

IN THE COURT OF PRL. SENIOR CIVIL JUDGE ATHANI
AT : ATHANI.

PRESENT: SHRI.S.M.JALAWADI,
B.Com. LL.B.(Spl.)
Prl. Senior Civil Judge, Athani.

Dated this the 1st day of March, 2018

M.A. NO.1/2018

1. Sri. Basavaraj @ Basavant Babu Bajantri,
Age : 56 years, Occ : coolie,
R/o. Ainapur, Tq : Athani, Dist: Belagavi.

.....Appellant.

(By Sri. V.S. Desai, Advocate)

// Vs. //

1. Sri. Ramchandra Babu Bajantri,
Age : 65 years, Occ : Coolie,
R/o. Ainapur, Tq : Athani, Dist: Belagavi.

.....Respondnet.

(By Sri. R.M. Bhosale, Adv.)

Date and nature of Order appealed against.	The Order dated 7.12.2017 passed on I.A.No.1 in O.S.No.639/2017 on the file of the IV Addl. Civil Judge & JMFC, Athani		
Date of Institution of the Appeal	08.01.2018		
Date on which Judgment was pronounced.	01.03.2018		
Total Duration.	<u>Year/s</u> 00	<u>Month/s</u> 01	<u>Day/s</u> 21

JUDGMENT

This is an Appeal preferred by the Appellant/Plaintiff being aggrieved by the Order dtd.7.12.2017 passed on I.A.No.1 in O.S.No.639/2017 by the learned IV Addl. Civil Judge & JMFC, Athani.

2. Rank of the parties as referred in the Trial Court is taken as it is in this Appeal.

3. The plaintiff filed suit for the relief of declaration and consequential relief of permanent injunction against defendant in respect of suit schedule property. In the Trial Court the Plaintiff filed I.A.No.1 U/O 39 Rule 1 and 2 of CPC requesting this Court to grant an ex-parte Temporary Injunction against Defendant from restraining him for alleged construction over CDEF portion as shown in the plaint sketch by encroaching upon his property bearing VPC No.2856 of Ainapur village measuring 45 feet length and 30 feet width till the disposal of the case. In support of the application the plaintiff had sworn an affidavit submitting that he is absolute owner in actual possession and enjoyment of the property bearing VPC No.2856 of Ainapur village having East-West 30 feet North-South 45 feet and the said property has been granted by the Government of Karnataka under the scheme of allotment of sites to the poor persons and the government has also granted another site under the same scheme to the defendant. Further the plaintiff submits that he has constructed his house property as shown by letters ABCD measuring East-West 25 feet and North-South 45 feet and residing along with his family members in the said house. The plaintiff he is paying house tax to the Pattan Panchayat Ainapur and also he is making payment towards KEB bill. But the defendant who is adjoining site owner by encroaching 5 feet towards western side of the suit property is trying to construct his building without there being any right, title and interest over his property. So the plaintiff he requested the defendant not to encroach 5 feet of his space and also requested not to construct any illegal structure, but the defendant he is not ready to heed his request, for which he filed an

application on 5.7.2017 to the Pattah Panchayat Ainapur not to grant construction permission to the defendant. In spite of his objections the Patta Panchayat Ainapur they have not at all taken any action against defendant. So he constrained to file the present suit stating that if the defendant succeeded in constructing his house by making encroachment upon his site then he will be put to irreparable loss and injury. The defendant is no way concerned with the suit property and he is not at all having right, title and interest over the suit property is illegally constructing by encroaching the portion of the suit property illegally. In spite of request made by the plaintiff the defendant he is not heeding his request for which the plaintiff constrained to file the present suit and filed the present application. Hence the Plaintiff submit that he is having prima facie case and balance of convenience and if the Temporary Injunction order is not granted then the Plaintiff will be put into hardship and injury. Hence the Plaintiff requested to allow I.A.No.1 as prayed for.

