

MHAH140000222021



IN THE COURT OF CIVIL JUDGE SENIOR DIVISION, NEWASA
TALUKA- NEWASA
DIST. AHMEDNAGAR

(Presided over by : B.U. Choudhari)

Regular Civil Suit No.19 of 2021

Aashit Gorakshanath Abhang and another

...Plaintiffs

Vs.

Bharat Bhaurao Kale and others

...Defendants

Order Below Exh.5
(Passed on 16/02/2021)

Application **Exh.5** is filed by the plaintiffs for temporary injunction under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908 (in short, the CPC) for restraining defendant Nos. 1 to 4 from making construction on the suit properties during pendency of the suit in which principal reliefs of demarcation of boundaries and perpetual injunction are claimed.

2. It is the case of the plaintiffs that the suit property described in plaint Para 1-A to 1-L (7 in numbers) are situated at village Kukana, District- Ahmednagar. The plaintiffs are the brothers. They are taking education. Plaint Para 1-A Property (Block No.90/1, area 13 R + kharaba 1 R was received by the plaintiffs from their deceased father Gorakshanath vide registered Gift Deed dated 01/06/2016, as result of which, Mutation Entry No.4207 was recorded. Plaint Para 1-B property (Block No. 90/1, area 25R) was re-conveyed to the plaintiffs and defendant No.16 under registered sale deed dated 12.03.2020, as a result of which, Mutation

Entry No.4783 was recorded. Plaintiff Para 1-C property (Block No.90/1, area 21 R) was purchased by defendant Nos. 1 to 4 from third parties, namely, Ajit Mandlik, Ashok Mandlik and Rajnandini Mandlik under different sale deeds executed on 24/01/2018, 05/12/2018 and 11/04/2019, as result of which, Mutation Entry No.4683 was recorded in their names. This property was having width of 100 ft. on east-west side and 230 ft. length on south-north side before purchase of the same by Ajit Mundlik from the father of the plaintiffs on 18/01/2016, as result of which, Mutation Entry No. 4159 was recorded. Plaintiff Para 1-D and 1-Y properties (Block Nos.90/1 , 20 R and 90/1 20 R was purchased by defendant No.6 from third party Dnyaneshwar Markali on 22/04/2014, as result of which, Mutation Entry No.3906 was recorded. Originally these properties were sold to Dynaneshwar Markali by Gorakshanath, the father of the plaintiffs by executing sale-deeds dated 14/05/2017 and 13/07/2013, as result of which, Mutation Entry Nos.3563 and 3753 were recorded. Defendant Nos. 7 to 14 have purchased undivided interest in Plaintiff Para 1-Y property. Plaintiff Para 1-R and 1-L properties (Block Nos.90/1, 78R and 90/2 21R. belong to defendant No.15. Block No.90/1 area 99R+Kharaba 01 R was owned by the father of the plaintiffs. Except 78R area from Block No.90/1, remaining area of the suit lands was owned and possessed by the plaintiffs' joint family. The suit properties are situated along Newasa-Shevgaon Road.

3. It is the further case of plaintiffs that their father was addicted to liquor, therefore, he had sold the suit properties from time to time. Their father was defrauded by the purchasers. The father of plaintiffs sold Plaintiff Para 1-Y property having 150 ft. width along east west side of the road. Thereafter, he sold Plaintiff Para 1-B property and then he sold land near plaintiff para 1-Y property to Ajit Mandlik having 100 ft width east-west and thereafter, the father of the plaintiffs executed a gift of remaining area including front area on 01/06/2016 in favour of the plaintiffs. Therefore, the father of the plaintiffs had no right, title or interest in the suit properties after execution of said gift deed. He died on 05/04/2020. In the mean time, defendant Nos. 1 to 4 started making construction on 21 R

land comprised in plain para 1c property. However, it was noticed on 07/12/2020 that defendant Nos.1 to 4 have started construction on the land exceeding the land purchased by them without change of user of the suit land for non-agriculture purpose. It is specifically alleged that these defendants have encroached upon plain para 1 A and 1 B property to the extent of 20 ft east-west along the High Way and 230 ft in length, thus, encroached upon 4.5 R area owned by the plaintiffs. Defendant Nos. 1 to 4 did not stop making construction on the encroached land nor did they give consent to the plaintiffs to undertake measurement of the suit lands. In this background, the plaintiffs are constrained to file the suit for demarcation of boundaries, restoration of encroached land and for perpetual injunction. Pending hearing and final disposal of the suit, the plaintiffs have prayed for temporary injunction claiming that they would suffer irreparable injury if injunction is not granted.

