



R.C. S. No. 29/2023
Prabhakar vs. Madhukar + 04
CNR No. MHRG090003922023

ORDER BELOW EXH.05

The instant application has been filed by the plaintiff under Order XXXIX Rules 01 and 02 of the Code of Civil Procedure, 1908 (in short “the C.P.C.”).

02. **Description of the suit property:**

House admeasuring 54.28 square meters bearing No.905 and building containing three shops towards its eastern side bearing No.905/1 area admeasuring 36 square meters situated at Roha, Taluka - Roha, District - Raigad (hereinafter referred to as the “suit property” for brevity) having four boundaries as mentioned in the plaint paragraph No.01.

03. Read the application and say-come written statement (Exh.11) of the defendant No.01. Defendant Nos.02 to 05 though served did not appear. Thus, suit proceeded ex-parte against them as per the orders passed below Exh.01 on 04.08.2023 and 09.10.2023.

04. Gone through the record. Heard the learned advocate Shri. S. N. Sanap for the plaintiff and the learned advocate Shri. M. D. Patil for the defendant No.01.

05. Following points arose for my determination and I have recorded my findings against each of them for the reasons mentioned below.

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1)	Whether the plaintiff has made out a prima - facie case?	No.
2)	Whether the balance of convenience lies in favour of the plaintiff?	No.
3)	Whether the plaintiff will suffer irreparable loss if his prayer of temporary injunction is refused?	No.

4)	What order?	The application is rejected.
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AS TO POINT NO.01 :-

06. It is argued by the learned advocate of the plaintiff that the defendant No.01 is making construction besides the boundary of the suit property. He has completed construction up to first floor. After the complaints given by his client to Nagar Parishad, the defendant No.01 got measured his property on 09.03.2021. In which encroachment made by him on the suit property is shown. The plaintiff is making construction without leaving required open space from the boundary of his property. Thus, encroachment in the air has been caused. He has filed affidavit of Rohit Namdar as well as latest photographs to show actual position on the spot. Importantly, permission for the construction given to the defendants is lapsed. They have not obtained renewed permission for the construction. Construction made by them is invalid as it is on the basis of lapsed permission. Further, it is not the case of defendants that there is sub-division of plots. Thus, entire area has to be considered. There is no compliance of Appendix K by the defendants. Therefore, benefit of Rule 2.1.2 (xv) of Unified Development Control and Promotion Regulations for Maharashtra (In short 'UDCP Regulations') cannot be given to them. Moreover, sanctioned map of the property of defendants show that one meter space has to be kept from their boundary, Which has been not done by them. Being an adjoining owner, the plaintiff possesses right to question illegal construction made by the defendants. In support of his contentions, the learned advocate of the plaintiff relied on the ruling of the Hon'ble Supreme Court in the case of *K. Ramadas Shenoy Vs. The Chief Officers, Town*, reported in **1974 AIR 2177** and on the ruling of the Hon'ble Parent High Court (Panaji Bench) in the case of *Smt. Fatima Joao Vs. Village Panchayat of Mercedes and another*, reported in **2001(2) ALL MR 680**.

07. On the other hand, it is argued by the learned advocate of the defendant No.01 that the plaintiff has not mentioned as to when his client

has encroached on the suit property as well as on the public drainage and road. Importantly, from the documents filed on record of old R.C.S.No.100/89, alleged encroachment is seen to be 35 years old. It is material to note that the suit property in the present suit and in R.C.S.No.100/89 is one and the same. In R.C.S.No.100/89 Nagar Parishad was party and drainage from east to west was shown, which is invisible in the suit at hand. Importantly, as agreed between the parties in R.C.S.No.100/89, the plaintiff has not measured his property. He has not come before the Court with clean hands. His client is making construction as per the permission. As per section 189 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (in short 'the Act of 1965') construction permission cannot be lapsed. For word may is used in said provision. Rohit Namdar is not an expert witness. His client is making construction within their wall compound. There is no possibility of encroachment in the air as there is drainage between both the properties. The measurement map does not show any encroachment of his client on the suit property. As per Rule 2.1.2 (xv) of UDCP Regulations there is no need to obtain permission for construction from the Nagar Parishad as plot area is within the stipulated bracket. Both the rulings are not applicable in the present suit as Nagar Parishad was party and those were representative suits. As per law construction needs to be started in one year and not completed in one year.

08. It is the case of the plaintiff that the defendant No.01 has made encroachment of 1.75 square meters on the suit property by constructing latrine and bathroom on the same. Moreover, while making construction the plaintiff has made encroachment on the public drainage as well as on the public way and thereby made them narrower. He is making construction on the basis of lapsed construction permission, which is invalid.

