

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

**Order below Exh. 5 in R.C.S.No. 17/2020**

This is an application filed by the plaintiff under Order 39 Rule 1 and 2 of the Code of Civil Procedure.

2. Description of the property :-

The land situated at village Padel, Tal. Deogad, Dist. Sindhudurg as follows :

Suit A property – bearing Survey No. 148B, Hissa No. 25, admeasuring H 0 – 03.00 R.

Suit B property - bearing Survey No. 148A, Hissa No. 2/1A, admeasuring H 0 – 52.06 R - H 1 – 57.44 R.

(Suit B property is the subject matter of the present application. Hence, herein after referred as “suit property”.)

3. The plaintiff's application in short is that,

suit A property which is non-agricultural (For short “N.A”) is owned by him. Suit A property is form of suit property. On 11/12/1980, the defendants executed gift deed in respect of suit A property in favour of him. Accordingly, he constructed house bearing Padel Grampanchayat House No. 473 and doing Hotel business thereon. It was declared that layout should be made while converting suit property into non-agricultural. Suit property is situated between Vijaydurg-Talere road and suit A property. In such circumstances, the defendants are trying to make unauthorised construction over the suit property i.e. without getting permission of the revenue and Grampanchayat. If the defendants succeed to make the said construction, then the plaintiff's right of way towards Vijaydurg-

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

Talere road would be closed. The plaintiff and his customer have been proceeding to Vijaydurg-Talere road by suit property. If the defendants succeed to made construction over the suit property, then the plaintiff could not use his suit A property. Further, he would not get air and light. The defendants' construction is situated from 15 meters of Vijaydurg-Talere road. The plaintiff objected the act of the defendants, but in vain. Therefore, on 27/05/2020, he filed complaint before the Tahshildar Deogad, but the Tahasildar had not paid any heed. Therefore, the plaintiff has constrained to file the present suit for perpetual injunction and mandatory injunction wherein the present application restraining the defendants not to erect construction over the suit property.

4. Defendants No. 2 to 7 have resisted this application by filing their say (Exh.19). Their say relevant point of controversy in short is that;

according to them, so many litigations including suit for partition are pending in respect of suit property. Therefore, the plaintiff has no right to claim any right over the suit property. In fact, their predecessor got N.A. order for doing hotel business. However, the plaintiff's father Rajaram Bandabe approached and requested to allot N.A. plot, as he had no business. Accordingly, their predecessor gifted suit A property to the plaintiff with condition that the plaintiff shall not keep any right or title over the remaining suit property. At the time of passing N.A. order, one road was left from suit A property for approaching towards Vijaydurg-Talere road. Therefore, except

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

that road, the plaintiff has no right to claim other road over the suit property. It is alleged that the plaintiff has not come with clean hand. According to them, at the time of passing N.A. order, 8.9 x 8.9 meter area was granted for construction of the house. But, thereafter the plaintiffs by violating the N.A. order developed suit A property up to 2000 to 2500 sq.ft. The plaintiff has never right to get light and air in suit A property. In fact, the road left at the time of N.A. order is the legal road, except that road the plaintiff has no right to claim any other road. In plaint, the plaintiff has stated that defendants' construction is situated 15 meters from the road. But, the plaintiffs has no right to file any complaint. For the reason that there are 100 stores constructed adjacent to Vijyadurg-Tarele road in Padel canteen to which the government has not initiated any action. The defendants' construction was completed up to the roof level before the institution of the suit. The plaintiff has filed old photos in the present matter and trying to get ex-party order without filing present photos of the defendants' construction. Under such circumstances, irreparable loss will be caused to defendants by granting temporary injunction. Therefore, prayed to dismiss the application.

5. From inter alia pleadings of the parties, following points arises for the determination. The findings against them as follows with reasons discussed below it.

| No. | <u>Points</u>                               | <u>Findings</u> |
|-----|---------------------------------------------|-----------------|
| 1)  | Whether the plaintiff is having prima facie | No.             |

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

|    |                                                                                                                            |                     |
|----|----------------------------------------------------------------------------------------------------------------------------|---------------------|
|    | case ?                                                                                                                     |                     |
| 2) | Whether balance of convenience is in favour of plaintiff ?                                                                 | No.                 |
| 3) | Whether irreparable loss will cause to the plaintiff in the event of rejection of interim temporary injunction as sought ? | No.                 |
| 4) | Is he entitled for the relief of temporary injunction as sought ?                                                          | No.                 |
| 5) | What Order ?                                                                                                               | As per final order. |

