

**ORDER PASSED BELOW EXH. 5**  
**passed on 02-05-2015.**

1. By way of this application under Order 39 Rule 1 (c) of the Civil Procedure Code, plaintiff prayed for grant of temporary injunction restraining defendants from further encroaching on his property and further to restrain to carry out further construction on alleged encroached area.

2. House Property no. 364(Old no.326), admeasuring area east-west 48 feet and north-south 39 feet, situated at Rohna Tah. Narkhed Dist. Nagpur which is bounded as under; towards east-road, towards west-house of defendant, towards north-road and towards south-house of Abhiya Wahane, is subject matter of suit.

3. Same was purchased by father of plaintiff from Shri Mukaji Dhone on 02-05-1980. Towards west of suit house is house no.312 of defendants. Father of plaintiff during his life time executed will deed in favor of plaintiff of suit property on 07-06-2012 and after his death on 03-11-2013, plaintiff bequeathed the property and is enjoying since then without any obstruction as an absolute owner.

4. Plaintiff specifically pleaded that in the third week of March 2008, defendants tried to interfere in possession from west side, hence R.C.S.No. 22/2008 was instituted by his father against father of defendant no.1 and Arun Shende. During pendency of suit, matter was settled between parties, hence plaintiff withdraw suit on 27-06-2013 as both removed the encroachment.

5. As per plaintiff, now in the year 2014, defendants obtained benefit of Gharkul Yojna and thereby started construction i.e. dugs pits in the month of December 2014 towards west side of suit house without obtaining necessary sanction from Gram Panchayat. Plaintiff requested him to not encroach over his property, but in vain. He even collected construction materials.

6. Plaintiff further pleaded that during pendency of suit, defendants illegally encroached over total area 26.06 square meter (280 square feet), towards west side which is 3.15 meter width towards north side and 8.71 meter length towards east side and 7.84 meter towards west side and same is shown by letter ABCD in plaint map which be treated as Part and Parcel of plaint. Similarly they have encroached over total area 29.62 square meter (319 square feet), towards south side which is 7.13 meter length towards south side and 2.07 meter width towards east side and 4.05 meter towards west side and same is shown by letter EFGH in plaint map. Moreso construction has reached to slab level.

7. Plaintiff specifically pleaded that as he is owner of encroached property, if the construction is continued, he will suffer irreparable loss, hence present suit for declaration, permanent and mandatory injunction along with present application is filed.

8. Considering the facts and circumstances on record on suit summons along with show cause notice came to be issued.

9. On 09/03/2015, defendants filed their written statement and reply to this application vide exh.21. Defendants denied the suit claim in toto particularly alleged encroachment. Needless to mention that they carried out amendment twice in written statement, firstly consequential amendment and further explanation to earlier pleadings was given. Copy of said amended written statement and reply is at exh. 33.

10. Defendants specifically contended that as earlier suit was withdrawn unconditionally, present suit is not tenable as except minor change there is no difference in pleadings.

11. Defendants further challenged ownership of plaintiff over suit house and particularly area of suit house. He specifically pleaded that they have sought necessary sanction from Gram Panchayat for construction and accordingly area of construction is 51 X 26 feet. Said sanction was given after

verifying title deed and at that time plaintiff did not raised any objection before concerned authority.

12. They further specifically contended that to start new construction, they have dismantle earlier construction and now their construction is reached to slab level. But they are residing without roof as authorities are not releasing the fund due to manipulation by plaintiff. They also contended that they have undertaken that will not carry out construction prior to filing written statement and have followed the undertaking, whereas plaintiff nowhere said that they have breached the undertaking. Hence, the accusation that they carried out construction in between is after thought.

13. They lastly stated that are suffering hardship as construction is stopped and false claim is made by plaintiff, so it be dismissed with cost and present application be rejected.

14. From the rival contention of the parties, following points arise for my determination, accordingly I recorded my findings thereon for the reasons given below.

Sr. No.	Points	Findings.
1.	Whether the plaintiff has made out prima facie case in his favour ?	... In the Negative.
2.	Whether the balance of convenience tilt in favour of the plaintiff ?	... In the Negative.
3.	Whether the irreparable loss will be caused to the plaintiff, if injunction is not granted in his favour ?	... In the Negative.
4.	What order ?	... As per final order Application is rejected.

### **REASONS**

#### **AS TO POINT NOS.1 TO 4 :-**

15. For the sake of brevity, I am clubbing all the points. Heard Ld. Adv. Shri Kamble on behalf of the plaintiff and ld. Adv. Shri Lolusure for defendants.

16. Ld. Counsel Shri Kamble for plaintiff vehemently argued that area of his house is not in dispute as he had sale deed of the year 1980 and his ownership is cemented by will deed. He emphasised on commissioners report and said that earlier temporary nature construction was carried out by defendants, but now its permanent nature construction, so both suits are different.

17. He also submitted that if construction is continued, he will suffer heavy loss as will be deprived from his valuable right, whereas no proejudiced will be caused to defendant. He lastly said that as had made out prima facie case, his application be allowed.

