

**RCS NO. 264/2007**

**ORDER BELOW EXH. 177**

**(DATE : 26/06/2020)**

1. Defendant No. 7 has filed this application under Order XXXIX Rule 4 r.w. Section 151 of Code of Civil Procedure. Heard learned advocate Shri. S.S. Mane for defendant No. 7 and learned advocate Shri. N.S. Patil for plaintiff at sufficient length.

2. It is submitted by defendant No. 7 that, this Court has directed both parties to maintain status quo of suit property vide order below Exh. 6 dated 30/06/2007. The said order is in existence. However, this defendant along with other defendants have sought permissions from the Court and repaired the suit property. The suit property is more than 100 years old. It is now in dilapidated condition. Earlier this Court has granted permission to change tin sheets of the roof and change the floor which were in very bad condition. The wife of defendant No. 7 is permanently residing in suit property. She is suffering from severe knee joint pain. As per medical advice knee operation is necessary. Due to the knee pains, she is unable to do her regular and routine work. It becomes very difficult for her to sit and get up in day today work. It becomes very difficult for her to use old toilet. Therefore, it becomes necessary for defendant No. 7 to construct new toilet with commode facility in vacant premises adjacent to the old toilet.

3. The learned advocate for defendant No. 7 further submitted that, vide Order below Exh. 6 the Court has directed to maintain status quo of suit property and also restrain from

alienation of suit property. There are no restrictions on repairing of suit property. Parties are not restrained from repairing suit premises or any other construction. It is submitted that, as per Article 21 of the Indian Constitution medical aid, medical assistance are fundamental rights of citizen. The proposed permission is related to the said fundamental right and also related to the right to privacy and right to human dignity of defendant No. 7. If application is rejected, it will be against the human dignity and against the natural justice. Therefore, he requested to allow the application immediately.

4. On the contrary, plaintiff has filed say Exh. 180 to this application. He has denied entire contentions of defendant No. 7 in toto. The learned advocate for the plaintiff submitted that Order XXXIX Rule 4 is not applicable to this application. Defendant No. 7 has filed application under Section 151 of Code of Civil Procedure. According to him, previous permission were granted for temporary work such as repairing of tin sheets roof and change of floor. Now, the important question is whether the relief sought by defendant No. 7 in this application is bonafide or not. He brought my attention towards the latest photographs of suit property filed by him at Exh. 182. He submitted that, defendant No. 7 has completed new construction in suit property without permission of the Court. Defendant No. 7 has carried out illegal work during lock-down period of Covid-19. After completion of said new construction, defendant No. 7 seeking permission from Court for construction to legalize his illegal act. He has filed these photographs before argument of defendant No. 7. He has also provided copies to the defendant No. 7 but in entire argument defendant No.7 has not said anything about the

photographs nor he has denied the new construction in suit property. Defendant No. 7 has knowledge that the injunction order of this Court regarding the suit property is in existence. He also has knowledge that before carrying out any repair or construction in suit property prior permission of Court is necessary. Still he has carried out new construction in suit property without permission of Court and now filed this application for permission of construction. It clearly shows that, defendant No. 7 not came before Court with clean hands. It is basic principle of law that who seeks equity must come before Court with equity. Defendant No. 7 suppressed fact of new construction from the Court. He is doing illegal act and claiming fundamental rights. So far as medical problem of defendant No. 7's wife is concerned, orthopedic W.C. chairs are available in market. It will save defendant No. 7's money and time of everybody. There is no need of new construction of toilet. If the application is allowed it will be against the injunction order below Exh. 6. Hence, he requested to reject the application. He further forcefully requested to demolish the illegal construction carried out by defendant No. 7 in suit property.

5. On the background of rival contentions of parties, I have carefully gone through the record and proceeding, Order passed below Exh. 6, order below Exh. 51, 86 and order below Exh. 131. The suit is for partition, separate possession, declaration and perpetual injunction. This defendant has filed written statement at Exh. 35 and resisted the suit claim. At present evidence of plaintiff is in progress. After completion of plaintiffs cross-examination he has examined witness Shri. Nilesh Patil Exh. 115. Cross-examination of this witness is partly completed. During

cross-examination of this witness defendant No. 7 has filed in all 23 documents with list and application Exh. 172. It is objected by the plaintiff and hearing on that application is pending. Meanwhile, this application is filed.

6. The learned advocate for defendant No. 7 has drawn my attention towards the MRI scan report of his wife. On perusal of said report, it appears that, his wife suffering from left knee joint pains. There is no doubt that any person who suffering from knee joint pains will face lots of difficulties in day to day work. In such situation, the question is whether the Court can grant new construction of toilet in suit property when temporary injunction order is in existence. Order XXXIX Rule 4 of Code of Civil Procedure empowers the Court to discharge or vary or set aside any order of injunction. It can be made on the application made by any party dissatisfied with such order. The said provision further provided that, where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party. There is exception to this provision that where such discharge or variation or setting aside has been necessitated by the change in the circumstances, or unless the Court is satisfied that, the order has caused hardship to that party.