**:: REASONS ::****As to all points:-**

6. Prior to entering into the merits and demerits of this case, it is pertinent to note that three parameters which guides the courts while granting or refusing to grant this discretionary relief of temporary injunction are well settled from time to time in the series of catena of judgments of Hon'ble High Courts and Hon'ble Apex Court. Those are, prima facie case, balance of convenience and irreparable loss. Stepping ahead this discretionary relief is also based on well known maxim "That he who seeks equity, must do equity, and must come with clean hands". Here, law do not expects the decision on whole merit or demerit of the main suit while deciding this interim application. On the contrary, the party who seeks the relief of temporary injunction must show that he has some debatable

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

question at main trial and there is every possibility of infringement of his rights at the hands of other party till the decision of suit on merit. Therefore, interference of court is necessary. Only after this establishment, the court can grant this discretionary relief in favour of that party for the protection of his rights till the decision of suit. While granting injunction, what requires to be needed is enlightened by The Hon'ble Bombay High Court in "**Great Eastern Energy Corporation Ltd V/s. Jain Irrigation system Ltd and others (2010 (4) Mh. L.J. 759)**" laid down the following proposition that ,

*"The expression "prima facie case" does imply existence of an arguable case. It also means that there must be some material which on the face of it tends to show that triable issues are involved. At the stage of considering interim application, the court is not required to render any finding on merits. The material placed on record is required to be examined at horizontal level. In- depth scrutiny so as to render final finding of fact is not called for."*

By keeping well in mind the above parameters. In this case to ascertain in whose favour the prima facie as well as balance of convenience and irreparable loss lies let me turn to the rival contention of both the parties and documentary evidence adduced by them to establish those parameters.

7. The plaintiff has claimed right of way over the suit property. According to him, he has been proceeding towards Vijaydurg-Talere road by suit property. However, the defendants are trying to make construction over it. If the defendants succeed to made

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

construction, then his right of way towards Vijaydurg-Talere road will be closed. *Per contra*, the defendants have come with the case that already one road was left while passing N.A. order in respect of suit A property and the same is in existence. Therefore, the plaintiff has no right to claim other road over remaining property.

8. Heard, the learned adv. Shri. A.M.Mangaonkar for the plaintiff and the learned adv. Shri. P.V.Bodas for the defendants. The learned adv. Shri. Mangaonkar submitted that the defendants' construction is totally unauthorised construction. According to him, the defendants did not get any permission from the local authority for making construction over the suit property. Further, he submitted that before making construction the defendants ought to have taken sanction layout from the concerned authority and then have to make construction. On this count, he relied on various authorities as follows- (1) **Seema Arshad Zahir & ors. Vs. Municipal Corporation of Greater Bombay & ors.** 2006 (3) ALL MR (SC) 159, (2) **Onkar Nath Vs. Ram Nath Gupta & ors.** AIR 1985 Delhi 293, (3) **Smt. Ang Lhamu Vs. Smt. Ladenla & ors.** AIR 1983 Sikkim 5, (4) **Prabhudas Kalyanji & ors. Vs. Haji Hasan Haji Yusuf Maklal & ors,** AIR 1983 Gujrat 109 and (5) **K. Ramdas Shinoy Vs. Chief Officers, Town Municipal Council Udipi & ors.** AIR 1974 SC 2177.

In **Seema Zahir** (Supra) the Hon'ble Supreme Court observed that

*“The discretion of the court is exercised to grant a temporary*

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

*injunction only when the following requirements are made out by the plaintiff : (i)existence of a prima facie case as pleaded, necessitating protection of plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's rights is compared with or weighed against the need for protection of defendant's right or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility o irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.*

In **Prabhudas Kalyanji** (Supra) the Hon'ble Gujarat High Court observed that

*“any person who has a house abutting on a public road or land is entitled to access to the road or lane from the house and no person or authority can destroy that right and hence if an obstruction is made by any person or authority of such public way which affects the ingress and egress, a special damage to the owner of the property must be presumed.”*

In **K. Ramadas Shenoy** (Supra) the Hon'ble Supreme Court observed and held that,

*“The resolution of the municipality had no legal foundation. The illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The municipal authorities owe a duty and obligation under the statue to*

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

*see that the residential area is not spoiled by unauthorised construction. A scheme in the residential area means planned orderliness in accordance with the requirements of the residents."*

