

Shree Kutchi Visa Oswal
Sthanikwasi Jain Mahajan
V/s.
Panchgani Municipal Council +1

ORDER BELOW EXH.5 IN R.C.S.NO.2/2021

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

2] Immovable properties Gat Nos.16/1, 16/2, 16/3, 14 and 19 situated at Mouje Godavali, Tal.Mahabaleshwar most probably property described in plaint para No.2 in a tabular form is the subject matter of the application [hereinafter for the sake of brevity called as 'suit properties'].

3] Perused the application and say, supported with affidavit. Gone through the entire documents filed on record by both the parties and also through the citation.

4] Considering the application and the arguments advanced by the Ld. Advocates for both the parties, the following points arise for my determination against which I have recorded my findings alongwith the reasons thereto as under :-

Sr.No	Points	Findings
1.	Whether plaintiff proves the prima facie case ?	...In the Negative
2.	Whether plaintiff proves the balance of convenience and in-convenience in his favour ?	...In the Negative
3.	Whether plaintiff proves the greater hardship and irreparable loss ?	...In the Negative
4.	What order ?	Application stands rejected.

REASONS

As to Point Nos.1 to 3 :

5] As all these points are interlinked with each others, therefore to avoid the repetition they are discussed together. Considering the tenor of application, it is the case of the plaintiff that, defendant No.1 is going to construct the side margins of the road as a foot-path and for that purpose defendant No.1 is digging the side margins of the road i.e. Godavali-Panchgani wherein plaintiff's suit properties are going to be damaged. Plaintiff alongwith a suit had produced the sketch map i.e. plaint map in which by purple colour they have shown the defendant No.1's construction in their suit properties. Plaintiff had already filed the complaint application and the notice through Advocate against the defendant No.1. So also, the work of plaintiff is not as per the provisions of Municipality Act. So also, defendant No.1 has not taken written consent of the plaintiff trust. So also, no acquisition procedure is carried out through Collector and its sanction is not obtained. So also, no compensation is paid by the defendant No.1 to the owners of the suit properties with regards to the expansion, construction of the road. Hence, the application.

6] Defendant No.1 vide his say **Exh.20** had strongly resisted the application and contended that, injunction cannot be granted to restrained the local body for initiating legal proceedings. So also, the prayer of the plaintiff is illegal one in a matters of public administration which is otherwise adverse effect on public interest will be caused. The golden principles of temporary injunction are not proved by plaintiff. On the date of

filing the suit regarding the foot-path, plaintiff has no possession and utilization. Therefore, on vague pleading injunction could not be granted. So also, there is no specific pleading of the plaintiff as to from which suit properties, the Godavali-Panchgani road is gone. Nearby the road there is compound of plaintiff and out of that compound Panchgani-Godavali road is there. Out of the compound there are poles street lights of defendant No.1. Beside the road there is side margins and nearby it, the Godavali-Panchgani road exists. The side margins are beneath the road since inception and they are measured. The side margins are used by the villagers, the walkers, old citizens, students, tourists, cyclists since long. Plaintiff has no concern with the side margins and have no right on it. Plaintiff has not specifically pleaded in which properties he is having possession and in which properties defendant No.1 Municipal Council had encroached by way of digging work and alleged construction.

7] Due to atmospheric conditions at Panchgani heavy rain fall occurred. The side margins of the road gets in very drastic situations which may cause the accidents. Municipal Council for the benefit of public at large and as per proposed plan are going to construct a foot-path and for that purpose no obstruction, disturbance, dispossession and damaged of the plaintiff's suit properties are caused. The road and the side margin is the part and parcel of the development plan of Municipal Council and defendant No.1 by applying legal procedure is carrying out the work. Plaintiff is having other efficacious remedy. Hence, prayed to dismiss the application.

8] Ld. Adv. for plaintiffs Shri. P. V. Herkal vehemently argued that, suit properties are of entire Gat, so description of boundaries are not necessary. Suit properties are trustees properties. Defendant No.1 has not made legal acquisition proceeding, so also had not taken consent or given notice for digging in the suit properties. So also, no development plan on record. As per section 174 of the Maharashtra Municipal Councils Nagarpanchayat and Townships Acts, 1965 (hereinafter called as 'Municipal Act') prescribed procedure is not at all followed by the defendant No.1. Plaintiff applied to Municipal Council on 16/12/2020 and also issued notice through advocate on 06/01/2021. From photographs it can be clearly seen that, defendant No.1 had encroached upon plaintiff's property. Defendant No.1 had not taken permission of Collector, sanction of competent authority. Plaintiff has filed will-deed of the trustees on record which shows their ownership in the suit properties.

9] In support of arguments, plaintiff relied on the Judgment of Hon'ble Bombay High Court in **Damodar Amrutrao Deore V/s. Malegaon Municipal Council & others, 2003(2) Mh.L.J.- 231** in which the Hon'ble Bombay High Court held that,

'The land acquisition proceedings are vitiated by reason of Section 11-A as it clearly provides that the Collector shall make an award under Section 11 within a period of two years from the date of publication on declaration under section 6. It is further provided by that section that, if no award was made within the period, the entire proceeding for acquisition of land shall lapse.'

So also, plaintiff relied on the provision of section 174 of the Municipal Act. Lastly, prayed to allow the application.

10] Considering the ratio of the citation filed by plaintiff in the light of the facts and circumstances of the case in hand, the same is not helpful. So also, the provision under section 174 of the Municipal Act is in respect of power to declare any street, a public street, subject to objections by the owners which is altogether different aspect then the case in hand.