09. On the contrary, it is the case of the defendant No.01 that prayer concerning the encroachment of the plaintiff is barred by the law of limitation, as that construction is old one. He has started construction as per

the permission of the Nagar Parishad and left required open space. He has neither encroached on the space of anyone nor on public drainage or public way. The plaintiff has filed the suit only to harass him.

10. Before going further it is necessary to check as to whether the plaintiff is having right to question construction made by the defendant No.01. I have gone through the rulings in the cases of *K. Ramadas Shenoy* (supra) and *Smt. Fatima Joao* (supra) relied on by the learned advocate of the plaintiff. In my most respectful submission, it is seen from those rulings that the adjoining owner possesses right to question construction made in his vicinity if the same is made without following rules and regulations of the concerned Municipal Law. Thus at this stage, the plaintiff seen to be having right to pray for the relief claimed in the instant application.

11. As per the case of the plaintiff, after complaints made by him to the Nagar Parishad, the defendant No.01 got measured his property. On going through the said measurement map and boundaries of the property shown by the measurement officer, it is seen that the defendant No.01 has made encroachment of 1.75 square meters on the suit property. Whereas, perusal of the measurement map dated 09.03.2021 of the property of the defendant No.01 nowhere shows any encroachment of the latrine and bathroom constructed by him on the suit property. Moreover, said map also does not show encroachment of the defendant No.01 on the public way and the public drainage as claimed by the plaintiff.

12. The hand sketch filed by the plaintiff on record shows encroachment of the defendant No.01 of 1.75 square meters on the suit property as well as on the public drainage and public way of the defendants. The said map seen to be prepared by the plaintiff himself. Whereas, it is material to note that neither the said map nor any other document shows that the plaintiff is having necessary knowledge and experience in the field of measurement of house. Thus, said map cannot be taken into consideration.

13. From the documents filed on record by the plaintiff himself it is seen that the defendant No.01 got measured his property from the office of Dy. S L. R. In said situation, before alleging encroachment at the hands of the defendant No.01 on the suit property by the plaintiff, it was expected from him to get measured his property from the concerned Dy. SLR or at least from the private measurer. However, he has neither complied said fact nor gave any explanation for its non completion.

14. Besides the facts mentioned in the above paragraph, it is worth to note that in the past, the plaintiff's father has filed R.C.S.No.100/89 against the defendant No.01 and his father for removal of encroachment of latrine and public drainage. Perusal of certified copies of relevant documents filed by the defendant No.01 below list of documents (Exh.33) show that R.C.S.No.100/89 was compromised between the plaintiff's father and the defendant No.01 and his father. It is specifically seen from the Decree (Exh.84) in said suit that it was decided between the parties to measure the suit property from the T.I.L.R. and if encroachment is found of either of them in their properties then they shall handover the same to the concerned. Importantly, the plaintiff has nowhere pleaded about R.C.S.No.100/89, nor record shows that he measured the suit property as decided in the said suit. From the supra facts it is seen that the plaintiff has not come before the Court with clean hands and their appears substance in the contention of the defendant No.01 that his construction of the latrine and bathroom is old one.

15. The plaintiff has filed on record affidavit of Rohit Namdar, photographs and sanctioned map. From the apparent scrutiny of those documents it is seen that the defendant No.01 has made construction of ground and first floor, he has kept four windows on the southern side and he is making construction without leaving proper space from the suit property. Photographs filed by the plaintiff show that the construction of the defendant No.01 is within his compound wall. As rightly argued by the learned advocate of the plaintiff sanctioned map of the property of defendants show one meter

open space from their boundary. The record apparently shows that there is boundary dispute between the plaintiff and the defendants. In said situation, joint measurement of their properties is expected by the Law. As I mentioned earlier, though agreed neither the plaintiff's father nor he himself appears to have measured the suit property till today. In absence of joint measurement of their properties, it cannot be firmly said that the construction of the defendant No.01 is not without leaving one meter space and that too only on the basis of oral evidence and photographs.

16. For grant of benefit of Rule 2.1.2 (xv) of UDCP Regulations it was obligatory on the defendant No.01 to show compliance of provisions in Appendix K of said Regulation. Perusal of Appendix K shows that the licensed personal has to certify that the construction is in accordance with the UDCP Regulations. However, the defendant No.01 seen to have not made said compliance. Thus, benefit of Rule 2.1.2 (xv) of UDCP Regulations cannot be given to him.

17. The careful reading of construction permission filed by the plaintiff on record of the construction of defendants, specifically condition No.02 in the said document shows that said permission is valid only for one year and it is necessary to make complete construction within the said period. Whether the said permission lapsed or not, for that purpose it is necessary to go through Section 189 of the Act of 1965. It reads as under.

