

**IN THE COURT OF CIVIL JUDGE & J.M.F.C.,
AT SANDUR.**

Dated this the 23rd day of November, 2022.

**Present : Sri. Devaraddy, B.A., LL.B, LL.M.
Civil Judge & JMFC., Sandur.**

O.S. No. 54/2019.

Plaintiff : Masti Narasamma.

V/S

Defendant : Gangamma.

I.A. No. IV

**Applicant/
Defendant** : Gangamma.

(By Sri. S.U.N. Advocate)

V/S

**Opponent/
Plaintiff** : Masti Narasamma.

(By Sri. G.M Advocate)

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ORDERS ON I.A. No. IV

The counsel for defendant filed IA No.IV under Order XXXIX Rule 4 R/W/S 151 of CPC, to set aside the injunction order passed by this court dated 30.05.2019.

2. The said application filed by accompanying affidavit and in the affidavit it is stated that, plaintiff filed the suit against her for the relief of permanent injunction.

The plaintiff also has filed I.A. No. II under Order 39 Rule 1 and 2 R/w Sec. 151 of C.P.C. to grant the temporary injunction order and it was allowed by this court dated 30.05.2019. Further stated that the defendant has constructed house by obtaining license from the concerned authority and she has also invested huge amount of Rs.10,00,000/- by borrowing hand loan from various persons for the purpose of purchasing the sand and cement. The plaintiff all of a sudden filed this suit and obtained exparte order dated 30.05.2019 without challenging the license which is obtained by her. Hence the suit filed by the plaintiff is hit by Section 9 of CPC.

3. Further stated that plaintiff sought the relief of access air and light but there is no specific relief of easementary right and to leave the setback of 3 feet over the boundary it is barred by law which is envisaged under the Municipality Act. Further stated that the defendant constructing the house within the area which is mentioned

in the license as such, until and unless exhausting his remedy under the Municipality Act, the plaintiff cannot approach this court. It is well settled principle of law that what can not do directly can not do indirectly so the plaintiff cannot directly exercise his right over before the Municipality, he can exercise his rights before this court for the relief of mandatory injunction to leave the setback of 3 feet. Further the plaintiff not mentioned the clear description of the suit property. Hence prays to set aside the injunction order dated 30.05.2019 passed by this court on I.A. No. II.

4. The counsel for plaintiff filed objection by denying the averments of the said application. Further submits that the application filed by the defendant is not maintainable either in law or on facts. The plaintiff is the absolute owner of the suit property, the present suit filed against the defendant for the relief of permanent injunction in respect of suit schedule property. The

plaintiff also filed interim application under Order 39 Rule 1 and 2 R/w Sec. 151 of C.P.C. as the defendant is trying to interfere with the peaceful possession of the plaintiff over the suit property by trying illegal construction within 3 feet setback place of the plaintiff which is attached to the western side wall of the suit property. Further submits that defendant has filed the caveat petition against the plaintiff before filing the suit, when the plaintiff filed the suit against the defendant, she has appeared through her counsel she has filed undertaking memo by stating that she would construct her house as per the license issued by the TMC Sandur and VADA. Further stated that defendant has not filed objection on I.A. No. II and written statement even though sufficient opportunity provided thereon. The defendant has continued for further construction even though suit summons and emergent notice duly served on her. When this was came to the knowledge of the plaintiff then plaintiff has filed the photos before this court along

with C.D. this court also granted temporary injunction order on 30.05.2019. Further stated that the photos produced by the plaintiff proves that defendant has violated the temporary injunction order granted by this court. For which, the plaintiff has filed application under Order 39 Rule 1 and 2 R/w Sec. 151 of C.P.C. against the defendant as she has violated the order of this court. Further stated that the defendant has not preferred any appeal against this temporary injunction order passed by this court before Appellate Court. Therefore the application filed by the defendant is not maintainable in the eye of law. The defendant has not produced any material evidence before the court to show that this court has no jurisdiction to try this suit since it was barred by law. Further stated that if the temporary injunction is vacated then plaintiff will be put great hardship and injustice and also creates multiplicity proceedings of the case. Hence prays to dismiss the application with costs.

5. Heard hearing on IA No.IV by both sides.

6. On the basis of above contention, the following points arise for consideration.

1. Whether the applicant / defendant has made out prima-facie grounds to allow the application filed under Order 39 Rule 4 R/w sec. 151 of CPC ?

