

MHAU130001092023



ORDER BELOW EXH. 5

This is an application for temporary mandatory injunction under Order 39 Rule 1 of the Code of Civil Procedure, 1908 (“C.P.C.” for short) made by the plaintiff. Read the application and reply of defendant No. 1 at Exh. 20 and that of defendant No. 2 corporation at Exh. 27. Heard Ld. Advocates for the rival parties.

02. Ld. Advocate for the plaintiff argued that, the plaintiff has constructed a building by name Zaveri Heights on the property bearing CTS No. 4314 within the jurisdiction of Municipal Corporation, Aurangabad. Towards Northern side of said building there is 12 feet wide lane and said lane is being used for ingress and egress to the parking area of said building. However, the defendant No. 1 has encroached upon said road and carried out construction over it to the extent of 5 meter x 3.40 meter and blocked the ingress and egress of plaintiff and the residents of Zaveri Heights building. He has also caused damage to the drainage line and chamber situated there. He argued that, the defendant No. 2 corporation has a right to remove said construction by giving 24 hours’ notice to defendant No.1. However, it has not done so. Therefore, it is necessary to demolish said construction for restoring it to its original position by way of mandatory temporary injunction. In support of his contention he relied upon Sopan Maruti Thopte & Anr. Vs. Pune Municipal

Corporation & Anr, 1996(2) All M. R. 383.

03. Ld. Advocate for defendant No. 1 argued that, the defendant No. 1 is carrying out construction of building in accordance with the permission granted by defendant No. 2 corporation. The defendant No. 1 is politically influencing defendant No. 2 corporation to take action against him. Accordingly, the defendant No. 2 corporation has issued notice dt. 31/10/2023 to him alleging illegal construction. He has replied to said notice and also prayed for measurement of his construction in the light of permission for construction. On the other hand, the defendant No. 1 himself has not carried out the construction of his building as per the permission of construction. The defendant No.1 has a road situated towards the Southern side of his building for approaching to its parking area. However, he has closed said road and is using said 12 feet wide lane to approach to the parking area of his building. The plaintiff has neither encroached upon said lane nor caused damage to the drainage system. No prima facie case is made out by the plaintiff for grant of injunction as prayed. Therefore, he prayed to reject the application.

04. Ld. Advocate for defendant No. 2 corporation argued that, the plaintiff was directed by the corporation to deliver 5.7 sq. meter land affected by construction of his building to it. However, there is no whisper in the plaint about the same. The plaintiff had got approved the construction plan by showing parking area at the ground floor of his building. However, he has illegally carried out construction in said parking space. The plaintiff has excess to said parking area from the other side of his building and said 12 feet wide lane is not being used for ingress and egress by him. On the other hand the notice was issued to defendant No.1 on a complaint received from the plaintiff and it is replied by defendant No.1 clarifying that, he has not constructed any thing more than the approved plan. Therefore, there is no prima facie case in

favour of plaintiff for grant of injunction as prayed.

05. Hence, the following points arise for determination and I have recorded my findings to each of them for the reason as follows:-

Sr.No.	POINTS	FINDINGS
1.	Whether the plaintiff has made out a prima-facie case ?	No...
2.	In whose favour balance of convenience lies?	Defendant No.1.
3.	Whether the plaintiff will suffer irreparable loss, if the injunction as prayed is not granted?	No...
4.	What order ?	As per final order.

REASONS

AS TO POINT NO.1 :-

06. The claim of temporary injunction is governed by the provisions of Order 39 Rule 1 and 2 of C.P.C. Order 39 Rule 1 of C.P.C. opens with the words “where in any suit it is proved by affidavit or otherwise-”. It means that, for the purpose of deciding an application for temporary injunction the court is required to consider the affidavits filed by the parties for this purpose or other material like documents produced by the parties. In the present case neither plaintiff nor defendants have filed affidavits for this purpose. In such circumstance it is necessary to consider the documents produced by the parties.

