



Reg. Civil Suit No. 17/2023
Yogesh Patel and Anr. 1
Versus...
Shaktiprasad Shukla and Ors.

ORDER BELOW EXH. 5

(Passed on this 21st day of March, 2023)

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This is an application under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure (in short 'C. P. C.') for grant of temporary injunction against defendants.

2. It is contentions of plaintiffs that they are owners and in possession of land having survey No. 81/C/1/3, area 3.12.70 sq. mtrs. of Village Palghar, Tal. & Dist. Palghar with abuttals as mentioned in para No. 2 of the plaint. The aforesaid land hereinafter is referred as "the suit property". Plaintiffs have constructed building thereon as name and style "Amrut Sagar". There is wire fencing and cement pole towards southern side of the suit property. They are in peaceful possession of the suit property without any obstruction from anyone. On 13.01.2023 they have started construction of wall compound by removing cement pole and wire fencing. Defendants obstructed them from constructing the wall compound. Therefore, they have applied to the Superintendent of Police, Palghar for Police protection to complete their construction work. But, they did not receive police protection. Hence, this suit and application for interim relief.

3. On the contrary, defendants No. 1, 5, 6, 8 and 14 filed their written statement and reply at Exh. 20 and denied all adverse contentions against them. They contended that plaintiffs have filed the instant suit with dishonest intention to block their approach road to their house. There is a approach road to their house and other persons towards western and southern side of the suit property since

long. There is no wire fencing towards southern side of the suit property. The construction of plaintiffs is illegal. There is no alternative road to approach their house. Plaintiffs did not make necessary party to all the users of the said road. Therefore, the instant suit is bad in law for non-joinder of necessary party. Plaintiffs have abused and threatened to kill them while approaching to the said road. Therefore, they have reported matter to the police station 13.01.2023 and 14.01.2023. Police have registered first information report of non cognizable offence on their report. The instant application is false and frivolous. Plaintiffs have no prima facie case and balance of convenience in their favour. If this application is not allowed, no prejudice will cause to plaintiffs. Hence, submitted for rejection of this application.

4. Defendants No. 2 to 4, 7, 9 to 13 filed pursis at Exh. 38 and adopted written statement and reply at Exh. 5 of defendants No. 1, 5, 6, 8 and 14 at Exh. 20.

5. Heard Shri. M. R. Yadav, learned counsel for plaintiffs and Shri. S. H. Patil, learned counsel for defendants at considerable length. Following points arise for my determination and I record my findings with reasons thereon as under:-

Sr. No.	<u>Points</u>	<u>Findings</u>
1.	Whether plaintiffs have made out prima-facie case?	: No
2.	Whether plaintiffs have proved that balance of convenience lies in their favour?	: No
3.	Whether plaintiffs have proved that they will suffer irreparable loss, if temporary injunction is not granted?	: No

4. Whether plaintiffs are entitled for the relief of temporary injunction as prayed? : **No**
5. What order? : **The application is rejected as per final order.**

REASONS

As to points No. 1 to 4 :-

6. Plaintiffs have contended that they are owners and in possession of the suit property, there is wire fencing and cement pole towards southern side thereof and defendants restrained them from constructing wall compound. On the contrary, defendants came with defence that there is approach road towards western and southern side of the suit property to their house. Plaintiffs have filed copy of sale deed dated 27.10.1939 as document No. 2 alongwith list of documents (Exh. 27) on record. Perusal of sale deed, reveals that it is executed by Laxmibai Ramchandra Appaji Dandekar and another one in favour of Chhaganbhai Hargovan Patel in respect of survey No. 81 C, area 99 feet towards east and west side, 72 feet south west side and 80 feet east side. It also shows that there is small road towards western side of the suit property for the use of purchaser. Plaintiffs have filed copy of 7/12 extract as document No. 1 alongwith list of document (Exh. 3) on record. Perusal of said 7/12 extract, reveals that name of plaintiffs are recorded as occupants of the suit property at column No. 7 of the 7/12 extract. There is endorsement about existence of road for four co-sharers in column of other rights of the 7/12 extract. The aforesaid documents show that plaintiffs are owners of the suit property and there is road for four co-sharers.

7. Defendants have filed copy of agreement of sale as document No. 1 along with list of documents (Exh. 28) on record. The learned counsel for plaintiffs referred the map attached with the

said agreement of sale. Perusal of said map, reveals that there is road towards western and southern side of the suit property and wire fencing for near about 3/4th portion of the southern side thereof. The plaintiffs have also filed copy of measurement map as document No. 5 alongwith list of document (Exh. 27) on record. Perusal of measurement map, reveals that plaintiffs are in possession of the land which is shown in the map. But, it does not show that there is small road toward western and southern side of the suit property. It also does not show that there is cement pole and wire fencing towards southern side of the suit property. The documents of plaintiffs do not support to their contentions. The learned counsel for plaintiffs tried to canvass that there is wire fencing and cement pole towards southern side of the suit property by playing CD on his laptop during course of argument. Plaintiffs have also placed copy of CD on record. But they did not file certificate under section 65 B of the Indian Evidence Act. Plaintiff No. 1 has filed affidavit in respect of CD, but it does not prima facie disclose that they have complied provisions of 65 B properly. Therefore, the said electronic record is not useful to the case of plaintiffs at this pretrial stage. Mere contention of plaintiffs is not sufficient to hold that there is wire fencing and cement pole towards southern side of the suit property.

