex

situated at VPC No.1164 and constructed new building in the name of defendant Nos.2 and 3 by obtaining grant under Rajiv Gandhi Grameen Vasati scheme. When they were constructed the said building, they used the passage/road to go to their house situated at VPC No.1066. Except said passage/road, there is no other way to go to there.

4. When such being the facts, the defendants filed another suit at OS No.250/2018 before this court against this present plaintiffs and obtained exparte temporary injunction on 19-12-2018 from restraining them to the use of passage/road situated adjacent to VPC No.1164 till the disposal of said suit. Then there is no question arise in putting door windows or slabs by encroaching VPC No.1162 and 1163 of defendants. The plaintiffs suppressed the true facts and filed this suit along with IA in order to harass the defendants. The plaintiffs have not made out ground to grant temporary injunction in their favour. There is no balance of convenience in their favour. Hence, the defendants prayed to dismiss the IA No.I with cost.

5. Heard and perused.
6. The points that arise for my consideration are :
 - 1) Whether the plaintiffs have made out prima-facie case to grant of temporary injunction as prayed in I.A.No-I?
 - 2) In whose favour the balance of convenience lies ?
 - 3) Whether the plaintiff will be put to irreparable loss or injury, if temporary injunction is not granted ?
 - 4) What order ?
7. My findings to the aforesaid points are as below:
 - Point No.1 : In the Negative
 - Point No.2 : In favour of defendants
 - Point No.3 : In the partly negative
 - Point No.4 : As per final order for the following;

REASONS

8. **POINT No.1 :**

The plaintiffs have filed this present suit along with this IA for the relief of declaration and consequential relief of permanent and mandatory injunction in respect of suit property from raising further construction on the northern wall of their property, fixing windows without living proper set back and also extending their

slab by encroaching said schedule property. Per contra, the defendants raised objection by resisting the application stating about injunction order in respect of their property against the plaintiffs already granted in OS No.250/2018.

9. The learned counsel for plaintiffs argued that the plaintiffs purchased the property through registered deed, the defendants have tried to put up door, windows and slab towards northern side wall, though they have right over the said property. The plaintiffs and their ancestral are owners in possession of said passage which was mentioned in vatni patra at page No.6, para No.6. The defendants have not filed any application to vacate Ex-parte temporary injunction order already granted by this court. In the earlier suit in OS No.210/1949 either plaintiffs or their ancestral are not parties. Hence, they prayed to allow the application. In inter alia, the learned counsel for defendants canvassed their arguments that the suit schedule properties are at VPC No.1162 and 1163 of Paschapur village and also property to an extent of 50X5 feet, they have shown the boundaries wrongly. According to them it is part and parcel of VPC No.1162 and 1163. Whereas the defendants contended that passage belongs to them only. Hence, they prayed to dismiss the

application.

10. In support of rival contentions, the plaintiffs produced documents such as Sale Deeds, property certificates, photos, CD plate, vatni tippani, objection submitted by the plaintiffs before PDO of panchayat etc. Per contra, the counsel for defendants produced the documents such as copy of order passed in OS No. 250/2018 on IA No.I, original Sale Deed in respect of VPC No.1164, grant certificate issued in favour of defendant Nos.2 and 3, property certificates issued by PDO Paschapur village of VPC No.1164 and 1066, registered partition deed and its translation copy, photos, CD and receipts.

11. On careful pleadings of the parties as asserted in the affidavit and objection statement, this suit is for the relief of declaration, permanent injunction and mandatory injunction in respect of passage of 50X5 situated towards northern side of their property at VPC No.1162 and 1163. whereas the defendants resisted the same. On going through the documents produced by both side, they reveal the passage i.e. small road towards northern side. It is relevant to note that there is no dispute in respect of title and possession of plaintiffs' in respect of

properties at VPC No.1162, 1163 and also defendants properties at V.P.C No.1066 and 1164. But the only controversy between the parties is that the passage of 40X5 exists in between their properties. The Sale Deed of plaintiff side disclose the existence of passage towards the southern side of VPC No.1162 and 1163. whereas the sale of defendants side demonstrate the passage at northern side of VPC No.1164. It is not in dispute that the defendants have constructing building by obtaining grant under Rajeev Gandhi Vasati Scheme. The defendant No.2 and 3 obtained the grant to construct this building. In the partition deed, it had shown the passage towards southern side of VPC No.1162 and 1163. Both side parties are claiming title on the said passage by stating the purchase of it. It is specific contention of plaintiffs that defendants constructing building by encroaching the passage without leaving set back. It is important to note, when the defendants are constructing building under Government scheme, each and every stage observed and verified by the authority to know whether there is violation or not in constructing the same. As stated by the plaintiffs themselves, the defendants almost completed the construction. Till then they kept silent. If at all any right over the property, nothing prevented the plaintiffs to raise

objection at earliest point of time. But they have not done so. More importantly, the present suit filed after filing of OS No.250/2018 by the defendants against these plaintiffs for the relief of permanent injunction. Whereas these plaintiffs have not opted to file any objection to IA, inspite they put their appearance through the counsel. Hence, order passed in favour of plaintiffs in that suit by granting temporary injunction order against these plaintiffs on 19-12-2008. The present suit filed after obtaining temporary injunction order in the said suit and the plaintiffs suppressed material facts with respect to pendency of suit in OS No.250/2018 against them in relating to this suit schedule property. Certainly, the defendants have not filed any application to vacate temporary injunction order already granted by this court. At the same time it could not be ignored the suppression of material facts by the plaintiffs in obtaining temporary injunction in this suit. Even though injunction granted, the same may be refused and it cannot be granted to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings as contemplated under Sec.41 of Specific Relief Act. Hence, in this

case I am of the opinion that the prima-facie case is in favour of defendants, otherwise it would cause irreparable loss or injury to the defendants and it cannot be compensated in terms of money, particularly when construction work is on the verge of completion. Hence, I constrained to answered the point Nos. 1 in the negative.

12. POINT NOs.2 and 3 :

As, these points are interconnected to each other, I have dealt together in order to avoid repetition.

In order to get equitable relief, the parties must prove prima-facie case first and they must approached the court with clean hands. For the reasons and conclusions arrived in point No.1, it is held that the plaintiffs have not made out prima facie case for grant of temporary injunction. Even the plaintiffs made out prima casie case, the court has to satisfy that non-interference by the would result in "irreparable loss". Irreparable injury does not mean that there must be no physical possibility of repairing the injury. But it means only that the injury must be a material one, namely, one cannot be adequately compensated by way of damages. Here the conduct of plaintiffs

should be considered. It is no doubt that plaintiffs produced sale deed of property, the same could be considered at full-fledged trial. Under fact and circumstances, let to consider the balance of inconvenience lies in whose favour in this case, if temporary injunction order is granted. As I have already adverted, balance of inconvenience caused to defendants if temporary injunction order is granted. On the other hand, no hardship and inconvenience caused to the plaintiffs compared to defendants. Therefore, I constrained to answer point No.2 in favour of defendants and point No.3 in the Negative.

13. **POINT NO.4 :** For the foregoing reasons and discussion made in point No.1 to 3, I proceed to pass the following order.

ORDER

The I.A.No.I filed by the plaintiffs
U/O.XXXIX Rule 1 and 2 r/w 151 of CPC is
hereby dismissed.

(Dictated to the stenographer, typed by her on the computer, corrected by me
and then pronounced in open court on this the 24th of June 2019)

**(SMT. BHAGYAMMA)
CIVIL JUDGE & JMFC.
HUKKERI.**