18. On other hand, ld. Counsel Shri Lolusure for defendants relied upon documents showing that area of suit house is nowhere recorded in relevant government records, so plaintiffs claim falls on this count. He further submitted that plaintiff never raised any objection that they are carrying out construction after undertaking, so he should explain as how stage of construction changed. As regard their property he relied upon government records and said that defendants have partitioned the property between them and are carrying out construction on their area. He also reiterated that are facing hardship as are without roof due to stoppage of construction, whereas plaintiff will suffer no loss as already claimed mandatory injunction. He hampered documents filed by plaintiff and prayed for rejection of application.

19. In reply, plaintiff argued that documents filed by defendants smells suspicious and cannot be considered in view of sale deed.

20. Before moving over the documents filed by parties in support of their claim, necessary to mention that in third date of suit, application for appointing Court Commissioner was moved by plaintiff to which no objection was given by defendants and hence Court Commissioner was appointed. On 09-02-2015 measurment map was filed wherein encroachment of defendants was shown on property of plaintiff. Hence plaintiff carried out amendment

regarding encroachment. On same date, plaintiff moved pursis vide exh. 16 contending that construction till slab level is completed but slab is not put. On same date, ld. Counsel for defendants undertake that will desist from making further construction on disputed area till filing written statement. Further on 12-03-2015, defendants raised objection on commissioners map vide pursis exh. 23.

21. Both parties relied upon number of documents. Interestingly majority of documents are obtained from Gram Panchayat, but are contradictory to each other.

22. Apart from relying upon commissioners map, Plaintiff relied upon tax receipts of his house for the year 2014-2015, assessment sheet of his house showing area 48X 38 feet for the year 2014-2015, boundary certificate issued by Gram Panchayat dt. 21-08-2009, report lodged by father of plaintiff against defendants and other dt. 02-11-2009.

23. Thereafter vide exh. 25, plaintiff relied upon copy of sale deed dt. 02-05-1980 and one photograph. Vide exh. 37, again two assessment sheets are filed by plaintiff, first is shown for the year 1980-1981 in name of predecessor in title of suit house but issued on 31-08-2009 showing area 48X 38 and as per it same is issued in view of sale deed dt. 02-05-1980 and second is in name of father of plaintiff bearing same contents for the year 1982-1983. Lastly while the case was closed for order on exh. 5, plaintiff again filed certificate dt.29-04-2015 issued by Gram Panchayat contending that house owned by Gulab Shende was assessed in the year 1985-1986, but there is no mention of its area in gram panchayat record and accordingly he filed assessment sheet which is silent about area of property.

24. Defendants also relied upon lots of documents but in one stroke. Assessment sheet of suit property for the year 1970-1971 issued in name of pre-decessor in title of suit property issued on 04-01-2013, certificate dt. 25-02-2010 issued by gram panchayat contending that assessment register Form

No.8 for the year 1980-1981 of village Rohna is not available at Gram Panchayat. Next is assessment sheet of house of defendants for the year 2009-2010 showing area 55 X 35 feet issued on 25-07-2009, certificate dt. 14-08-2008 issued by Gram Panchayat, contending that area of suit house is not available in record, but same was assessed since 1966-1967, tax receipt of defendants house. Further is assessment sheet of house in possession of defendant no.1 for the year 2014-2015 as per which area is 28 X 35 (as per defendants, remaining area is in possession of defendant no.2 as they partitioned property between them). On 30-09-2014 Gram Panchayat issued certificate that defendant no.1 is resident of village Rohna and prior to this has not obtained any benefit of Gharkul. Next is boundary certificate of property in possession of defendant no.1, interestingly as per this plaintiffs house does not come anywhere. Admittedly earlier civil suit was instituted by father of plaintiff against father of defendant and Arun Shende and subsequently same was withdrawn by plaintiff, next document is certified copy of plaint of that suit. Last is assessment sheet of plaintiffs property for the year 2014-2015 showing area of property dt. 07-10-2014.

25. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Further prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. Relevant consideration is whether the evidence led is sufficient to arrive at the conclusion which is only possible conclusion to be arrived on basis of available evidence. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction.

26. It is also to be satisfied that non-interference by the Court would result in irreparable injury to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession.

Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages.

27. The third condition also is that the balance of convenience must be in favour of granting injunction. While granting or refusing to grant injunction it is to find that the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted.

28. Needless to mention that at this stage mini trial is not to be conducted, but the case is to be analysed on basis of available documents and importantly pleadings.

29. Few facts which can be culled out from pleadings of both parties are that defendants are though disputing area of plaintiffs property but is not seriously agitating his ownership. Even same is prima facie proved by sale deed. Though area is mentioned in sale deed, but how that area is ascertained is big issue and even that is part of trial. Further, ownership of defendants over property no.312 is not in dispute. Herein also plaintiff is silent about area of property owned by defendants. Importantly, defendants carrying out construction is not in dispute which as per them is in their area i.e. 51 X 26 feet, but have not filed sanctioned plan which is mandatory for obtaining benefit of Gharkul scheme.

