

**IN THE COURT OF CIVIL JUDGE JUNIOR DIVISION, NARKHED,  
DIST. NAGPUR.**

(Presided over by N. B. Rathod)

**Regular Civil Suit No. - 4/2022  
Liladhar & another/Dayaram & others**

**ORDER BELOW EXH.05**

(Passed on 20<sup>th</sup> day of January, 2022)

**NATURE OF APPLICATION :-**

This is an application filed by the applicants under rule 1 and 2 of Order XXXIX r/w. Section 151 of the Code of Civil Procedure, 1908 for grant of temporary injunction.

**THE FACTS:-**

2] Present suit is filed for permanent and mandatory injunction. The property in dispute is city survey no.1077 admeasuring 87.07 Sq.mts. situated at Sawargaon (hereinafter referred as "*suit property*"). It is the case of plaintiffs that as per the record of rights, the suit property was owned and possessed by Sampat Barai, Ganpat Barai and Rama Barai. Due to mistake of City Survey Officers, the name of Sampat Barai and Santosh Barai came to be deleted from the record of suit property.

3] It further reveals from the said record of rights that city survey no.1078, 1076 and 1080 is having way through the suit property. If the geological position of the suit property is seen, then it can be noticed that the suit property is situated in between city survey nos.1075 to 1080, therefore said Sampat Barai, Santosh Barai and Rama Jago were used suit property as their courtyard (Angan). Since from the beginning, the suit

property was kept open for the common use and occupation of plaintiffs as well as defendants and late Rama Barai was/are having common right over the suit property.

4] The plaintiffs was in service and most of time he resided at his service places, hence he could not notice said mistake of City Survey Officers. When the plaintiffs noticed said mistake, at that time they applied under the Right to Information Act to the office of City Survey, Nagpur and enquired about deletion of name of Sampat Barai and Santosh Barai and concerned office informed them that said document is not available in their office. Due to mistake of City Survey Officer, the valuable rights of plaintiffs and defendant nos.5 to 12 cannot be denied from the suit property. The defendant nos.1 to 4 fraudulently mutated their names being the legal heirs of Rama Barai. The suit property is still in the joint possession of plaintiffs and defendants.

5] The defendant no.1 without obtaining legal sanction illegally started construction over the suit property. The plaintiffs given complaint to the Gram Panchayat, Sawargaon on 31.12.2021. They further lodged complaint against the illegal and unauthorized construction before the Block Development Officer. Neither the Gram Panchayat, Sawargaon nor the Block Development Officer has taken action against the defendant no.1. Due to illegal and unauthorized construction of defendant no.1, the ingress and egress of city survey no.1076, 1078, 1079 and 1080 is completely blocked. There is no alternate way to approach city survey no.1078, 1080 and 1076.

6] If the alleged construction of defendant no.1 is not restrained, then the valuable rights of plaintiffs and defendant nos.5 to 12 will be

defeated. Hence, the prima facie case is made out in favour of plaintiffs as well as balance of convenience lies in their favour than the defendant no.1. If the defendant no.1 is not prevented by an order of injunction, then the plaintiffs shall suffer irreparable loss. Accordingly prayed to allow the application.

**SAY/REPLY :-**

7] The defendant no.1 appeared and filed his say/reply at Exh.16 and denied all the adverse allegations made against him by the plaintiffs. He denied that the suit property was owned and possessed by Santosh Barai and Jago Barai. He submitted that the suit property was exclusively owned by Rama Barai and now owned by defendant nos.1 to 4. He further denied that the suit property was used as courtyard (Angan). He specifically denied all the material pleadings of the plaintiffs.

8] The suit property was mutated in the name of Rama Barai and the plaintiffs were well aware about said entries, but they never challenged said entries. City survey was conducted in 1970 and record was prepared. At that time, the father of plaintiffs had not objected to record the suit property in the name of Rama Barai. Defendant is owner of suit property and he want to make construction over said plot. Being the owner of suit property, the defendant has every right to enjoy his property. On 08.03.2021 the defendant no.1 gave application to the Gram Panchayat, Sawargaon and thereby asked permission for construction. The Gram Panchayat did not convey anything, hence under deemed permission the defendant no.1 has every right to do construction.