4. Defendant No. 3 appeared in the suit and resisted the suit claim by filing **written statement at Exh. 25**. He has contended that he has purchased the land of 21 R out of Block No. 91/1 from Rajnandini Ajit Mandalik under a registered sale-deed dated 11/04/2019. He was put in possession of the said land on the same date. Originally this land was owned by the father of the plaintiffs who had sold the same to Ajit Ashok Mandalik under registered sale-deed dated 18/01/2016. Thereafter, Ajit Ashok Mandalik and father of the plaintiffs had also executed a correction deed on 18/07/2016 whereby it was clarified that the area sold was having width of 120 ft. and length of 191 ft. and the same was at a distance of 65 ft. from the center of the road. It is alleged that the plaintiffs had suppressed this material fact and filed the present false suit. It is also contended that Defendant No. 1 to 4 have completed their construction on the area of 21 R land and the work of finishing is to be completed only. It is contended that the plaintiffs have no prima-facie case. Therefore, application for temporary injunction may be rejected.

5. Points for determination along with my findings thereon for the reasons to follow are as under:

<u>Sr.No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1)	Whether prima-facie case is in favour of the plaintiffs?	No
2)	Whether balance of convenience is in their favour?	No
3)	Whether the plaintiffs would suffer a great irreparable injury, if injunction is not granted in their favour?	No
4)	What order?	Application is rejected.

: REASONS :

AS TO POINT NOS. 1 TO 3:-

6. It is the submission of **Ld. Advocate Shri.V.R.Jangale** for the plaintiffs that prima facie case is in favour of the plaintiffs. Even balance of convenience is in their favour and they would suffer irreparable injury, if injunction is not granted in their favour. The Ld. Advocate further submitted that there would be greater hardship to the plaintiffs to recover possession of the land on which encroachment has been done by the defendants even if so directed by the court after having found encroachment after demarcation of boundaries of the suit lands. Therefore, he has submitted that temporary injunction may kindly be granted against the defendants.

7. **Per contra**, Ld. Advocate **Shri.B.P. Varma** for Defendant No. 3 submitted that the construction is carried on the property duly purchased without making any kind of encroachment. He has further submitted that there would be greater hardship caused to Defendant No. 3 if temporary injunction is granted against him. He has further submitted that the plaintiffs do not have prima facie case, balance of convenience does not tilt in their favour and it would be defendant No.3 who would suffer an

irreparable loss and not the plaintiffs, if temporary injunction is granted. He has, therefore, prayed for rejection of temporary injunction application.

8. Before advertng to the rival claims and contentions of the respective parties, it would be worth to refer to the observations of the Hon'ble Supreme Court made in Para 13 of **Kashi Math Samsthan and another Vs. Shrimad Sudhindra Thirtha Swamy and another, AIR 2010 SC 296**, which read as under –

“It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his four and would suffer irreparable loss and injury if no injunction order is granted.”

9. On careful perusal of the observations noted above, it is crystal clear that if the party fails to prove existence of prima facie case to go for trial, it is not open to the Court to grant injunction, even if, the party has made out a case of balance of convenience and irreparable loss.

10. In the instant case, the whole emphasis is on the area on which construction is being made by defendant Nos. 1 to 4. According to the plaintiffs, these defendants have been carrying on construction in excess of the land purchased by them whereas it is the contention of the defendants that their construction work is on the area of the land which was purchased by them. It is worth to note that the plaintiffs have filed on record number of documents in order to demonstrate existence of prima facie case besides filing of affidavits of the persons who had the

knowledge of the facts involved. However, it is worth to note that defendant No.3 has placed on record a deed of correction dated 18.07.2016 whereby certain corrections have been carried by the father of the plaintiffs and Ajit Ashok Mandlik, the predecessor of defendant No.3, in sale deed dated 18.01.2016. It has been specifically clarified that the **land sold was mentioned as having 100 ft front and 230 ft length but the same stands corrected as 120 ft front and 191 ft length and leaving 65 ft** from the centre of the road. It is worth to note that this factum has been absent in the plaint, may be, because the plaintiffs had no knowledge. Therefore, it cannot be said that there was any kind of material suppression. However, the fact remains that the very basis of the case of the plaintiffs is washed out in the teeth of the correction deed mentioning the specific area therein. Prima facie it cannot be said that the alleged construction is by way of encroachment in view of registered correction deed executed by the father of the plaintiffs. It is a different matter whether the father of the plaintiffs was in full senses or not, was having authority or not, but the fact that the defendants are having correction deed in their hands, it cannot be prima facie held that the defendants are causing any kind of irreparable loss to the plaintiffs. In this view of the matter, **Point Nos. 1 to 3** are answered in the **negative**.

AS TO POINT NO.4:

11. In view of the findings recorded against Point Nos.1 to 3, in answer to point No.4, the following order is passed-

ORDER

(1)	Application Exh.5 is rejected.
(2)	Costs in cause.

Date :-16.02.2021

(B.U.Choudhari)
Civil Judge Senior Division,
NEWASA