4. For the said application, the defendant filed his written statement and also filed one memo submitting that the said written statement be treated as objections to IA No.1. In the objections the defendant submits that the application is not at all maintainable either in law or on facts. The defendant he admitted that the plaintiff has been granted site under the scheme grant of sites to the poor persons by the Government of Karnataka and accordingly at the same time he has been also granted one open site which is situated towards western side of the plaintiff's site at that time and as per the contention of the defendant there is a common wall in between plaintiff's house property and his house property which is shown by letters EF in the written statement sketch and its width is 2 feet and the defendant since from 1983 by constructing his house

is permanently residing along with his family members and the Pattan Panchayat Ainapur had given panchayat number as 3460 to his house property. So the defendant submits that he is not at all constructing any building by encroaching upon the plaintiff's property, as there is a common wall in between plaintiff's house property and his house property. So question of encroachment of 5 feet and construction of building there upon does not arise at all. The plaintiff he has constructed his house in his entire portion of the site which was allotted to him and he has not at all left any 5 feet either side of his site and therefore the plaintiff only with an intention to give harassment to the defendant filed the present suit and IA No.1. Further the defendant submits that even the Government of Karnataka they have granted one house property to his wife Smt. Leelavati Bajantri and his wife is constructing house in the ABCD portion as shown in the written statement sketch which is not at all abutting to the plaintiff's property. So the plaintiff by suppressing all the material facts has filed the present suit which is not at all maintainable. The plaintiff is not having any prima-facie case and balance of convenience and if the T.I. order is granted then defendant will be put into irreparable loss and injury. So the plaintiff with an evil intention has filed the present suit for which the defendant submits that the application is liable to be dismissed. Hence the defendant requested for dismissal of the application with cost.

5. So, after perusal of the application and objections of the rival parties, the Trial Court has framed the following Points for consideration;

POINTS

1. Whether the plaintiff has made out prima facie case in his favour?

2. Whether the balance of convenience lies in favour of the plaintiff?
3. Whether the plaintiff's will be put to great hardship and irreparable loss if, order of temporary injunction is not granted?
4. What order?

6. After hearing on both the sides, the Trial Court has dismissed IA No.1.

7. Being aggrieved by the said Order, the Appellant-Plaintiff has preferred this Appeal contending that the Order passed by the Trial Court is contrary to law, facts, procedure and the materials on record. The Trial Court passed its order on mechanically without appreciating the documents produced by the appellant/plaintiff and passed its order which is one sided. The Trial Court has not at all considered the documents and the citations relied by the parties. The Trial Court has not at all considered the fact that the appellant even though he has proved prima-facie case and balance of inconvenience and even though the trial court has answered the same in affirmative, but it has wrongly dismissed IA No.1, which is against the provisions of law and the facts placed before the court. The trial court has not at all considered the fact that the defendant is not at all having any right, title and interest over the plaintiff's property. The trial court has not at all consider the real facts placed by the plaintiff so as to consider IA No.1. The Trial Court has not at all considered the fact that if the Temporary Injunction order is not granted then the plaintiff put into hardship since he will lost his property. The Trial Court has not at all followed the principles of natural justice. So the order passed by the Trial Court on I.A.No.1 is totally erroneous and not in accordance with law for which there is

necessity of interfere into the order passed by the Trial Court. So, the Appellant-Plaintiff he requested to interfere into the Order passed by the Trial Court by allowing the appeal as prayed for

8. Lower Court records were secured and perused by this court.

9. Heard the arguments of both sides at length and perused the records of the case.

10. At this juncture, I have to state that the scope for interference with the discretionary order of this nature is limited. However, if it is shown that the Impugned Order suffers from infirmities, then this Court may interfere with the impugned Order. That means Appellant has to show that the Impugned Order is either capricious, arbitrary, absurd, perverse or opposed to law. If that is shown, then the question of interference with the Impugned Order arises. If not, no.

11. So, in the circumstances, the following points that would arise for consideration are as under;

POINTS

(a) Whether the Impugned Order passed on I.A.No.1 by the Court below is arbitrary, capricious, absurd, perverse or opposed to law?

(b) Whether the Impugned Order under appeal is liable to be interfered with?