**The ratio laid down in K. Ramadas Shenoy has been followed in Onkar Nath and Smt Ang Lhamu (Supra).**

9. On the contrary, it is submitted by the learned adv. Shri. Bodas that the plaintiff has not claimed declaration in respect of his right of way over the suit property. Further, he submitted that already one road was left from suit A property for proceeding towards Vijaydurg-Talere road, while passing N.A. order. Therefore, the plaintiff has no right to claim other road over the suit property. According to him, while passing injunction order conduct of the plaintiff should be taken into account. He has referred the matters of, (1) **Seema Arshad Zaheer & ors. Vs. Municipal Corporation of Greater Mumbai & ors. 2006 STPL 8792 SC**, (2) **Shankar Govindlal Patwari Vs. Sanjay Rameshwar Sharma 2014 BHCCO 43877**, (3) **Rame Gowda by Lrs. Vs. M. Varadappa Naidu by Lrs. & ors. 2003 STPL 19000 SC**, (4) **M/s. Vora Automotives Pvt. Ltd. Vs. Gopalrao Namdeorao Pohre & ors. AIR 1993 Bom 151**, (5) **Mandali Ranganna & ors. etc. Vs. T. Ramchandra & ors. AIR 2008 SC 2291**, (6) **Kanraj Khatri Vs. Nathuram Jain AIR 1997 MP 92**, (7) **Anathula Sudhakar Vs. P. Buchi Reddy by Lrs. & ors. 2008(5) ALL MR 451**, (8) **Narayandas S. Kanuga Vs. Sarasvatibai D. Joshi & anr. dt. 07/03/1967**.



Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

In **Shankar Patwari** (Supra) the Hon'ble Bombay High Court observed that

*“If due to grant of relief of temporary injunction un-deserving benefit will be given to a party and Court will not be in a position to undo the wrong done to the other side, the Court is not expected to grant such relief.”*

In **M/S. Vora Automotives Pvt. Ltd.** (Supra) Hon'ble Bombay High Court observed that

*“The statutory obligation is for the public good. However, every individual wrong could not be enforceable. To redress the grievance in case of breach of statutory duty, the remedy as provided by the Act which creates a duty or obligation, can alone be availed. As a settled principle, Civil Court being a forum of general jurisdiction cannot be permitted to be approached.”*

In **Mandali Ranganna** (Supra) Hon'ble Bombay High Court observed that

*“While considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto, viz. Existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.”*

In **Kanraj Khatri** (Supra) Hon'ble Madhya Pradesh High Court observed that

*“One is that it should appear to the Court that on the facts stated*

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

*in the plaint, the plaintiff has chance to get a decree. If the facts are not properly pleaded and they have no relation to the relief sought by the plaintiff then the only result would be that the suit would be liable to be dismissed. In the state of such pleadings no Court can come to the conclusion that the plaintiff has a prima facie case in his favour. However, there may be another situation that may arise that apparently, there appears to be no flaw in the facts pleaded as they are logically related to the relief claimed but by application of law the suit may not be maintainable.”*

*“The defendants have said that there is alternative way from which light and air can pass to the house of the plaintiff. There is no counter reply filed by the plaintiff, denying this allegation. There is nothing on record to show that the light and air to the plaintiff shall be obstructed totally. Thus there is no possibility of causing irreparable injury to the plaintiff. He is not entitled to temporary injunction.”*

In **Anathula Sudhakar** (Supra) Hon'ble Supreme Court observed that

*“Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy.”*

In **Narayandas** (Supra) Hon'ble Bombay Hight Court observed that

*“In this connection, Ss. 54 and 56 the Specific Relief Act are also very relevant. Section 54 enables the court to grant perpetual injunction to prevent the breach of an obligation existing in favour of the*

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

*applicant-whether express or implied. This is again subject to eceptions. The query, therefore, has to be “whether there exists an obligation in favour of the applicant”. Even where an obligation is made out, if the case falls withing S. 56, injunction cannot be granted. Where the plaintiff cannot and do not allege any recognizable right or obligation in them, nor the breach of the same. If they could not get a perpetual injunction they could not get temporary injunction.”*

10. In the background of these arguments, the sum and substance of the learned Adv. Shri Mangaonkar is based upon unauthorised construction of the defendants. He has invited attention towards 7 x 12 extract of suit property (Exh.7), copy of complaint (Exh. 4/3) and order of Public Work Department Devgad (Exh. 15/1). The other right column of 7 x 12 extract (Exh.7) speaks that sanction layout is condition precedent for passing N. A. order. The said order is passed on 17/01/2006. Further, the complaint (Exh. 4/3) is filed by the plaintiff before the Tahasildar, Deogad against unauthorised construction of the defendants. Lastly, the Public Work department issued direction to the defendant No.3 to remove the unauthorised construction within ten days by notice (Exh.15/1) dated 02/06/2020. As per these documents, it appears that construction of defendants is unauthorised. The defendants have not brought on record commencement certificate/ permission to make construction over the suit property.