2. What order?

7. Based on the materials, the above said points are answered as under;

Point No.1 : In the **Negative.**

Point No.2 : As per the final order for the following;

REASONS

Point No.1 :

8. The plaintiff has filed the suit against the defendant for the relief of permanent injunction to restrain the defendant from constructing within 3 feet attaching towards the western side of his house. The plaintiff also

filed IA No.II under Order 39 Rule 1 and 2 R/w sec. 151 of CPC and prays to pass interim temporary injunction order. After considering the plaint averments and materials available on record, this court has allowed the said application dated 30.05.2019 and thereby restrained the defendants, her men, from interfering with the possession and enjoyment of the plaintiff over the suit property and also from constructing any structure within 3 feet attaching towards western side on the wall of plaintiff's house. Now the defendant has filed this application to set-aside the order passed by this court.

9. The learned counsel for the defendant submits that she has been constructing house in her property by obtaining license and she has invested huge amount with regard to construction of the house. Further contended that suit of the plaintiff is not maintainable since plaintiff has violated the license issued by the Town Municipality to construct the house.

10. The learned counsel for the plaintiff submits that she has filed the suit and also interim application to restrain the defendant from illegal construction in the suit schedule property. Further submits that after considering the materials available on record this court allowed the said application and restrained the defendant from constructing any structure in the suit property as sought in the said application. Further submits that the defendant has undertaken that she would construct structure in her property as per the terms and conditions of the license issued by the municipality but she has violated the terms and conditions in the suit property by encroaching setback which was left by the plaintiff. Further submits that this court has allowed the application and restrained the defendant from further construction of the house.

11. Now it is just and necessary to know the relevant provisions before going to discuss the merits of the application. Order 39 Rule 4 provides as under :

4. Order for injunction may be discharged, varied or set aside.- Any Order for an injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an Order for injunction has been passed after giving to a party an opportunity of being heard, the Order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the court is satisfied that the Order has caused undue hardship to that party.

According to the Rule 4 of Order 39 of CPC any order for an injunction may be discharged, or varied, or set-aside

by the court, an application made thereto by any party dissatisfied with such order and two grounds are satisfied under the first proviso to Rule 4 which are available to the party seeking to set-aside the order of temporary injunction i.e., that the party has moving the made a false or misleading statement with regard to material particular and that injunction was granted without giving notice to the opposite party.

12. In the present case this court has issued the notice to the defendant on IA No. II before passing the order, the said notice as well as suit summons duly served on defendant and she has appeared before the court through her counsel but she has not filed any objections even though sufficient time provided thereon. Thereafter her objection has taken as nil on IA No. II, and passed necessary order on the said application by considering the materials available on record. Hence this court has passed an order of injunction in favour of the plaintiff on I.A. No. II

as he proves prima-facie case. Therefore the defendant fails to prove that plaintiff has obtained an order of the temporary injunction from this court based on false grounds and misleading to the court. As already stated above that the order for injunction has been passed after giving opportunity to the defendant. The defendant also has failed to prove that the plaintiff has obtained an temporary injunction order without giving notice to her.

13. The defendant also has contended in the said application that the plaintiff has not mentioned correct description with regard to suit schedule property and suit is barred by law and he has not sought the necessary relief with regard to suit schedule property. But it is not the stage to decide other contentions taken by the defendant in the present application until and unless conduct trial thereon. Hence said contentions are the matter of trial and requires full fledged trial thereon.

14. From going through the above discussion and

grounds and also materials available on record this court has come to conclusion that the applicant / defendant has failed to prove the prima-facie grounds to allow the application filed under Order 39 Rule 4 of CPC. Hence, Point No.1 is answered in the **Negative**.

Point No.2 :

15. In view of discussion of Point No.1 to 3, this court proceed to pass the following;

O R D E R

I.A. No.IV filed by the defendant Under Order 39 Rule 4 R/W/S 151 of CPC, is hereby dismissed.

No order as to costs.

[Dictated to the Stenographer, transcribed by him, corrected by me and then pronounced in the open court on this day of **23rd day of November, 2022**]

(Devaraddy)

Civil Judge and J.M.F.C.,
Sandur.