(c) What Order?

12. My findings on the above said Points are as under :

Point No.1: In the Negative.

Point No.2: In the Negative.

Point No.3: As per the Final Order for the following:

REASONS

13. **POINT NOS.1 & 2:** These two points they are connected with each other, so in order to avoid repetition I have taken these points together for common discussion and consideration.

14. In the Trial Court the plaintiff filed suit for the relief of declaration and consequential relief of permanent injunction against defendant. As per the contention of the plaintiff the Government of Karnataka has granted open site measuring east-west 30 feet and north-south 45 feet and he has constructed house property measuring east-west 25 feet and north-south 45 feet and the Pattan Panchayat Ainapur they have given Number as 2856 and he is residing along with his family members in the said house since from the date of construction and also paying house tax to the Pattan Panchayat Ainapur and also by paying KEB electricity bill. So it is for the plaintiff to prove that he has only constructed his building to the extent of east-west 25 feet and north-south 45 feet as contended in the suit plaint. Because as per the contention of the plaintiff he left 5 feet open space towards western side of his house wherein the defendant is having his own house property bearing No.3460. So there is no dispute that properties No.3460 and 2856 are abutting to each other. So under such circumstances it is for the plaintiff to prove that after the edge of the defendant's property he left 5 feet open space towards western side of his open site and constructed his house. Because in the present case the plaintiff he only produced 5 documents along with suit and the first document is Hakku patra issued by the Government of Karnataka to the plaintiff in respect of open site which is measuring east-west 30 feet and north-south 45 feet which is not at all disputed by the defendant. Further the plaintiff he has produced the recent house

property extract issued by Pattan Panchayat Ainapur wherein the house property is having number as 2856 and the description of the property is shown as house. So in the property extract issued by the Pattan Panchayat Ainapur they have not at all mentioned that house is measuring east-west 25 feet and north-south 45 feet and the open space is measuring 5 feet east-west and 45 feet north-south. So the Pattan Panchayat Ainapur they have not at all mentioned any single word in the property extract of the plaintiff that the plaintiff has left 5 X 45 feet open space towards western side of his house property. So his own property extract clearly discloses that the plaintiff he has constructed his building in the entire extent without leaving any space. If really the plaintiff has left 5 feet open space towards western side of his house property then definitely Pattan Panchayat authorities they ought to have mentioned the same in the property extract. So the documents produced by the plaintiff i.e. his own property extract clearly discloses that the plaintiff is not at all having any prima-facie case and balance of convenience. Further the plaintiff he has produced one tax paid receipt, wherein the Pattan Panchayat authorities they have clearly mentioned that they have recovered house tax from the plaintiff. So the plaintiff he has not at all paid any tax in respect of open site to the Pattan Panchayat Ainapur. So the tax paid receipt itself shows that for the year 2015-16 and 2016-17 he paid house tax to the said Pattan Panchayat Ainapur. So the said document is also not at all having any evidentiary value to restrain the defendant as prayed under IA No.I. Further the plaintiff has produced two electricity bills which are undisputed. Further the plaintiff he has produced one copy of the objections submitted by him to the Pattan Panchayat Ainapur on 25.7.2017. In that objections the plaintiff he has not at all shown what is the exact measurement of open site and what is the exact measurement of his house property. So in the present case the

plaintiff he has not at all produced any important document like house construction permission issued by Pattan Panchayat Ainapur in order to consider his plea that he has constructed building measuring east-west 25 feet and north-south 45 feet. So why the plaintiff he himself has restrained from producing the house construction permission issued by Pattan Panchayat Ainapur in order to show that the defendant has illegally constructed his building by encroaching upon his property. So the plaintiff he has not at all produced any single document before the court regarding exact measurement of the house property, which he constructed in the open site granted by the Government of Karnataka. But his own document i.e. property extract and tax paid receipts they clearly disclose that the plaintiff he has constructed his building in the entire extent without leaving any open space.