Section 189. Notice of construction of building.

(1) The expression “ to construct a building” through out this Chapter includes— (a) any material alteration, enlargement or reconstruction of any building, or of any wall including compound wall and fencing, varandah, fixed platform, plinth, door-step or the like, whether constituting part of a building or not ;

(b) the conversion into a place for human habitation of any building not originally constructed for human habitation ;

(c) the conversion into more than one place for human habitation of any

place originally constructed as one such place ;

(d) the conversion of two or more places of human habitation into a greater number of such places ;

(e) such alterations of the internal arrangements of a building, as affect its drainage, ventilation or other saniatry arrangements, or its security or stability ; and

(f) the addition of any rooms, buildings or other structures to any building, and a building so altered, enlarged, reconstructed, converted or added to, is throughout this Chapter included under the expression “a new building”.

(2) Before beginning to construct any building, the person intending so to construct shall give to the Chief Officer notice thereof in writing and shall furnish to him at the same time, if required by a by-law or by a special order to do so, a plan showing the levels, at which the foundation and lowest floor of such builing are proposed to be laid, by reference to some level known to the Chief Officer, and all information required by the by-laws or demanded by the Chief Officer regarding the limits, design, ventilation and material, of the proposed building, and the intended situation and construction of the drains, privies, water-closets, house-gullies and cess pools, if any, to be used in connection therewith, and the location of the building with reference to any existing or projected streets, the means of access to such building and the purpose for which the building will be used :

Provided that, if the by-laws of the Council so require, such notice shall be in such form as the Council may from time to time prescribe and such plans shall be signed by a person possessing the qualifications laid down in the by-laws or licensed under the by-laws so to sign such plans.

(3) If the person giving notice under sub-section (2) fails to—

(i) furnish all the information and documents required under subsection (2) ;
or

(ii) the Chief Officer deems it necessary to call for any further information or documents,

the Chief Officer, shall, within sixty days of the receipt of the notice, require

such person by an order in writing to furnish such information or documents.

(4) Within sixty days of the receipt by the Chief Officer of the notice under sub-section (2), or if any further information and documents have been called for under sub-section (3) then within sixty days of the receipt of all such further information and documents, the Chief Officer may—

(a) grant the necessary permission to construct according to the plans and information furnished under sub-section (2) and sub-section (3) ;

(b) impose any conditions in accordance with this Act or the rules and by-laws made thereunder, as to the level, drainage, sanitation, materials or to the number of storeys to be erected, or with reference to the location of the building in relation to any street existing or projected or to the means of access to such building or the purpose for which the building is to be used ;

(c) direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building or street have been decided to his satisfaction ;

(d) subject to the provisions of the next succeeding section, refuse such permission for reasons which shall be communicated to the applicant in writing.

(5) The Council may, before any work has been commenced in pursuance of any permission granted by the Chief Officer under sub-section (4), revoke such permission and may give fresh permission in lieu thereof or issue any other order as may be passed by the Chief Officer under sub-section (4).

(6) If the Chief Officer fails to issue an order under clause (c) or (d) of sub-section (4) within the period prescribed in that sub-section, the person giving notice under sub-section (2), shall, after the expiry of the said period, be entitled to proceed with the work in respect of which such notice has been given under sub-section (2), in the manner specified in such notice, provided that such manner is not inconsistent with any provisions of this Act or any rule or bye-law for the time being in force thereunder.

(7) No person who becomes entitled under sub-section (4), (5) or (6) to proceed with any intended work of which notice is required by sub-section

(2), shall commence such work after the expiry of the period of one year from the date on which he first became entitled so to proceed therewith, unless he shall have again become so entitled by a fresh compliance with the provisions of sub-sections (2) to (6). (8) If any person begins any construction of a building of which notice is required to be given under sub-section (2)—

(i) without the permission of the Chief Officer under sub-section (4) or of the Council under sub-section (5), save as otherwise provided under sub-section (6) ; or

(ii) having received permission under clause (a) of sub-section (4), contrary to the plans and information furnished under sub-sections (2) and (3) ;

(iii) having received permission under clause (b) of sub-section (4), contrary to the conditions imposed under that clause or contrary to the plans and information submitted under sub-sections (2) and (3) in so far as such plans and information are not modified by such conditions ; or

(iv) contrary to the provisions of sub-section (6), when construction is begun under that sub-section,

the Chief Officer may, by a written notice, require such person to stop such construction and to alter or demolish any construction already made as specified in the notice. If, within fifteen days from the service of such notice for demolishing any such construction, the work of demolishing it is not commenced, the Chief Officer may cause such work to be done and the expenses incurred therefor shall be recoverable from the person concerned in the same manner as an amount due on account of a property tax.