8. Plaintiffs have filed construction permission obtained from Grampanchayat, Palghar as document No. 3 alongwith list of documents (Exh. 27) on record. Perusal of said permission letter reveals that the Grampanchayat, Palghar permitted to father of plaintiff No. 1 for renovation of the buildings as per plan on 30.12.1986. The construction permission shows that the Grampanchayat, Palghar has granted permission to plaintiffs to renovate the building as per approved plan. But plaintiffs failed to file approved plan on record, the reason best known to them. For want of

approved map, it cannot not be considered that plaintiffs have received permission for construction of the compound wall as per approved plan. It also creates doubt that plaintiffs have started construction of their wall compound as per approved plan.

9. According to plaintiffs, defendants have restrained them from constructing their compound wall on 13.01.2023, therefore, they have requested to the Superintendent of Police, Palghar for police protection for construction of the wall compound. They have filed copy of application made to the Superintendent of Police, Palghar for police protection for construction of the wall compound as document No. 4 as per list of documents (Exh. 27) on record. But there in no recital to that extent in the application made for police protection to the Superintendent of Police on 16.01.2023. The said application shows that plaintiffs have applied for police protection for construction of the wall compound on surmises of obstruction from the adjacent possessors of the suit property. It also does not show prima facie that defendants have restrained plaintiffs from making construction of their wall compound.

10. Plaintiffs have filed their affidavits on record to show that defendants have alternative road to approach their house at Exh. 33 and 34 on record. They have suggested that there is approach road to house of defendants to side of Brujwasi Hotel and lions Club adjacent to Mahim Palghar road. But there is no pleading of plaintiffs that defendants have alternative road to approach their houses other than road towards western and southern side of the suit property.

11. On the contrary, defendants have filed affidavits of Ashok Thakarelal Patel and Dharmesh Narendra Patel on record alongwith list of documents (Exh. 26) on record. They have stated on oath that there is road towards western side of the Amrut Sagar building to

approach defendants and other 150 to 170 persons. They are not party to this suit. There is nothing on record which shows prima facie that they are interest witnesses. Therefore, their affidavits carry more weightage than plaintiffs' affidavits.

12. Defendants have also filed copies of first information report of non-cognizable offence along with list of documents (Exh. 29) on record. Perusal of those FIRs, shows that defendant No. 5 and one Nighai Motilal Chauhan have reported the matter to police that plaintiffs have restrained them from approaching by side of their building on 13.01.2023 and 14.0.2023, respectively. It shows that plaintiffs have restrained defendant No. 5 and one Nighai Chauhan from approaching from the road adjacent to their house. But there is no counter claim of defendants for the relief of injunction, the reason best known to them. But plaintiffs have come with case that defendants have restrained them from constructing from wall compound. Therefore, they have to show prima facie case without taking benefit of weaknesses of other side.

13. The learned counsel for plaintiffs relied on the decision of the Hon'ble Apex Court in the case of **Abraham Patani of Mumbai and Anr. Vs. State of Maharashtra and Ors.**, reported in **AIR Online 2022 SC 1377** and argued that land of plaintiffs is not acquired for building new road for defendants, therefore, it can not be considered that there is road for defendants from the land of plaintiffs. Facts of the cited case are that there was dispute about construction of road through property of the appellant by respondent No. 2 therein Municipal Corporation. There was conflict between statutes i.e. Town Planing Act and the Municipal Corporation Act. But facts of present case are that defendants are claiming that they have a approach road to their house through land of plaintiffs. Defendants are claiming easementary right over the land of plaintiffs. Facts of the

cited case and case in hand are not identical. Therefore, the ratio laid down in the cited case is not applicable to the case of plaintiffs with all respect.

14. The learned counsel for plaintiffs also relied on the decision of the Hon'ble Apex Court in the case of **Rame Gowda Vs. M. Varadappa Naidu (D) by Lrs. and Ors.**, reported in **2003 Supreme (SC) 1271** and argued that the person in peaceful possession is entitled to retain his possession. No doubt, it is settled position. Facts of cited case are that there was dispute in between the parties about exact dimension and shapes of pieces of land to be owned and possessed by them. But there is no dispute about dimensions and boundaries in between the parties in the case in hand. In this case, defendants are claiming road through land of plaintiffs as easementary right. Facts of the cited case and case in hand are totally different. Therefore, the ratio laid down in the cited case is not applicable to the case of plaintiffs with all respect.

