

Order below Exh.5 in
R.C.S. No. 199/2019
CNR-MHSN-12-001083-2019
(Sachin Kanase & Ors. Vs. Prakash Jadhav & Ors.)

The plaintiffs have filed the present application for seeking the relief of temporary injunction.

2. The plaintiffs have instituted the present suit for fixation of boundaries and for mandatory injunction.

3. It is the case of the plaintiffs that city survey no. 62 having Grampanchayat milkat no. 383/A-283/B situated at village-Nagthane, Tal. Palus is referred as suit property A and city survey no. 63 having Grampanchayat milkat no. 266/A+B situated at village-Nagthane, Tal. Palus is referred as suit property B. According to the plaintiffs, the defendants have made encroachment over the suit property A and it is referred as suit property C.

4. It is further averred by the plaintiffs that suit property is the ownership of the plaintiffs. In the month of November, defendants have demolished their old house. Thereafter, plaintiffs requested them that measurement of both survey numbers should be done, but defendants unauthorizedly and illegally started to raise construction over the suit property C which is coming under portion of suit property A. The defendants have made attempt to dig the suit property C. If the defendants complete the construction, it will affect the very purpose of filing the present application. So also, it will change nature of suit property and plaintiffs will suffer irreparable loss. Therefore, plaintiffs have constrained to file present application and sought the relief that defendants be restrained from raising construction.

5. The defendants have filed their say below Exh. 19. They strongly opposed the application. According to them, plaintiffs' suit is hit by the provisions of Order 7 Rule 3 of C.P.C. for want of proper identification of suit property A. The application of the plaintiffs is premature. Unless and until the encroachment at the hands of defendants is found plaintiffs cannot restrain at their whims. No encroachment made at all by the defendants as described in the plaint. Suit property B is the ownership of the defendants. The defendants are raising construction upon suit property B without making any encroachment. In fact, city survey scheme has been made in the year 1978 and as per the city survey record it appears that towards western side of the suit property A city survey no. 60 is situated. In fact, plaintiffs have wrongly shown that towards the western side of suit property B suit property A is situated. Defendants are raising the construction over the old boundaries. The defendants have obtained permission of Grampanchyat Nagthane for raising the construction. There is no alternative house for the defendants where they can stay. Under such a circumstances, if the application is allowed it will cause greater hardship upon the defendants. Plaintiffs' suit is hit by the principle non joinder of necessary party as well as misjoinder of necessary parties. Therefore, application of the plaintiffs is liable to be rejected.

6. Heard both sides.

7. Learned advocate for the plaintiffs has argued that defendants have made encroachment over the suit property A. The encroached portion shown as suit property C. The defendants unauthorizably raising the construction. If the defendants raised the construction over the encroached portion, then plaintiffs will suffer irreparable loss especially when the plaintiffs have successfully shown the prima case and also shown how the balance of convenience lies in

their favor. He has relied upon the case of *Ram Kalap Vs. IV. Additional Dist. Judge Gorakhpur & ANR AIR 1989 ALL 157 and Vijay S/o Shravan Shende & Ors. Vs. State of Maharashtra 2009, (4) ALL MR 601*. By placing reliance upon these caselaws it was argued that application kindly be granted.

8. On the other hand, the learned advocate for the defendants has argued that plaintiffs have not come before the court with clean hands. Description of suit property A is totally wrongly described to obtain the injunction in favor of the plaintiffs. He has invited my attention towards xerox copy of C.S. no. 63 (suit property B) and argued that boundaries of suit property B is not adjacent to suit property A. Therefore, question of encroachment at the hands of defendants does not arise at all. He has invited my attention towards the case of *Yashwant Laxman Pai Raikar Vs. Laxman V. Singbal 2009 CJ (Bom) 1862* wherein the Hon'ble the Bombay High Court has held that one who come before the court seeking equitable relief of injunction should have come with clean hands.

9. The learned advocate for defendants has also argued that plaintiffs suit is also not maintainable therefore, present application of the plaintiff is also liable to be rejected. He has also argued that plaintiffs have admitted the possession of defendants and on the date of filing the suit plaintiffs are not in possession, therefore, the suit of the plaintiffs is liable to be dismissed. Thats why present application kindly be rejected. He has also relied upon further caselaws, *Ratiram Kundlik Khedkar Vs. Pundlik Arjun Khedkar 1980 CJ (Bom) 167 and Ramegowda Vs. M. Varadappa Naidu 2003 CJ (SC) 891*.

10. After considering the contents of application following points arise for my determination along with my findings thereon.