07. It is not in dispute that, the defendant No.1 is carrying out construction over the property bearing CTS No. 4320 situated within the jurisdiction of Municipal Corporation, Aurangabad. It is admitted position that, the permission for construction on said property is granted to him by defendant No.2 corporation. The plaintiff claims that, while carrying out said construction

the defendant No.1 has encroached upon the area adm. 5 meters x 3.40 meter of the lane. The photographs produced by the parties in this connection are not useful for the reason that the area of construction or the alleged encroachment cannot be ascertained from it. It is seen from the documents that, the plaintiff has worked hard to push defendant No.2 corporation for initiating action against defendant No. 1 in respect of removal of the alleged illegal construction. It is also seen that, defendant No. 2 corporation had issued notice to defendant No. 1 pursuant to complaint received from the plaintiff in respect of illegal construction. According to defendant No. 2 corporation the defendant No. 1 has clarified to it that, he has not constructed anything more then the approved plan. In *Sopan Maruti Thopte* (cited supra) the Hon'ble High Court has laid down the procedure to be followed by the Municipal Corporation before taking action of removal of construction. In the present case a notice appears to have been issued by the defendant No. 2 corporation to defendant No.1 and it is replied by him as per the procedure laid down in this authority. As the defendant No.2 corporation appears to have been satisfied by said reply, the defendant No.2 corporation is not expected to proceed further as per the procedure laid down therein. Therefore, this judgment is not helpful to the plaintiff.

08. It is seen that, the allegation of the encroachment and construction made by plaintiff is not supported by measurement. The defendant No. 2 corporation, who has granted permission to defendant No. 1 for construction, do not allege any such encroachment by him on the lane and that to after issuance of a notice to him. If these circumstances are considered, it appears that, the plaintiff has not raised a substantial question for determination. When a substantial question for determination is not raised, it is said that, no prima facie case is made out. Hence, I hold that the plaintiff has not made out a prima facie case for grant of temporary injunction and answer point no.1 in the

negative.

AS TO POINT NO.2 :-

09. It appears from the copies of map that, there is a road on the other side of plaintiff's building for approaching to its parking area. Moreover, this is the same road in respect of which the defendant No.2 corporation had sought plaintiff to execute relinquishment deed and he had not executed it. It is also seen that, this road is blocked. Therefore, it is open for him to unblock it and it is also proper as per the copies of map produced by the parties. Therefore, no loss or injury will be caused to him in case of refusal to grant injunction as prayed. However, the grant of injunction may result in injury to the defendant No.1 as he it would prevent him from enjoyment of his property. Thus, the comparative mischief, hardship or inconvenience which is likely to be caused to the defendant No.1 by granting such injunction will be greater than that which is likely to be caused to the plaintiff by refusing it. Hence, I answer point no.2 accordingly.

AS TO POINT NO.3 :-

10. The suit is for mandatory injunction in respect of immovable property. It follows that, the grant or refusal to grant injunction as prayed will cause irreparable loss to the either party. It is seen from the photographs produced by parties that, the defendants No.1 has carried out construction till the slab level. It follows that, the defendants No. 1 has incurred expenses on it. It is seen from the copy of map and also contended by defendant No. 2 corporation that, the plaintiff has a road from the other side of his building to approach to the parking area of said building. In such circumstances the refusal to grant temporary injunction will not result in irreparable loss to the plaintiff. Hence, I answer point no.3 in the negative.

AS TO POINT NO.4 :-

11. The plaintiff has not made out a prima facie case for grant of temporary injunction. The balance of convenience does not lie in favour of plaintiff and he will not suffer irreparable loss if the temporary injunction is refused. The plaintiff is silent about the road existing towards the other side of his building. The relief claimed by him in this application is demolition of the alleged encroachment, which if granted, will amount to final relief. Thus, the conduct of plaintiff is not free from blame and he did not approach to the Court with clean hands. Hence, it is necessary to reject the application. Therefore, in answer to point no.4, I pass the following order.

ORDER

Application stands rejected.

(Shri. N.H. Tikhe)

Date :-25.07.2024.

Civil Judge Senior Division
(Corporation Court), Aurangabad.

CERTIFICATE

I affirm that the contents of this P.D.F. file Order are same, word to word, as per the original Order.

Name of the Stenographer	: S.D.Chavan
Court	: C.J.S.D. (Corporation Court), Aurangabad
Date	: 25.07.2024
Order signed by the presiding officer on	: 25.07.2024
Order uploaded on	: 25.07.2024