15. The learned counsel for plaintiffs also relied on the decision of the Hon'ble Bombay High Court in the case of **Baban Anandrao Naik Vs. Pramila Uttamrao Yenare and Anr.**, reported in **2011 (6) ALLMR 15** and argued that at the time of determination of an application for temporary injunction, the factum possession would only be relevant factor. No doubt, it is a settled position. But in the present case, as discussed above, plaintiffs failed to show that there is wire fencing and cement pole to southern side of the suit property and defendants have alternative road to approach their house. There is no dispute in between the parties about possession of the suit property. Facts of the cited case and case in hand are not similar. Therefore, the ratio laid down in the cited case is not applicable to the case of plaintiffs with all respect.

16. The learned counsel for plaintiffs also relied on the decision of the Hon'ble Apex Court in the case of **Gangubai Bablya Chaudhary Vs. Sitaram Bhalchandra Sukhtankar and Ors.**, reported in **1983 (4) Supreme Court Cases 31** and argued that while granting injunction, possession of the property is to be seen. No doubt, it is settled position. Facts of cited case are that respondents therein were in possession of sufficient land on which they could put up construction. Therefore, the injunction was granted. But in the present case, plaintiffs are not constructing their wall compound towards southern side of the suit property as per plan and defendants are claiming approach road by the road of western side of the suit property. If injunction is granted as sought, it will cause inconvenience to defendants to approach their house. Facts of the cited case and case in hand are totally different. Therefore, the ratio laid down in the cited case is not applicable to the case of plaintiffs with all respect.

17. The learned counsel for plaintiffs also relied on the decision of the Hon'ble Allahabad High Court in the case of **Ved Prakash Rastogi Vs. Nagar Palika**, reported in **AIR 2008 ALLAHABAD 27** and argued that simplicitor suit for injunction is maintainable in absence of relief of possession. No doubt, if the plaintiff is threatened by defendant in any form by way of dispossession or by way of trespass, nuisance, etc., it is always open for the plaintiff to seek injunction against the defendant. But in the present case, defendants are claiming right to use road which is at western side of the suit property to approach their house and there is no alternative road for the same. Plaintiffs have failed to show that they are constructing their wall compound as per approved plan. Therefore, the ratio laid down in the cited case is not applicable to the case of plaintiffs with all respect.

18. The learned counsel for defendants argued that the road which is at western side of the suit property is used by 150 to 170 persons, but plaintiffs did not make necessary part to them in this suit, therefore, the suit is bad for non-joinder of necessary party. On the contrary, the learned counsel for plaintiffs relied on the decision of the Hon'ble Bombay High Court in the case of **Francisco Rodrigues and Anr. Vs. Angelica Rebello**, reported in **2011 (2) ABR (NOC) 190 (Bom)** and on the decision of the Hon'ble Madhya Pradesh High Court bench at Gwalior in the case of **Brijnath Sharma Vs. Dharam Singh and Anr.**, reported in **AIROnline 2021 MP 3128** argued that no relief is claimed by plaintiffs against other person than defendants, therefore, they are not necessary parties in this suit. The sum and substance of the cited cases is that if no relief is claimed against the proposed party, he/she/ it can not be termed as necessary party or proper party and proper adjudication can be made even in absence of such party. In the present suit, plaintiffs have claimed that defendants have restrained them from making construction of wall compound. No relief is claimed by plaintiffs against person claiming to be necessary party. Therefore, there is no need of those persons for determining real controversy in between the parties. Hence, they are not necessary parties in this suit. Thus, the ratio laid down in the cited case is applicable to the case of plaintiffs.

19. In such circumstances, one can safely hold that plaintiffs are constructing wall compound towards southern side of the suit property as per approved plan and defendants have restrained from making the said construction. There is no evidence which prima facie shows that plaintiffs are constructing wall compound towards southern side of the suit property as per approved plan and defendants have restrained from making the said construction.

Therefore, in such facts and circumstances, one can safely hold that plaintiffs are not constructing wall compound towards southern side of the suit property as per approved plan and defendants have restrained from making the said construction.

20. In view of aforesaid discussion, plaintiffs failed to establish that they have prima facie case and balance of convenience lies in their favour. In case this application is not allowed, plaintiffs will not suffer irreparable loss as they are not making construction as per building construction permission and defendants have tried to restrain them from making construction thereon. Hence, I answer points No. 1 to 3 in negative. In view of these negative findings, plaintiffs are not entitled for temporary injunction as sought. Therefore, instant application needs to be rejected. Consequently, I answer point No. 4 in negative.

As to point No. 5:-

21. In view of above discussion and findings, I pass following order:-

ORDER

1. The application is hereby rejected.
2. Costs in cause.

(Typed and pronounced in open court.)

Palghar.
Date:- 21.03.2023.

(Mahendra K. Sorte)
Jt. Civil Judge, Jr. Dn.,
Palghar.