30. At this stage of suit, evidence is not before Court, nor parties can be asked to lead evidence. Hence claim needs to be decided on basis of available material which definitely includes documents and may include affidavit or any other material like commissioner report in this suit. Further, another rule of law applicable at this stage is that if efficacious remedy is available, interim relief cannot be granted. Lastly, person claiming interim relief should come with clean hands as present is equitable relief.

31. Above legal aspects is necessary to mention as same is attracted in instant suit. Reverting back on facts, plaintiff says that he owns total 1872 square feet area as per sale deed and as per map defendants have encroached over total 599 square feet area, so they be stopped to carry out further construction. Whereas defendants says that are carrying out construction on their property and plaintiff is not owner of area mentioned in sale deed as there is no record available in Gram Panchayat saying that his pre-decessor in title was owner of so much area.

32. Both parties relied upon documents to support their claim which as mentioned above is contradictory to each other. As one document filed by defendants shows that in 1970-1971 there is no mention of area in possession of Muka Dhone, pre-decessor in title of plaintiff. Whereas, plaintiff filed document to show same position with defendants. But interestingly, subsequently both have documents to show area of respective properties issued by same Gram Panchayat. In such situation, none of documents can be relied as are showing contradictory position. It also shows that inspite of cementing their respective claim, parties are interested in weakening anothers contention. At the cost of repetition, sale deed shows area pleaded by plaintiff, but how that area is ascertained is not clear, hence at this juncture, that cannot be considered in view of other documents filed by defendants.

33. Ownership of parties over respective properties, except area is appearing at this stage, but area needs to be ascertained and at this stage both failed to prima facie show that. As a matter of record, earlier suit bearing R.C.S.No. 22/2008 was instituted by father of plaintiff which was contested by father of defendant no.1, means written statement was filed. Plaintiff could have filed copy of written statement showing whether area of his property was admitted by father of defendant no.1 in that suit or not. It could have helped plaintiff as in that situation, that can be accepted. Defendants filed copy of plaint but not written statement, and it is for plaintiff to prove his claim, so he could have filed. However, as he did not filed the same, he should suffer. As

such, at this stage, area owned by both parties is not clear and to decide that we have to wait till trial.

34. Plaintiff says that construction is going on his area and for that he relies heavily upon commissioner map. Defendants contention that is carrying out construction after sanction is not backed by any documents or other material. But onus is on plaintiff. Commissioner map shows encroachment, but same is challenged by defendants. Then also that can be ascertained at this juncture, but not blindly. Perusal of map shows that Commissioner had measured plot as per sale deed dt. 02-05-1980 and not both the properties. Moreso, boundaries mentioned in map does not matches with boundaries mentioned by plaintiff in plaint. Towards south side is house of defendant no.1 as per commissioner map, but in sale deed and plaint, there is house of Abhiya Wahane towards south side. This discrepancy cannot be overlooked at this stage. As per map, plaintiff only and defendants along with counsel were present at the time of measurement and measurement is carried out as per sale deed, then also this discrepancy affects plaintiff. It is not the case of plaintiff that defendants purchased said south side property. Even plaintiff did not filed any material to remove this or explain this. Moreso, commissioner measured plaintiffs property as per sale deed and nothing else.

35. When the documents are contradicting each other and material document is showing position different from what is pleaded, something more is expected from plaintiff in form of supporting affidavit of adjacent neighbors, or person knowing or are related with properties etc. But plaintiff failed to bring this.

36. Plaintiff claims injunction on basis of ownership over particular area, but at this juncture, fails to prove ownership over respective area. Further, his contention of encroachment over his plot is also not proved by him as there is discrepancy in boundaries mentioned in map and plaint. As such plaintiff fails to prima facie prove his claim. Hence I answer Point no.1 in Negative.

37. At this stage if balance of convenience is there it is definitely not in favor of plaintiff as he fails to prima facie prove his case and balance of convenience tilts in favor of person in whose favor prima facie case lies. Hence, I answer point no.2 in Negative.

38. As regard to irreparable loss, it can safely be concluded that plaintiff will not suffer irreparable loss as he has already claimed relief of mandatory injunction. He is not in possession, so he suffering any loss at this stage is not the situation. Whereas defendants have dismantle their old construction and have stopped their new construction, so if they are restrained they will be roof less particularly when extreme hot waves are going on and rainy season will knock the door shortly. Even if construction is completed, plaintiff will not remain remedy less and even has already pleaded that relief. So alternate efficuous remedy is available.

29. Moreso constuction is completed till slab level, it is not the case of plaintiff that defendants have tried to encroach on area more than on which construction is going on, so no situation that suit will become complex if injunction is not allowed. As such, available situation shows that plaintiff will not suffer any loss particularly irreparable loss, whereas defendants will due to stage in which construction is stopped. Hence, I answer point no.3 also in Negative.

40. In nutshell, plaintiff failed to prove his claim, similarly he failed to prove the essential ingredients for granting this equitable relief of injunction. I proceed to pass the following order.

**: O R D E R :**

1. Application at exh.5 for grant of temporary injunction is rejected.
2. Cost in cause.

Date : 02-05-2015.  
Narkhed

( **S.K. Choudhary** )  
Jt. Civil Judge, Junior Diviosn,  
Narkhed.