9] The plaintiffs made number of false complaints to various authorities, so that the suit property is not mutated in the name of

defendant nos.1 to 4. Due to pressurizing tactics the property remained to be mutated in the name of defendant nos.1 to 4. If the defendant no.1 is restrained from making construction, then he would be suffer. The plaintiffs neither pleaded nor filed any map on record as to from which side their alleged way passes. 6 feet lane is left by the defendant from where the plaintiffs can approach to their house if they want.

**10]** The plaintiffs have no rights over the suit property. They failed to establish prima facie case in their favour. The alleged construction of defendant is above the plinth level. The construction material is lying. Hence, if the construction of defendant is stopped, then he would suffer irreparable loss. Accordingly, he prayed to reject the application.

**POINTS :**

**11]** I have heard both the side at length and perused relevant docket of the suit proceeding. After considering and evaluating pleading of plaintiffs and defendant no.1, following points arise for my determination. I have recorded my findings along with reasons thereon as under :

<b>S.N.</b>	<b>POINTS</b>	<b>FINDINGS</b>
1.	Do the plaintiffs prove that prima facie case is made out in their favour?	<b>..No</b>
2.	Do the plaintiffs prove that balance of convenience lies in their favour?	<b>..No</b>
3.	Do the plaintiffs prove that if the injunction is not granted, then irreparable loss will be caused to them which cannot be compensated in terms of money?	<b>..No</b>
4.	What Order ?	<b>...As per final order (Application is rejected)</b>

12] To establish the case, the plaintiffs filed on record the copy of letter dated 31.12.2021, 18.05.2021, 16.06.2021, 15.02.2021, copy of Akhiv Patrika of city survey nos.1076, 1078, 1080, copy of Kachcha Adhikar Abhilekh, copy of order dated 11.08.2021, copy of sale deed dated 06.06.1992, photographs of alleged construction. The plaintiffs placed their reliance on the authority of Hon'ble Supreme Court of India in the case of Dipak Kumar Mukherjee ..vs.. Kolkata Municipal Corporation and others Civil Appeal No.7356 of 2012 and the authority of Hon'ble Delhi High Court in the case of Onkar Nath ..vs.. Ramnath Gupta and others (AIR 1985 DELHI 293). These documents and the authorities will be discussed in detail while giving reasoning to the above points at relevant point of time. In an against, the defendant no.1 in support of his case has filed on record the copy of letter dated 08.03.2021, copy of Jahirnama of Grampanchayat, Sawargaon and copy of proceeding book.

#### **ARGUMENTS ON BEHALF OF PLAINTIFFS**

13] The learned counsel for plaintiffs Shri.Khante argued that the defendant no.1 started illegal and unauthorized construction over the suit property. Alleged construction of defendant no.1 is without sanction. The plaintiffs having right of way through the suit property. There is no alternate way to the city survey no.1078, 1076 and 1080. The suit property is used as Angan by Sampat, Santosh and Rama Barai. The suit property was commonly owned and possessed by Santosh Barai, Sampat Barai and Rama Barai. The City Survey Officer mistakenly deleted the name of Santosh Barai and Sampat Barai from the record of suit property. The suit property is in joint possession of the plaintiffs and defendants. He further argued that if the injunction is not granted, then the valuable rights of plaintiffs will be deprived, as there is no alternative way to them.

**ARGUMENTS ON BEHALF OF DEFENDANT NO.1**

14] The learned counsel Shri.S.M.Nafde for the defendant argued that the suit property was originally owned and possessed by Rama Barai and after his death, the defendant nos.1 to 4 are its owner and in possession. The name of Sampat Barai and Santosh Barai were deleted from the suit property in presence of father of plaintiffs, hence they cannot say that the names were deleted due to mistake. The plaintiffs did not mention proper description of their alleged way. However, the defendant has left 6 feet lane from the suit property. Hence the plaintiffs can use said lane if they want. He further submitted that his construction is legal under the concept of deemed permission, as the Gram Panchayat, Sawargaon has not given response to the application made by the defendant no.1 on 08.03.2021. Accordingly, he prayed to reject the application.

**:: REASONING ::**

15] The record has been carefully and thoroughly perused. The submission of learned counsel Shri.Khante for the plaintiffs and learned counsel Shri.Nafde for the defendant no.1 have been heard at length and considered.