11] Ld. Adv. for the defendant No.1 Smt. Jaikar strongly argued that, defendant No.1 being the local authority without permission cannot act to do any work. In view of general law facts to be considered which are of public interest. The existence of Godavali-Panchgani road is since long i.e. prior to filing the suit. The road and the side margins were in existence. Plaintiff is not having legal concern with the side margins and the road. Since inception there is electric poles, wires, side margins, road, thereafter there is plaintiff's compound and suit properties. There is no specific pleadings as to from which specific property the road is going. No boundaries are mentioned. Three to four feet area digging work is going on.

12] There is no documentary evidence of plaintiff to show that, the trust is the owner of the side margins besides the road. Plaintiff can't operate against the local body to stop the legal proceedings. So far as possession is concern, plaintiff is not having the same and also the cultivation on the side margins of the road.

Application is not legal and tenable one as considering the atmospheric conditions in order to make side margins available for walking to the general public. The side margins are to be repairs with foot-path and no new construction will be carried out by the defendant No.1. Plaintiffs are purchasers in the suit properties. No cause of action is shown by the plaintiff to file the suit. Defendant No.1 is not constructing a new road. Section 174 of Municipal Act is not applicable. Development plan is signed by the Town Planning Officer under section 162(1) of M.R.T.P. Act 1966. Hence, prayed that application be rejected.

13] Basically, plaintiff has to satisfy the court in the temporary injunction application as to what rights of enjoyment of his properties are obstructed, infringed by the defendant No.1 and the another aspect is that plaintiff has to established possession over the side margins nearby the road of Panchgani and Godavali. Admittedly, plaintiff on record has filed the 7/12 extracts of the suit properties having the specific areas in the suit properties, so also, the will-deed of the trust and the photographs on record. Prima facie at this juncture, in view of the xerox copy of map of measurement carried out on 24/03/2007 by the Surveyor which shows the electricity poles of Municipal Council and the road and the demarcation 'O N' are the new boundary marks and the coloured area of survey No.19 which is 0.12 R is in cultivation of survey No.18.

14] The letter of plaintiff to defendant No.1 on 16/12/2020 is only regarding as to why measurements are carried out and stones were fixed in the suit properties. On the contrary, the notice

of plaintiff's advocate is regarding defendant No.1 shall not carry out any illegal unauthorized digging work or construction in the suit properties. Therefore, it seems that plaintiff has not come with a specific case as to nearby the Godavali-Panchgani road the area of side margins belongs to his ownership. On the contrary, in photographs produced by plaintiffs it can be clearly seen that, suit properties are having iron fencing and the big iron gate i.e. compound is been erected to the suit properties and defendant No.1 is the digging on side margins nearby the Panchgani-Godavali road. Therefore, it seems that plaintiff failed to establish at this juncture the apprehension, obstruction by the defendant No.1 to their lawful ownership and possession in the suit properties.

15] The another aspect of the case when plaintiff has come with a case that, defendant No.1 is attempting to the raise construction in the suit properties and claiming the same to having acquired, then in that event and such type of suit, plaintiff ought to have sought the relief for declaration of his title, alongwith the consequential injunction, if at all plaintiff was in the possession. Herein plaintiff failed to establish his possession opposite to the iron gate and fencing compound and on the side margins near the Panchgani-Godavali road. Therefore, filing of mere suit for perpetual injunction was conduct of plaintiff to avoid the normal course which prohibited the assistance of the court to get the reliefs under section 41(i) of the Specific Relief Act, 1963.

16] So also, plaintiff, being the charitable trust, has not filed the Public Trust Register extracts (PTR) on record to determine the suit properties of the trust and also to ascertain the

plaintiffs are the only trustees of the trust. Plaintiff has also not filed an affidavits of nearby owners of their suit properties, as to suit properties of plaintiff are going to damaged due to act of defendant No.1. So also, nearby persons properties will also be affected by the alleged work of defendant No.1.

17] Thus, in the light of above discussion, plaintiff failed to establish that he got the extreme prima facie case, so also balance of convenience and inconvenience is not in his favour. So also, in view of irreparable loss and greater hardship it will be defendant No.1, if prohibited or restrained from carrying out his work of public development of making foot-path. There is no arguable case at all. On the contrary, no greater hardship or irreparable loss will be caused to the plaintiff trust. So also, Section 174 of the Municipal Act will not be helpful to the plaintiff's case. As such plaintiff failed to establish his case in order to grant discretionary relief of injunction in his favour. Therefore, in the light of above discussion and the settled position of law regarding the possession and the discretionary relief of injunction, if considered, the conduct of plaintiff or his agents seems to be such as to dis-entitled them from the assistance of the court. Therefore, I answered the point Nos.1 to 3 in the Negative.

As to Point No.4 :

18] As the plaintiffs failed to establish the point Nos.1 to 3, as such they are not entitled for the relief claimed. Therefore, considering the work of construction for foot-path by defendant No.1 for the benefit of public at large is the domain of public

policy. Hence, in the light of above discussion and in answer to the point No.4, I proceed to pass the following order -

ORDER

- 1] Application Exh.5 stands rejected.
- 2] Costs in cause.

Date : 03/02/2021.
Mahabaleshwar.

(Shailesh U. Kanthe)
Civil Judge, Junior Division,
Mahabaleshwar.