15. But on the other hand, the defendant he has taken a specific contention that the plaintiff has constructed his building to the entire extent without leaving any space and there is a common wall in between his house and house of the plaintiff which is shown by letters EF in the written statement sketch. So in order to prove this contention the defendant he has produced some photographs which clearly disclose the very existence of common wall in between plaintiff's house and defendant's house. Moreover the plaintiff he has not raised any objections or filed any affidavits stating that these photographs produced by the defendant are no way concerned to the suit property. Even the plaintiff he has not at all produced any single photograph in respect of his house property in order to show that the defendant illegally by encroaching upon his open site to the extent of 5 feet is illegally trying to construct his building. Even the plaintiff he ought to have obtained the certified copy of the construction permission of his house property and

produced the same before the court, but he did not do so. So that itself shows that the plaintiff by suppressing material facts and with an intention to give harassment to the defendant he filed the present application.

16. Even the plaintiff he has not produced any affidavits of the neighbouring house owners in order to show that the defendant is illegally by encroaching upon the property is trying to construct his building. So under such circumstances looking from the documents and the pleadings submitted by both the parties it is crystal clear that the plaintiff he fails to establish whatever the contention that has been taken under IA No.1. So the trial court has rightly held the point no.1 in Affirmative, since the defendant has not at all disputed regarding the title of the plaintiff over property No.2856 which belongs to plaintiff. But the plaintiff when he has not at all proved regarding the alleged construction of the defendant then the trial court has rightly dismissed IA No.1 holding the remaining points in negative. So proving of prima-facie case it does not entitle to the plaintiff to get the order of temporary injunction against defendant. Because the plaintiff must prove regarding interference of the defendant by encroaching upon his property, the defendant is constructing his house. When both the houses were adjoining to each other having common wall then question of constructing any building by encroaching 5 feet open space of the plaintiff does not arise at all. Because as already discussed above the plaintiff he has not at all produced any single piece of evidence to show that he has left 5 feet open space towards western side measuring 5' X 45' by the side of the house of the defendant. So under such circumstances it is crystal clear that the plaintiff he fails to prove whatever the grounds urged in the appeal memo.

17. So the Trial Court has rightly comes to the conclusion that the plaintiff has failed to prove point no.2 and 3. So the Trial Court has refused to grant Temporary Injunction order against defendant. So under such circumstances after perusal of all these documents it is clearly discloses at this stage the plaintiff has not made any prima-facie case and balance of convenience. So the Trial Court has properly appreciated the documents produced by both the parties and passed its order in accordance with law.

18. So, that itself goes to show that the plaintiff is not at all having prima facie case and balance of convenience. So, looking from the pleadings and the documents produced by both the parties, it is crystal clear that the Trial Court has rightly appreciated all these facts and circumstances of the case and has rightly dismissed I.A.No.1. So, the Trial Court it has not committed any error while dismissing I.A.No.1. So, whatever the order passed by the Trial Court on I.A.No.1 is passed on the material documents, evidence and the provisions of law. So, there is no necessity of interference into the order passed on I.A.No.1 by the Trial Court.

19. So, the Trial Court has rightly passed its order on I.A.No.1 in accordance with Provisions of Law. So, the Appellant he has not at all proved whatever the grounds urged in the Appeal Memo. So, the arguments of learned Advocate for the Plaintiff/Appellant that prima facie case exists in favour of the Plaintiff/Appellant for allowing the I.A.No.1 cannot be accepted. Hence I answer Point Nos.1 and 2 in the Negative.

20. **POINT NO.3:** In view of my findings on Point Nos.1 and 2, I proceed to pass the following:

:ORDER :

**The Appeal preferred by the Appellant
U/o.43 Rule 1(R) of CPC is hereby dismissed.**

No order as to costs.

**Office is hereby directed to send the copy of
the above said Order along with the Lower Court's
records to the Court below forthwith.**

(Dictated to the stenographer transcribed by him on the Computer, corrected by me and then pronounced in the Open Court on this the 1st day of March, 2018)

**(S.M.Jalawadi)
Prl. Senior Civil Judge, Athani.**