

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.13554 OF 2021

ASHVIN AMRUT FIRODIYA
VERSUS
ANIL MACHINDRA SHISODE

...
Advocate for Petitioner : Mr. Dixit Sushant V.

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CORAM : MANGESH S. PATIL, J.

DATE : 07.12.2021

PER COURT :

The petitioner who is the original plaintiff is aggrieved by the consistent observations and conclusions by the two courts below holding him not to be entitled to temporary injunction as claimed by him by way of his application (Exhibit-5) before the trial court.

2. The learned advocate for the petitioner would vehemently submit that the petitioner is the owner of the property bearing City Survey No.1071 whereas the respondent is the owner of the City Survey No.1085. There was a 2.5 feet wide private way intervening the two properties. By making encroachment over it and by demolishing the southern side compound wall of his property, the respondent has made encroachment over City Survey No.1071 and have started construction. The petitioner has therefore filed a suit for possession of the encroached portion and mandatory injunction calling upon the respondent to remove the construction i.e. carried out on the encroached portion. He would submit that properties have been measured by Court Commissioner revealing the encroachment. If the respondent completes the construction it would create obstruction to the petitioner in use of his property. He would further submit

that even the respondent would then claim some easementary rights over the encroached portion if he is permitted to use it. There was a *prima facie* case and balance of convenience in his favour and he would have been put to irreparable loss if the temporary injunction would have been refused. In spite of such state affairs, the two courts below have grossly erred in refusing temporary injunction by recording a *prima facie* observation about the encroached portion being a part of property City Survey No.1085, which is perverse and arbitrary.

3. I have considered the submissions and perused the papers. There is no dispute about the fact that the petitioner and the respondent have purchased their properties bearing City Survey Nos.1071 and 1085 respectively. Though the measurment *prima facie* demonstrates about the respondent having made some encroachment over the petitioner's property, it is not something which is being revealed to the petitioner. He is alive to the fact that the respondent has made encroachment over his property and that is why he has specifically prayed for possession of such encroached portion and also seeking mandatory injunction calling upon the respondent to remove whatever construction that is standing on the encroached portion.

4. There are settled parameters for grant of temporary injunction. Unless all the three parameters are made out, no temporary injunction can be granted. Merely because the petitioner *prima facie* has a genuine case as far as the encroachment is concerned he would not succeed. The form in which he is seeking temporary injunction restraining the respondents from carrying out the construction over the encroached portion clearly demonstrates that he has been admitting the respondent to be in possession of the encroached portion and even some construction was standing on that encroached portion on the date of the suit. If the petitioner is claiming mandatory injunction, the dimension of the construction particularly the height would be inconsequential. It is not his case that the respondent is

hellbent to increase the area of encroachment. He is merely seeking a temporary injunction restraining the respondent from carrying out further construction over the already encroached portion. If and when he would succeed in getting the decree as claimed by him, whatever is the construction that would be standing in the encroached portion that would have to be removed. However until then, the balance of convenience would stand in favour of the respondent rather than the petitioner. It is the respondent who would be put to irreparable loss and inconvenience if he is restrained from carrying further construction which already has begun.

5. This clearly demonstrates that except demonstrating some *prima facie* case the petitioner does not meet the other two requirements which would entitle him to claim temporary injunction. It is in view of such state of affairs, when the discretion has been exercised by the two courts below which cannot be said to be either perverse, arbitrary or capricious, this Court cannot substitute its own discretion in the place of the discretion which is refused to be exercised by the two courts below.

6. The learned advocate Mr. Dixit would seek to salvage some ground by submitting that apart from the relief of mandatory injunction, the petitioner has also been claiming a perpetual injunction as also a temporary injunction restraining the respondent from obstructing his exclusive possession over the property City Survey No.1071. At least to this extent, the courts below ought to have granted him temporary injunction when there is no dispute about his title to that property.

7. The submission, though attractive at the first blush, a careful reading of the pleading in the plaint as also the application for temporary injunction would clearly demonstrate that though a prayer has been made for a perpetual injunction in terms of the submission made by learned advocate Mr. Dixit, the contents of the plaint as also the application (Exhibit-

5) are clearly devoid of the apprehension being entertained by the petitioner of some other obstruction to his possession over the suit property apart from the encroached portion of 4 sq. mtrs. Therefore in my considered view even the petitioner would not be entitled to claim any temporary injunction in general terms as is now being submitted.

8. The Writ petition is dismissed *in limine*. The observations made herein above are confined to the decision of the Writ Petition.

(MANGESH S. PATIL, J.)

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