16] Initially, the plaintiffs prayed relief of temporary injunction against the defendant nos.1 to 4. But in view of pursis below Exh.11 filed by the plaintiffs and their learned counsel, the instant application is proceeded only against the defendant no.1.

**AS TO POINT NO.1 TO 3 :-**

17] While considering an application for the injunction, it is well

settled principle that, the court must look into : (i) Prima Facie, (ii) Balance of Convenience and (iii) irreparable injury. Likewise, in *Colgate Palmolive (India) Ltd. Vs. Hindusthan Lever Ltd. AIR 1999 SC 3105*, the Hon'ble Supreme Court of India observed that the other considerations which ought to weigh with the Court hearing the application or petition for grant of injunctions are ;

- (i) Extent of damages being an adequate remedy;
- (ii) Protect the plaintiff's interest for violation of his rights though however having regard to injury that may be suffered by the defendants by reason therefore;
- (iii) the Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;
- (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;
- (v) the issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
- (vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;
- (vii) whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise”.

**18]** As per the case of plaintiffs, they are in joint possession of the suit property as well as they have right of way through the suit property. Further the suit property was originally owned and possessed by Sampat Barai, Santosh Barai and Rama Barai. The name of Sampat Barai and Santosh Barai were deleted by the City Survey authority mistakenly. The suit property was used as courtyard (Angan) by the Sampat Barai, Santosh Barai and Rama Barai, because the suit property is situated between city

survey no.1076 to 1080. The defendant no.1 started illegal and unauthorized construction over the suit property without sanction.

**19]** So far as concerned with the issue that the name of Sampat Barai and Santosh Barai were deleted by the City Survey Officers mistakenly, here it is necessary to mention that the document no.7 i.e. the copy of Kachcha Adhikar Abhilekh filed by the plaintiff shown that Sampat, Ganpati and Rama Jago were present, hence the submission of plaintiffs that the name of Sampat Barai and Santosh Barai were deleted by the concerned by mistake is not highly appreciable and considerable. Further, here it is necessary to mention that if the Sampat Barai was having any objection in respect of deletion of his name, then he could have taken objection definitely. Further, it is shown that only the name of Rama Barai is mutated in the suit property. Hence, prima facie it is shown that Rama Barai was owned and possessed the suit property. Hence, the submission of plaintiffs that they are in joint possession of suit property is also not established.

**20]** Further, it is the case of plaintiff that the suit property was situated in between the city survey nos.1075 to 1080, hence the same was used as courtyard. There is nothing on record to show that the suit property was used as courtyard. Merely, on the basis of that the property is situated in between the other properties, it is not lawful and proper to say that said property was used as courtyard, more particularly when there is no document to that effect.

**21]** Regards to the contention of right of way, the plaintiffs placed their reliance upon the document at Sr.no.7 i.e. Kachcha Adhikar Abhilekh. On perusal of said Adhikar Abhilekh, it is shown that the property no.106,

104, 108 (i.e. city survey nos.1078, 1076 and 1080) are having right of way from the suit property. The defendant no.1 submitted that through the plaintiffs are having right of way from the suit property, but they did not use said way since last 40 years. He further submitted that he left 6 feet lane in the suit property and the plaintiffs can used said lane if they want. The learned counsel for the plaintiffs argued that the right of way is specifically mentioned in document no.7 and the defendant no.1 is going to deprive the right of plaintiffs by making illegal construction. In an against the learned counsel for the defendant no.1 submitted that the plaintiffs did not mention proper description of the alleged way in the description.

**22]** On careful perusal of pleadings of the plaint and instant application, it is clearly shown that the plaintiffs did not mention the proper description of alleged way. Further, they did not mention from which side they were/are used to pass from the suit property. Hence, it is shown that the submission of plaintiffs regarding alleged way is vague. Though the document no.7 show that the plaintiffs are having right of way from the suit property, but it is the duty of plaintiffs to establish that from which side they were used to pass from the suit property. Hence, in absence of proper description of alleged way, it is not proper and lawful to restrain the defendant no.1 when he pleaded that he has left 6 feet lane and the plaintiffs can used said lane as a way.

**23]** As per the say and submissions of the both parties to the suit i.e. plaintiffs and defendant no.1 and as per the photographs, alleged construction of defendant no.1 is completed upto the plinth level. The Ld. Counsel of plaintiffs argued that there is no permission from Gram Panchayat for said construction, hence alleged construction is illegal and unauthorized. The issue whether there is permission or not can only be

decided by the competent authority established under the Gram Panchayat Act.