7. In present case, ex parte status quo order came to be passed on Exh. 6 on 30/06/2007. Thereafter, temporary injunction application below Exh. 6 came to be allowed on merit vide order dated 02/04/2008. By that order defendant No. 5, 7, 10 and 11 directed to maintain status quo of suit property till final decision of suit on merit. The meaning of status quo order in this

suit is clear that the defendant No. 5, 7, 10 and 11 are temporarily restrained from carrying out any construction in suit property. They are directed to maintain status of suit property as it is. However, during pendency of suit vide Order below Exh. 51 permission was granted to these defendants to repair tin sheets, roofs of suit property. Thereafter, application Exh. 86 filed by these defendants for repairing of suit property by own expenses rejected by the Court. Then, these defendants have filed application Exh. 131 for permission to change the flooring in the suit property. The said application came to be allowed with condition that, defendant shall not claim any equity and shall incur expenses from their own pocket and shall not claim any reimbursement from other parties at the time of partition.

8. When application below Exh. 51 and Exh. 131 were granted conditions and circumstances were different. Order below Exh. 51 passed on the basis of commission report and Order below Exh. 131 is passed with intention to preserve the suit property. Now, in present application defendant No. 7 seeking permission for construction of new toilet in vacant premises in suit property. It is not situation that, there is no toilet in suit property. Old toilet in suit property is in existence. Defendant No. 7 can reconstruct or repair that old toilet but permission can not be granted for construction of new toilet. Because, if such permission is granted it will certainly change nature of suit property and will create lots of difficulties at the time of actual and physical partition of the suit property if any order made in that effect.

9. Another important aspect is plaintiff has filed photographs at Exh. 182. These photographs clearly shows that,

new construction is carried out adjacent to the old toilet in suit property. The said construction is almost completed. Surprisingly, defendant No. 7 who is party in person not said anything about genuineness of these photographs. While in his argument he took me to the constitutional rights of citizens, law of natural justice. But, interestingly has not said anything against or about these photographs. His silence on this point clearly shows that, some new construction in suit premises adjacent to old premises is completed before filling of this application. It also shows intention of defendant No. 7 that, he wants to legalize his illegal construction. He ought to have come before court with clean hands. He might have mention situation of Covid-19 lock-down. But, he has not clarified which circumstances restrained him from seeking permission of the Court before making any new construction in suit property. It shows that, defendant No. 7 illegally carried out construction and then claiming his fundamental rights and natural justice through this application.

10. In such situation, in my considered opinion, new construction in suit property is not at all permissible. There is no need of any variation in temporary injunction order below Exh. 6 for want of change in circumstances. On the contrary it is necessary to demolish illegal construction carried out by defendant No. 7. At the most permission can be granted for repairing in old toilet. So far as medical problem of defendant No. 7's wife is concerned, permission can be granted to repair old toilet and replace the old toilet with commode. If such order is passed there is no change in suit property nor it will cause any loss to other parties. Hence, I proceed to pass following order.

**ORDER**

1. The application is decided in following manner -
  - i) Prayer in respect of construction of new toilet in suit property is rejected.
  - ii) Defendant No. 7 is permitted to replace the chamber-pot of old toilet with commode pot.
  - iii) Defendant No. 7 shall bear the cost of that replacement and shall not claim any reimbursement from other parties.
  - iv) Defendant No. 7 shall not claim any equity or expenses for these replacement or repairs at the time of final decision and partition if any.
  - v) Defendant No. 7 shall report the compliance along with photographs if he carried out replacement or change in old toilet.
  - vi) Defendant No.7 is directed to demolish new construction made by him adjacent to the old toilet and shall report the compliance along with detail photographs.
  - vii) Plaintiff is entitle to inspect such replacement, repairs and changes in the old toilet whenever it is carried out.
  - viii) Defendant No.7 shall file undertaking in terms of above order before next date and they shall not start any change, replacement, repairing or any construction in that respect without filing such undertaking.

Date : 26/06/2020

(Bhushan R. Thakur)  
Jt. Civil Judge Sr. Dn., Islampur.

**CERTIFICATE**

I affirm that, the contents of this P.D.F. file order/Judgment are same, word to word, as per the original order.

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|-------------------------|---|--------------------------------|
| Name of Stenographer    | : | Shri. Pradip T. Patil          |
| Court                   | : | Jt. Civil Court Sr.Dn.Islampur |
| Date of Order/Judgment: |   | 26/06/2020                     |
| Typed on                | : | 26/06/2020                     |
| Signed by P.O. on       | : | 26/06/2020                     |
| Uploaded on             | : | 26/06/2020                     |