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the plaintiffs prove that they are having prima-facie case ?	<u>Negative</u>
2.	Whether the plaintiffs prove that balance of convenience lies in their favour ?	<u>Negative</u>
3.	Whether the plaintiffs prove that they will suffer irreparable loss if the injunction is not granted ?	<u>Negative</u>
4.	What Order ?	<u>As Per Final Order</u>

Documents relied upon by the Plaintiffs-

11. The plaintiffs have relied upon city survey extract of C.S. no. 62 and 63 (Exh. 3/1, 3/2), 8A extract of Grampanchayat milkat no. 283/B and 283/A (Exh.3/4, 3/5), City survey extract (Exh. 3/6), death certificates (Exh. 3/7 to 3/9), photos (Exh. 3/10), affidavit (Exh. 3/11), affidavits (Exh. 26/1, 26/2), application made before grampanchayat Nagthane (Exh. 26/3), application of Grampanchayat Nagthane (Exh. 26/4), inquiry register copy (Exh. 26/6), rough sketch map (Exh. 32/3) etc.

Documents relied upon by the Defendants-

12. Copy of sanad of C.S. no. 63 (Exh. 22/1), affidavit (Exh. 22/2), photos (Exh. 22/3, 22/4), affidavit (Exh. 30/1), etc.

AS TO POINT NO. 1 TO 3

13. These points are interlinked with each other and for the sake of convenience they are discussed together.

14. It is undisputed that suit property A is the ownership of plaintiffs and suit property B is the ownership of defendants.

15. The core issue involved in this application is whether the plaintiffs have prima facie shown that defendants have made encroachment over the suit property A which shown as encroached portion (Suit property C).

16. After hearing the rival submissions of both sides and after perusal of the documents, especially, City survey extract below (Exh. 3/6) and xerox copy of sanad of suit property B below (Exh. 22/1) prima facie it appears that suit property A is not adjacent to suit property B. After perusal of the xerox copy of sanad of suit property B below (Exh. 22/1) prima facie it appears that towards north side of suit property B adjacent C.S. no. 65 is situated, towards the south side there is road and towards the east side adjacent C.S. no. 64 is situated, and towards the west side C.S. no. 60 is situated. The document below Exh. (26/4) i.e. application made by Grampanchayat Nagthane to City survey office, Palus alleging that Pandurang Tukaram Jadhav having C.S. no. 63 has made the encroachment over the grampanchayat area. Therefore, measurement of the said city survey number is essential to show factor of encroachment. The xerox copy of said application is dated 06/08/2016. But, it is not the case of plaintiffs. Therefore, without making appropriate pleading regarding this fact, plaintiffs cannot take any advantage at this stage of the suit. Therefore, prima facie plaintiffs have failed to show the defendants have made the encroachment as averred by them in the plaint. Therefore balance of convenience does not lies in favor of the plaintiffs. Therefore, plaintiffs have failed to show that they will suffer irreparable loss.

17. With due respect to the ratio laid down in *Ram Kalap's case* and *Vijay S/o Shravan Shende & Ors.* case is not applicable to the case in hand. With due respect to the ratio laid down in the case of *Ratiram Kundlik Khedkar's case* and *Ramegowda's case* is not applicable to the case in hand. With due respect to the ratio laid down in the *Yashwant Laxman Pai Raika's case* is applicable to the case in hand, because, there are allegations of encroachment and plaintiffs have expected to show correct boundaries of suit property. But, they have wrongly shown it.

18. As mentioned earlier, it is undisputed that possession of suit property C is in the hands of defendants. The case is at the stage of temporary injunction. At this stage factum of possession is the only relevant factor which is required to be taken into consideration. Inquiry of possession in depth regarding source of possession or to its legality is not expected. Reference is essential to the case of *Baban Anatrao Naik Vs. Pramila Uttamrao Yenare 2011(6) All M.R. 15.* Wherein, the Hon'ble Bombay High Court has held that at the time of determination of an application for temporary injunction, the factum of possession would only be relevant factor. Whether the possession is lawful possession or not would not be subject matter of inquiry. Accordingly, I answer as to point no. 1 to 3 as 'Negative' in answer to point no. 4, I pass the following order.

ORDER

1. Application stands rejected.

Palus.
Date- 17/01/2020.

(N.D. Rudrabhate)
Jt.Civil Judge Jr.Dn., Palus

CERTIFICATE

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

Name of Stenographer : Pravin G. Sabale
Court : Jt.Civil Judge Jr.Dn., Palus
Date : 17/01/2020
Signed by the Presiding Officer on : 17/01/2020
Uploaded on : 18/01/2020