[(9) Any person to whom the notice under sub-section (8) of this section or sub-section (2) of section 195 has been served, on his failure to comply with such notice,]

(a) for restoration of the foundation, plinth, floor or structural members or load bearing wall, thereby endangering the life and property of any person occupying, resorting to or passing by such building or any other building or place in the neighbourhood thereof, shall be punished with imprisonment for

a term which shall not be less than three months but which may extend to three years; and with a fine which shall not be less than ten thousand rupees but which may extend to fifty thousand rupees; and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for each day during which such contravention continues after conviction for the first such contravention;

(b) for removing, pulling down the unauthorised work, shall be punished with imprisonment for a term which shall not be less than one month but which may extend to one year and with a fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees; and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for each day during which such contravention continues after conviction for the first such contravention.

(10) The Court convicting such person may also direct such person to demolish or alter the building in accordance with the order of the Chief Officer or in such other manner as the Court may deem proper and within the period specified by the Court. If such person fails to demolish or alter the building within the period specified by the Court, or in the manner required by the Court, he shall, on conviction, be punished with further fine which may extend to 2[two hundred and fifty rupees] for every day after the expiry of the period for compliance specified by the Court in its order during which such non-compliance continues.

(11) Nothing in sub-section (8) or (10) shall be deemed to affect the power of the Council or the Chief Officer to demolish or alter the building under section 195.

(12) The Chief Officer may, at any time, inspect without giving notice of his intention to do so, any work of which notice is required by sub-section (2); and at any time during the execution of any work may by written notice, specify any matter in respect of which the execution of such work is in contravention of any provision of this Act or of any by-laws made under this Act or of any order passed under this section; and require the person

executing such work to cause anything done contrary to any such provision or bylaws or order to be amended or to do anything which by any such provision or by-law or order he is required to do but which has been omitted.

(13) Where it has been brought to the notice of the Chief Officer or any other officer of the Council, nominated by the Council in the prescribed manner, that erection of any building or execution of any work is carried out or commenced contrary to the provisions of the Act, rules or bye-laws and if such officer has failed, without sufficient reasons, to take action as provided under this section, he shall, on conviction, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to twenty thousand rupees or with both.

18. The careful reading of supra provision nowhere shows that the construction permission cannot be lapsed. Thus, argument advanced in that regard by the learned advocate of the defendant No.01 is not acceptable one.

19. The plaintiff basically pleaded about encroachment of the defendant No.01 on public drainage and public way. In said situation as well as in view of his case regarding lapsed construction permission of the defendants, it was expected that he would join the concerned Nagar Parishad in the suit. Surprisingly, he has not furnished any reason as to why he has not added Nagar Parishad as party in the present suit that too when it was party in earlier R.C.S.No.100/89.

20. In the backdrop of supra discussion, I come to the conclusion that the plaintiff has failed to establish prima-facie case in his favour. Accordingly, I answer point No.01 in the negative.

AS TO POINT NO.02 :-

21. To decide in whose favour balance of convenience lies, I must see to whom substantial mischief or injury will be caused. The defendant No.01 appears to have dismantled his old house and started construction thereon. He seen to have made huge expenditure. Contrary, the plaintiff has not even

measured the suit property to support his case of encroachment. In the above situation, in my opinion balance of convenience tilts in favour of the defendant No.01. Accordingly, I answer point No.02 in the negative.

AS TO POINT NO.03 :-

22. The expression "Irreparable loss" means injury which is substantial and could never be adequately compensated or atoned by way of damages or it can be said that injury which cannot be possibly repaired. The plaintiff has failed to make out a prima facie and balance of convenience in his favour. The defendant No.01 demonstrated that he will suffer substantial mischief if the injunction is granted. Again, the plaintiff seen to have not come before the Court with clean hands. Consequently, I come to the conclusion that the defendant No.01 will suffer irreparable loss if injunction is granted. Hence, I record my finding to point No.03 in the negative. Lastly in answer to point No.04, I pass the following order.

ORDER

- 01) The application (Exh.05) stands rejected.
- 02) Both parties to bear their own costs.

Sd/-

(S. S. Mahale)

Civil Judge (Junior Division),
Roha, District - Raigad.

Date : 24/11/2023.
Place : Roha.

(टिप - डिजीटल स्वाक्षरीची मुदत संपल्यामुळे प्रस्तूतचा दस्त डिजीटल स्वाक्षरीने सही केलेला नाही.)