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

**11.** Though at this juncture, it appears that the construction of the defendants is unauthorised, the plaintiff has come with the case that due to unauthorised construction of the defendants his right of way towards vijaydurg-Talere road is going to be closed. Therefore, without giving much importance to unauthorised construction of the defendants, it has to see whether the plaintiff right of way is going to be closed by the construction of the defendants. Before going towards this point let us turn towards case of the defendants.

**12.** The defendants have come with two defences, firstly, the plaintiff has violated the N.A. order by making excess development in suit A property. Secondly, already the road was left for the plaintiff while passing N. A. order. It is urged by the learned adv. Shri Bodas that the conduct of the plaintiff is required to be considered. As far as first defence is concerned, the defendants have not brought on record any documents which show action against the plaintiff was/is taken for the excess development in suit property. Now coming towards second defence, the defendants have produced sanction layout plan (Exh. 31/1) and photographs (Exh. 18/1, 21/8 ) of suit A property. After perusal of sanction plan, it appears that one footpath is left in suit property proceeding towards Vijaydurg-Talere road. Likewise, on going through the photographs, it appears that maximum open area is remained for the plaintiffs to approach Vijaydurg-Talere road. On joint perusal of sanction plan and the photographs, prima facie it seems that the defendants have left the maximum open area in front of suit A property to have access on the Vijaydurg-Talere Road.

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

13. Though the construction of the defendants is unauthorised, prima facie the open road is in existence from the suit A property to the Vijaydurg-Talere road. Moreover, the photographs in question speaks that the construction of the defendants is completed up to roof level. Under such circumstances, if the defendants are restrained from making further construction, then irreparable loss will be caused to them. The learned Adv. Shri Mangaonkar has invited attention towards section 149 of the Maharashtra Regional And Town Planning Act. Section 149 provides that *save as otherwise expressly provided in this Act, Every order passed or direction issued by the state government or order passed or notice issued by any regional board, planning authority or development authority under this Act shall be final and shall not be questioned in any suit or other legal proceedings.* According to him, the order passed by public work department is not been challenged. Therefore, this order itself is sufficient to draw inference that construction of the defendants is unauthorised and liable to be stopped. Here, if we again turn towards the order of public Work department (Exh.15/1), then it appears that they have initiated enquiry against the construction of defendants. Therefore, it would not be just and proper to stop the construction of the defendants.

14. The plaintiff has come with the case that he has rights of light and air over the suit property. If the defendants' construction is being completed, he will be deprived from using light and air in his

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

property. Here, one important aspect requires to mention that the plaintiff has equally efficacious remedy under Sec.41 (h) of the Specific Relief Act to claim relief of declaration along with perpetual injunction. It is urged by the learned Adv. Shri Mangaonkar that initially the plaintiff did not know the actual construction of the defendants. Therefore, he has not claimed declaration. There is no substance on the point of the plaintiff, for the reason that ones he knows by virtue of construction the defendants are trying to close right of way, air and light, then he ought to have claim consequential relief of declaration. It is settle principle of law that when the suit itself is not maintainable, then interim injunction should not be granted. The valuable authorities cited by the plaintiff are not helpful to him, for the reason that in those authorities public rights were going to be effected. The facts stated in these authorities are different from the present matter in hand. For the reason that prima facie in this matter it appears that already one road/footpath was left to the plaintiff to have access to Vijaydurg-Talere road and the same is still in existence.

**15.** Thus, from the sanction layout and the photographs, prima facie its appears that the plaintiff is having much road to access vijaydurg-Talere road. Further prima facie, it appears that the construction of the defendants is completed up to the roof level. Even the defendants' construction is restrained or not, the plaintiff's right of way is not been effected. Therefore, if injunction order is passed, then irreparable loss will be caused to the defendants. Moreover, for

Namdev Bandabe Vs. Pandurang Warik &amp; ors.

CNRNo. MHSI09-000115-2020

getting the relief of temporary injunction all point must be proved. If, the plaintiff fails to prove one of the parameters of the T.I i.e. prima facie case, balance of convenience, irreparable loss, then no need to inquire into the others parameters. Here, reference have to drawn towards **Kashimath Sansthan V.s Shrimat Sudhidra Swami and Ors., reported in AIR 2010 S.C 296**, where in the Hon'ble Apex court held that

*" But it is equally well-settled that when a party fails to prove prima facie case to go for trial question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say if party fails to prove prima facie case to go for trial, it is not open to the court to grant injunction in his favour, and would suffer irreparable loss and injury, if no injunction order is granted."* Hence, by answering the above points under discussion following order is passed.

ORDER

1. The application at Exh. 5 is rejected.
2. Costs in main cause.

Deogad

Date: 22/06/2020

(B.R.Patil)

Civil Judge, J.D., Deogad