

Order below Exh. 5

The present application is filed by plaintiffs for grant of temporary injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908, to restrain defendants from carrying out construction by causing encroachment over the suit property.

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

This suit is filed for removal of encroachment and injunction. The suit property is city survey no. 952, situated at Chinchavali Shekin, Tal. Khalapur, Dist. Raigad admeasuring 214.4 sq. Mtr. area. The suit property is self acquired property of plaintiffs. It was purchased by plaintiffs from Gangaram Gholap on 03/01/2011 with the registered sale deed bearing no. 4/2011. plaintiffs constructed house no. 96 over said city survey. Defendants owned total area 50.6 sq.mtr of city survey no. 1043 and 1044, which is situated at southern side of suit property. Defendants have no concern with the suit property. Illegally and taking undue advantage of the fact that, plaintiffs not residing in the village Chinchavali Shekin, defendants in November 2019 started construction by causing encroachment over suit property. Plaintiff issued notice on 15/11/2019 to defendants. plaintiffs also filed written complaint in Khopoli Municipal council on 27/11/2019. Though, the municipal council inform to defendants to stop the construction still they failed to do so. False reply send by defendants to plaintiffs on 30/11/2019. Defendants are carrying out construction over 56.46 sq.mtr out of which 29.16 sq.mtr construction is on the suit property. Hence, for the purpose of declaration and injunction plaintiffs filed this suit.

3. Ld. Advocate for plaintiffs submitted that, plaintiff has made out the prima facie case in his favour. Balance of convenience lies in

favour of plaintiff. If defendants are not restricted then irreparable loss would be caused to plaintiffs. Hence temporary injunction may please be granted against defendants.

4. Defendants appeared and filed their say and written statement at exh. 18. They contended that, the suit is not legally tenable. plaintiffs have no right to file this suit. Moreover, this Court have no jurisdiction to entertain this suit. Wrong four boundaries are mentioned in the plaint. Defendants purchased land admeasuring 85.87 sq.mtr area out of total area 90.2 sq. mtr area of city survey no. 1043 and 1044 from previous owner Smt. Sitabai Ram Telvane. Since 1985 defendants paying tax in respect of old house bearing old property no. W19-96/1 of which new property no. is W19Z4000254. Defendants are carrying out construction over their area admeasuring 85.87 sq. mtr. Khopoli Municipal council issued notice only to defendant no. 1 which is not binding on defendant nos. 2 to 4, as it is not issued to defendant nos. 2 to 4.

5. It is further contended that, to harass defendants, plaintiffs filed this suit. There is no situation to grant temporary injunction. Irreparable loss would be cause to defendants if temporary injunction will be granted. Hence, application of temporary injunction may please be rejected with cost.

6. Perused an application and say. Perused all the documents filed by parties. Heard learned advocates for both the sides. Following point arose for the determination, I have recorded my findings thereon along with reasons are as under :

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

REASONS

Point no. 1 :-

7. The learned advocate Mr. S.S. Palande for plaintiff argued that plaintiffs is lawful owner and possessor of the suit property. Initially suit property was owned and possessed by Vividh Karyakari Society, Chinchavali Shekin, later on it was purchased by Mr. Gangaram Gholap. On 03/01/2011 plaintiffs purchased suit property. Mutation entry bearing no. 757 was carried out to that effect. Defendants purchased in all total 50.6 sq.mtr area out of city survey no. 1043 and 1044. Though, defendants are owner and possessor of 50.6 sq. mtr area, they are constructing new house over near about 85.15 sq. mtr area by causing encroachment over suit property. Defendants by carrying out said construction caused encroachment of 29.16 sq. mtr over the suit property. Though, the municipal council of khopoli issued notice to defendants to stop the construction still defendants are carrying out construction. It shows that, defendants are not law abiding citizen. Though, defendants have no right to carried out construction over suit property, still they are carrying out construction as alleged. Said conduct of defendants breaching the rights of plaintiffs. plaintiffs have prima facie case in his favour.

8. Heard learned advocate Mr. T.G. Arade for defendants. He submitted that, wrong 4 boundaries are mentioned by plaintiffs in his plaint. Though, it was directed by concern authority to measure the land still plaintiffs failed to do so. Defendants have ownership and possession over 85.87 sq. mtr area. In fact they are constructing over 61.33 area. There is no reason as to why plaintiffs not filed sale deed of suit property. Moreover, plaintiff also not filed assessment extract of suit property. plaintiffs is the agent of land. He not came in the Court with clean hands. Though, permission of construction was given to defendant nos. 1 to 4, still municipal council issued notice to defendant no. 1 only. No report of spot visit was attached with said notice. plaintiffs failed to file affidavit in support of photographs filed by him. Construction is already completed. Hence no question of temporary injunction. Plaintiff have no prima facie case.

9. Before deciding application it is necessary to go through the relevant provision of the law. Hence 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, plaintiffs or otherwise cause injury to plaintiffs 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 plaintiffs, or otherwise causing injury to plaintiffs 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.

10. After going through above mentioned provision it is clear that the temporary injunction may be granted to secure property in danger.

11. Considering submission and documents on record, it seems that plaintiff is claiming temporary injunction against defendants restraining them from carrying out construction over suit property. plaintiffs is the owner of suit property having allegations that, defendants are carrying out construction by causing encroachment. After perusal of sale deed executed in favour of plaintiff is shows that plaintiffs is the owner and possessor of suit property. Defendants filed certain documents along with list at exh. 21. Sale deed dated 26/04/1984 shows that, defendants are owner of 50.6 sq.mtr area out of city survey no. 1043 and 1044. The learned advocate for defendants argued that, mistakenly only area 50.6 sq.mtr is mentioned, in fact defendants are owner of 85.87 sq.mtr area. But defendants failed to show any of the document to prove that they are the owner of area admeasuring 85.87 sq.mtr.

Moreover, though the municipal council of Khopoli issued notice to defendant no. 1 to stop construction and cause measurement through T.I.L.R., still defendants carried out further construction. There is no

reason as to why defendants not carried out measurement as directed by Khopoli Municipal council. Prima facie it seems that, defendants failed to act upon as per the direction of concern authority.

12. further mutation extract of city survey no.1043 and 1044 shown that in all defendants have 50.6 sq.mtr. area out of these both city survey numbers. But defendants claiming that they have 50.6 sq.mtr. area each in both survey numbers. It shows that defendants with their wrong concepts are under impression that they are owner of double area than they actually having ownership. 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 :-

13 . So far as factors of balance of convenience and irreparable loss are concerned, from the facts of the case its seems that defendants are alleged to carried out construction which causes resistance to plaintiffs. This conduct of defendants create obstruction in the right of plaintiffs to enjoy the property. As the learned advocate for defendants submitted that, the construction is already completed, hence even if the injunction is granted it will not cause any prejudice to the rights of defendants. Balance of convenience lie in favour of plaintiffs. No doubt irreparable loss would be caused to plaintiffs if injunction will not be granted and further construction is carried out by defendants. Hence, I answer point nos. 2 and 3 in favour of plaintiffs.

Point no. 4 :-

14. In the light of above discussion, it is concluded that plaintiffs succeeded to prove the prima facie case. The factors of balance of convenience and irreparable loss lie in favour of plaintiffs. Hence, the application needs to be allowed. While answering to point no. 4 I pass

the following order -

ORDER

- I. The application below Exh. 5 is allowed with cost.
- II. Defendants, their agents, servants or any person claiming through them, are hereby restrain from causing obstruction to the possession of plaintiff by causing encroachment over the suit property.

Place: Khalapur
Date : 24.12.2019

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