

R.C.S. 13/2017**Order below Exh. 5**

The present application is filed by the plaintiff for grant of temporary injunction under Order 39 Rule 1 and 2 of the Civil Procedure Code to restrain defendant nos. 1 and 2 from causing encroachment on the suit way.

2. Facts of case of the plaintiff in brief are as follows :-

This suit is filed against defendants for declaration, removal of encroachment, and injunction. Suit property is the 10 foot way from Takai-Adoshi main road to Gut No. 227. On 17/04/2003 Chaul area admeasuring 2.75 gunthas (40 x 20 Foot) constructed on Gut no. 227 was sold by the plaintiff to defendant no. 2. More ever defendants also purchased area 0-01-0 out of total area of 0-70-80 of Gut no. 226 from Kaluram Baluram Dhamale. It was decided to give suit way to the plaintiff. Since said agreement i.e. on 17/04/2003 the plaintiff was using said way without any interruption. Copy of said agreement was also given to Grampanchayat, Sajgaon.

3. But now defendant nos. 1 and 2 by carrying out construction over said way, caused obstruction to the plaintiff. They closed said road though they have no right to do so. Hence Grampanchayat, Sajgaon had sent notices to defendant nos. 1 and 2 as per Section 52 and 53 of Mumbai Grampanchayat Act. Still they did not stopped said construction. There is no alternative way available to the plaintiff to approach to his properties. Hence the plaintiff filed complaint in Grampanchayat, Sajgaon on 30/05/2016 and in Khopoli Police Station on 27/01/2017 about said fact. But both authority give opinion to the

plaintiff to approach to the Court. Hence the plaintiff filed this suit against the defendants. Though only defendant nos. 1 and 2 caused encroachment still said property now sold to defendant no. 3, hence he is added as party to this suit. The plaintiff claiming temporary injunction against defendant nos. 1 and 2 only. The plaintiff has made out prima facie case in his favour, balance of convenience is in favour of the plaintiff. More ever irreparable loss would be caused to the plaintiff if injunction would not be granted in favour of the plaintiff.

4. Defendants appeared through their Ld. Advocate. Though sufficient opportunity was granted to defendant nos. 1 and 2 to file say but they failed to file their say. Hence this application needs to be decided without say of defendant nos. 1 and 2. Opportunity also given to Ld. Advocate for defendant nos 1 and 2 to argue on this application, but he failed to do so.

5. Perused application. Heard learned advocate for the plaintiff. Following point arose for the determination. Findings thereon along with reasons are as under :

| Sr. No. | Points | | Findings |
|----------------|--|----|--|
| 1. | Whether the Plaintiff has made out prima facie case? | .. | Yes |
| 2. | In whose favour the balance of convenience lies? | .. | In the favour of the plaintiff |
| 3. | Who will suffer irreparable loss and hardship ? | .. | Plaintiff, if the injunction is rejected |
| 4. | What order? | .. | The application is allowed |

REASONS

Point no. 1 :-

6. The learned advocate Mr. D. N. Shete for the plaintiff argued that when sale deed was executed, it was decided to give suit way to the plaintiff from gut no. 227. Since said sale deed i.e. on 17/04/2003 the plaintiff was using said way without any interruption. Copy of said agreement was also given to Grampanchayat, Sajgaon.

7. But now defendant nos. 1 and 2 by carrying out construction, caused obstruction over said way. They closed said road though they have no right to do so. Hence Grampanchayat, Sajgaon had sent notices to defendant nos. 1 and 2 as per Section 52 and 53 of Mumbai Grampanchayat Act. Still they did not stopped said construction. There is no alternative way available to the plaintiff to approach to his properties. Hence the plaintiff file complaint in Grampanchayat, Sajgaon on 30/05/2016 and in Khopoli Police Station on 27/01/2017 about said fact. The plaintiff filed this suit against the defendants. The plaintiff has made out prima facie case in his favour, balance of convenience is in favour of the plaintiff. More ever irreparable loss would be caused to the plaintiff if injunction would not be granted in favour of the plaintiff.

8. He further submitted that if injunction will not be granted then heavy loss would be caused to the plaintiff as there is no alternative way available to the plaintiff to approach to his properties. Considerable period will be lose to decide this suit, till then it is necessary to restrain illegal conduct of defendant nos. 1 and 2 to protect interest of the plaintiff. The plaintiff have every right to enjoy his property. Still defendant nos. 1 and 2 by causing encroachment, created hurdle in the enjoyment of rights of the plaintiff.

9. Defendant nos. 1 and 2 appeared but failed to file their say. It seems that they agree with the averments made by the plaintiff.

10. I have gone through the provisions of Order XXXIX Rule 1 of the Code of Civil Procedure which runs as follows -

Order XXXIX Rule 1. Cases in which temporary injunction may be granted.—Where in any suit it is

proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property 1[or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

11. After going through above mentioned provision it is clear that the temporary injunction may be granted to secure properties in danger. Defendant nos. 1 and 2 didn't deny claim of the plaintiff. It seems that defendant nos. 1 and 2 are agree with the claim of the plaintiff. Defendant no. 2 on 17/04/2003 executed consent deed on stamp paper of Rs. 20 stating that there is a way on Gut no. 227 to visit to property of the plaintiff. More ever the plaintiff filed Non-Cognizable criminal case against defendant no. 2. Grampanchayat, Sajgaon also sent legal notice to defendant nos. 1 and 2 to stop illegal construction carried out by them. Considering all the submissions and document filed on record, plaintiff is succeeded to establish prima facie case in his favour. Hence, I answer point no. 1 in affirmative.

Point no. 2 and 3 :-

12. So far as factors of balance of convenience and irreparable loss are concerned, from the facts of the case its seems that defendant nos. 1 and 2 is alleged to carried out construction to cause resistance to the plaintiff. This conduct of defendant nos. 1 and 2 create hurdle in the right of the plaintiff to enjoy the property. Defendants did not filed their say. Hence even if the injunction is granted it will not cause any prejudice to the rights of defendant nos 1 and 2. balance of convenience lie in favour of the plaintiff. No doubt irreparable loss would be caused to the plaintiff if injunction will not be granted in favour of the plaintiff. Hence, I answer point nos. 2 and 3 in favour of the plaintiff.

Point no. 4 :-

13. In the light of above discussion, it is concluded that

the plaintiff succeeded to prove the prima facie case. The factors of balance of convenience and irreparable loss lie in favour of the plaintiff. Hence, the application needs to be allowed. In the result, I pass the following order -

ORDER

- I. The application below Exh. 5 is allowed.
- II. Defendant nos. 1 and 2, their agents, servants or any person claiming through them are restrained from causing obstruction to the plaintiff from using 10 foot way from Takai-Adoshi main road to Gut No. 227, till the final disposal of the suit.

Place: Khalapur
Date : 15.10.2018

(Vishal S. Dhondage)
Jt. Civil Judge, J.D., Khalapur