

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.368 of 2007

Shahzadi Begum, aged about 58 years, W/o Shri Sheikh Jarib, R/o Village Motipur, Tahsil and District Rajnandgaon (C.G.)

(Plaintiff)

---- Appellant

Versus

Mohammed Yusuf Khan, aged about 53 (50) years, S/o Shri Mohammed Yaqub, R/o Mill Chal, P.H.No.37/2, Motipur, Tahsil and District Rajnandgaon (C.G.)

(Defendant)

---- Respondent

For Appellant: Mr. Shashi Bhushan Tiwari, Advocate.

For Respondent: Mr. Rahul Jha, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

02/01/2020

- 1.This second appeal preferred by the appellant / plaintiff was admitted for hearing on the following substantial question of law: -

"Whether both the Courts below have erred in considering demarcation report (Ex.D.4) and in not considering sale deeds (Ex.P.2, Ex.P.11, Ex.P.13 and Ex.D.5) in its proper perspective while holding, the plaintiff failed to prove existence of public road and thereby dismissing the plaintiff's suit?"

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.)

- 2.The plaintiff filed suit only for mandatory

injunction under Section 39 of the Specific Relief Act, 1963 stating inter alia that she has purchased the land from one Sardar Harbhajan Singh on 17-2-1983 and constructed a house ad-measuring 30 ft. x 44 ft. shown in the map attached with the plaint as A, B, C, D and on northern side of her house, there is 10 ft. public road shown as Ka, Kha, Ga, Da and on that side, plot of the defendant is also situated. It was further pleaded that on 15-3-1999, the defendant has started construction on public road and has also collected stones, *muroom*, etc., and as such, the defendant be restrained from making construction and the construction already made be removed by issuing mandatory injunction which was opposed by the defendant by filing written statement stating that there is no public road existing and he is making construction on his own land.

3. The trial Court after appreciating oral and documentary evidence on record has held that the plaintiff has failed to prove the existence of 10 ft. public road on the northern side of her house and the defendant has made construction on his own land which is a part of Khasra No.329/11, area 11 decimals, and dismissed the suit. On appeal being preferred, the first appellate Court concurred with the findings of the trial Court and dismissed the

appeal leading to filing of second appeal under Section 100 of the CPC in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.

4. Mr. Shashi Bhushan Tiwari, learned counsel appearing for the appellant herein / plaintiff, would submit that both the Courts below are absolutely unjustified in considering the demarcation report Ex.D-4 and in not considering the sale deeds (Exs.P-2, Ex.P-11, Ex.P-13 and Ex.D-5) in its proper perspective while holding that the plaintiff has failed to prove existence of public road and thereby dismissed the plaintiff's suit.

5. Mr. Rahul Jha, learned counsel appearing for the respondent herein / defendant, would support the impugned judgment and decree.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

7. Ex.D-4 is demarcation report conducted by the Revenue Inspector at the instance of the defendant. Ex.P-2 is kishtbandi khatauni of the year 1983 recorded in the name of Sardar Harbhajan Singh. Likewise, Ex.P-11 is sale deed executed by Chunnilal in favour of Sardar Harbhajan Singh and

Ex.P-13 is sale deed executed by Sardar Harbhajan Singh in favour of plaintiff Shahzadi Begum. Ex.D-5 is sale deed executed by Sahnun in favour of Sheikh Abdul Rahim & Sheikh Abdul Satar.

8. The trial Court as well as the first appellate Court, both, have considered the aforesaid documents and came to the conclusion that there is no such public road existing on the northern side of the plaintiff's house and the defendant has made construction on his own land which is Khasra No.329/11. The plaintiff has claimed the relief of mandatory injunction.

9. Section 39 of the Specific Relief Act, 1963 states as under :-

"S. 39. Mandatory injunctions. - When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

10. Mandatory injunction is an injunction in a positive form, requiring a person or party to a suit to do a particular thing. It provides a remedy where it is not possible to restore the status quo, unless the wrongdoer is made to undo the wrong, which he has committed. It is granted when to prevent a breach of obligation, it is necessary to compel the performance of certain acts. It aims at

restoration of things to status quo ante. A mandatory injunction cannot be granted to create a new state of things. Where the possession of the plaintiff has been violated pending proceedings, an order of mandatory injunction can be passed to restore possession. The two elements which must be considered for the grant of mandatory injunction as per the Specific Relief Act, 1963, 14th Edition, by Pollock & Mulla are as under :-

(i) what acts are necessary in order to prevent a breach of the obligation; and

(ii) whether these acts are such as the court is capable of enforcing.

In order to grant mandatory injunction, the plaintiff must show that there has been a breach of legal obligation and that it is necessary to maintain the status quo.