24] On careful perusal of document filed by the defendant no.1, it is shown that he had given letter to the Grampanchayat, Sawargaon and intimated that he would start construction from 25.03.2021. Further therein he mentioned that he had given earlier application alongwith the documents. Hence, the submission of defendant no.1 that alleged construction is under the shadow and concept of “deemed permission” is also cannot be ruled out. Further the copy of government rule filed by the plaintiffs vide pursis below Exh.19 is also not substantiate their case.

25] The learned counsel for the plaintiffs placed his reliance upon the authority of Hon'ble Supreme Court of India in the case of *Dipak Kumar Mukherjee ..vs.. Kolkata Municipal Corporation & others Civil [Appeal No.7356 of 2012]*. The law laid down by the Hon'ble Supreme Court of India in the cited case are the settled principle of law.

26] Further, the learned counsel for the plaintiffs placed his reliance upon the authority of the Hon'ble Delhi High Court in the case of *Onkar Nath ..vs.. Ramnath Gupta and others [AIR 1985 DELHI 293]* in which the Hon'ble High Court held that “*If a structure is raised without permission it will affect the right of plaintiff. The plaintiff is owner of the building where the defendant are alleged to be the owner of adjoining plot. If the defendants are allowed to raised unauthorized structure, the right of the plaintiff is likely to be affected*”. On careful perusal of this authority it shown that issue involved therein was in respect with the right of light and air of the plaintiffs. Further it shown that the plaintiffs were established their case and also established prima facie case in their favour.

27] But in the case in hand, the issue involved is in respect with the alleged way and the issue that the suit property was/is used as courtyard. With due respect to the observations and the ratio laid down by the Hon'ble Delhi High Court in the case *cited supra*, here it is pertinent to note that it appears from the perusal of written statement that 6 feet lane has been left by the defendant no.1. The plaintiffs in the present matter failed to establish how their right will be deprived if the injunction is rejected, as they failed to give the proper description of alleged way. Further, they failed to establish that the suit property was/is used as courtyard. Hence, I hold that the ratio laid down in the case cited supra is not applicable to the case in hand, as the issue and facts of the case are different.

28] Prima facie the plaintiffs failed to establish that they are in joint possession of the suit property. Contrary it is established that the defendant no.1 is in possession of the suit property bearing city survey no.1077. Hence, the submission of the plaintiffs is not appreciable and considerable as there is no document regarding joint ownership and about the submission of courtyard. And no proper description of alleged way is given by them. Contrary, it is established that the defendant no.1 is in possession of the suit property as per document no.7 filed by the plaintiffs. Hence, I hold that the plaintiffs failed to establish prima facie case in their favour. Accordingly I answer *issue no.1 in Negative*.

29] As I have already stated about that prima facie case is not made out in favour of the plaintiffs, hence balance of convenience also not in their favour. So far as concerned with the issue of irreparable loss, here it is pertinent to note that the construction of defendant no.1 is completed upto the plinth level and as per his written statement, he left 6 feet lane and submitted that the plaintiffs can use said lane as a way. Hence, definitely

the irreparable loss would be caused more to the defendant no.1 than the plaintiffs if the injunction is allowed. With these reasons I hold that, irreparable loss will also not be caused to the plaintiffs if the injunction is rejected. Accordingly, I answer **point nos.2 and 3 in Negative**.

**CONCLUSION:-**

30] With due respect to the law laid down by the Hon'ble Supreme Court Of India in the case *cited supra* and with due respect to the observations and the ratio laid down by the Hon'ble Delhi High Court in the case *cited supra* and in view of my **Negative Findings to the point nos.1 to 3** along with my reasons and after evaluating all pro and cons, I hold that instant application deserves to be rejected. Accordingly I answer point no.4. The findings of the instant application shall not affect the final decision of suit. Hence, I proceed to pass following order :-

**:: ORDER ::**

1] Application (**Exh.5**) is rejected.

Dt. 20/01/2022

(N. B. Rathod)  
Civil Judge Junior Division  
Narkhed.

**CERTIFICATE**

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

**Name of the stenographer : A.Y.Kulkarni (Gr.-III)**

Case argued on	:	20-01-2022
Order dictated on	:	20-01-2022
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