11. In the matter of **Maria Margarida Sequeria Fernandes and Ors. v. Erasmo Jack de Sequeria (Dead) through Lrs.**¹, the Supreme Court has reiterated the principle of law with regard to the suit for mandatory injunction. Paragraph 80 of the report states as under :-

Suit for Mandatory Injunction

"80. It is a settled principle of law that no one can take law in his own hands. Even a trespasser in settled possession cannot be dispossessed without recourse of law. It must be the endeavour of the Court that

1 AIR 2012 SC 1727

if a suit for mandatory injunction is filed, then it is its bounden duty and obligation to critically examine the pleadings and documents and pass an order of injunction while taking pragmatic realities including prevalent market rent of similar premises in similar localities in consideration. The Court's primary concern has to be to do substantial justice. Even if the Court in an extraordinary case decides to grant ex-parte ad interim injunction in favour of the plaintiff who does not have a clear title, then at least the plaintiff be directed to give an undertaking that in case the suit is ultimately dismissed, then he would be required to pay market rent of the property from the date when an ad interim injunction was obtained by him. It is the duty and the obligation of the Court to at least dispose off application of grant of injunction as expeditiously as possible. It is the demand of equity and justice."

12. In the celebrated case of Dorab Cawasji Warden v. Coomi Sorab Warden and Ors.², the Supreme Court has laid down guidelines for grant of interlocutory mandatory injunctions, which are as follows :-

"16...(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief."

13. Recently, in the matter of Golden Valley Educational Trust Oorgam v. Vokkaligara Sangha³, the Karnataka High Court laid down the parameters as to

² (1990) 2 SCC 117

³ 2013 SCC OnLine Kar 10461

when mandatory injunction can be granted and in paragraph 43 summarized as under :-

"From the aforesaid decisions, the law in respect of mandatory injunction could be summarized as under:-

The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course'. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly. Where the defendant has acted without regard to his neighbour's rights or has tried to steal a march on him or has tried to evade the jurisdiction of the Court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour, he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. The principles governing the grant of Injunctions are the same, whether the acts sought to be restrained are a breach of contract or a tort. In both cases there must be no acquiescence and damages must not be a sufficient remedy, and the restoration of things to their former condition must be the only relief which will meet the requirements of the case. Prompt action is essential if a mandatory Injunction is the desired remedy. Where a plaintiff has not brought his suit or applied for an Injunction at the earliest opportunity, but has waited till the act complained of by him has been completed, and then asks for a mandatory Injunction, such an Injunction will not in general be granted. The Court will seldom interfere to pull down a building which has been erected without complaint. A landlord should not have a mandatory Injunction for demolition of a building unless he has not only objected to such building but has also taken legal steps to prevent it. But where the defendant has acted reasonably though

in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. Firstly, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at law and all his consequential remedies in equity. The Court in the exercise of its discretion will be guided by consideration of justice, equity and good conscience and that it is not possible for the Court to lay down inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused. A mandatory injunction is a discretionary relief and delay is a factor which has to be taken into account while granting it, where a case for grant of this relief is otherwise made out and that such delay, however to be a disqualifying circumstance, must amount to waiver or abandonment of the rights sought to be enforced or acquiescence in the act complained of or laches, after the act is done. One of the tests to determine whether a mandatory injunction should or should not be granted is whether the plaintiffs, who objected to the constructions being made by a co-owner on a joint land, did so at the earliest or waited till the constructions had been completed. In the first case injunction would normally be issued, whereas if the constructions had been allowed to be completed, an injunction would normally be refused, as the basis for refusing injunction would be that by their conduct in not objecting at the earliest stage, the joint co-owners had induced the maker of constructions to believe that he could make it, and in doing so spent money and effort. Before the plaintiff could claim such mandatory injunction, he should establish that he did not stand by and allow the injury to be caused to him. If the evidence discloses that the plaintiff did make it possible to the defendant to cause that injury such as unauthorized construction and never took any step such

as the institution of a suit and an application for injunction restraining the defendant when such unauthorised construction was in progress and comes to the Court with his suit only after such unauthorised construction was completed, the case would not be one for a mandatory injunction but only for damages."

14. In the aforementioned case, the Karnataka High Court has pondered over when mandatory injunction can be granted and has clearly held that in a case where the plaintiff objected to the construction raised by the co-owner on the joint land mandatory injunction should be granted, but where the plaintiff waited to object till the construction had been completed injunction should be refused.

15. The plaintiff in the plaint has only pleaded that on northern side of her plot, there is a 10 ft. public road marked as Ka, Kha, Ga, Da and the defendant has started digging and has collected stones and *muroom* by which she is deprived of the use of public road and her interest is likely to be jeopardized. Both the Courts below have concurrently recorded a finding that the plaintiff has failed to establish the existence of public road on the northern side of her plot and has also failed to prove that construction has been made by the defendant over the public road, rather it has been made on the private road. The finding of both the Courts below that the plaintiff has failed to establish the existence of public road and

construction on the said public road by the defendant is a finding of fact based on the evidence available on record, it is neither perverse nor contrary to record.

16. In view of the aforesaid principle of law, the plaintiff is not entitled for mandatory injunction. The substantial question of law is answered accordingly and the second appeal deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

17. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge