ORDER BELOW EXH.05
(Passed on 23-01-2018)

01. This is an application for temporary injunction restraining defendant No.1 from proceeding with construction till final decision of the suit.

Case of the plaintiff :

02 Plaintiff is owner of plot No.1 out of Gut No.257 situated at Sagwan particularly described in paragraph No.1 of the plaint. The said plot was purchased by plaintiff from Shobhabai Moharkar on 22/03/2012. It was taken into possession as per sanctioned layout and maps. Thereafter, plaintiff has carried out construction after getting requisite permission from defendant No.2. As per the direction in the permission, plaintiff has left requisite distance from the boundaries. She has also constructed the compound wall with 5 feet height surrounding to her house. Plaintiff has left windows towards the Western wall. Those windows are only source of sunlight and fresh air. The compound wall is apparently well within the boundaries of the suit property.

03. The defendant No.1 has started the construction on the plot which is abutting to the suit property from the western side. No prior permission is obtained for such construction. While carrying out construction the defendant No.1 destroyed western side portion the compound wall behind back of plaintiff. Plaintiff requested defendant No.2 to intervene. But defendant No.2 did not take it seriously

plaintiff put a proposal to defendant No.1, if he has any doubt about the area of plot, plaintiff is ready to carry out joint measurement and requested to stop the construction till the reports come. Thereafter defendant No.1 stopped the construction. Thereafter, plaintiff requested defendant No.2 to provide his title deeds for carrying out the joint measurement, but thereafter defendant No.1 immediately proceeded with the construction.

04. Defendant No.1 after destroying compound wall of plaintiff has encroached up 1 ½ to 2 feet in the suit property. He started erecting a wall upon said encroachment. Due to proposed wall western side windows of plaintiff will not open and she will be deprived from sunlight and fresh air. Hence plaintiff filled this suit along with this application and she prayed to restrain defendant No.1 from proceeding with construction till final disposal of the suit.

05. **Case of defendant No.1 :**

Defendant No.1 filed W.S vide Exh.20 and admitted that, defendant No.1 started construction on the plot which is abutting to the suit property from western side. However, it is denied that, he destroyed compound wall of plaintiff. The compound wall was and is never in existence towards western side of plaintiff. It is further submitted that temporary injunction cannot be granted against true owner. Defendant No.1 has purchased the plot No.1 out of Gut No.257 situated at Sagwan particularly described in paragraph No.11 of the W.S. from partners of Smart City Developers, Buldana on 14/06/2016.

06 Defendant No.1 applied for permission to construct over the plot, accordingly Grampanchayat Sagwan has granted permission for construction and accorded sanction to the map of proposed construction. Thereafter, defendant No.1 started construction. When the construction of defendant No.1 is about to complete, the plaintiff filed the suit along with application for temporary injunction. Present suit is filed with malafide intention for suppressing one's own wrong of making construction and encroachment towards eastern side of plot of defendant No.1.

07 Plaintiff has purchased a portion from total plot with prior permission from competent authority before its Sub-division. Plaintiff has not come before this court in clean hands. Plaintiff has constructed over extra area than actual area of his plot. She should have left require space from her western side so that she can get sunlight and air. Defendant No.1 has left space from his eastern side and there is no harm plaintiff for construction of defendant No.1. So also plaintiff has already left another window for sunlight and air and therefore there is no harm to plaintiff due to construction of defendant No.1. If the application is allowed, irreparable loss, would be caused to the defendant No.1 and he will be deprived from residing in his own house. Hence, he prayed to reject the application.

Case of defendant No.2 :

08 Defendant No.2 filed W.S. vide Exh.21 and denied averments of plaintiff. It is admitted that, plaintiff got permission for

construction of her house. It is also denied that defendant No.1 is not carrying out construction as per the construction permission granted to him. It is not clear as to who has encroached on whose land as the measurement is not carried out. Plaintiff did not file report to police station for demolition her wall therefore it is clear that she herself is not firm whether defendant No.1 is encroached on her plot. Plaintiff did not give notice to defendant No.2. Plaintiff did not obtain permission for construction of the compound wall. She never sought permission for construction compound wall. Therefore, it is not clear whether that wall was in existence.

09. In view of rival contentions of the parties, arguments advanced at bar, following are the points for determination along with my findings thereon for the reasons ensuing.

Sr. No.	**Points**	**Findings**
1)	Whether plaintiff has made out prima-facie case in her favour ?	No.
2)	Whether balance of convenience tilts in favour of granting application ?	No
3)	Whether irreparable loss will be caused to the plaintiffs if application is not granted ?	No.
4)	What order ?	Application is rejected.

R E A S O N S

As to Point Nos. 01 to 03 :

10. Plaintiff has filed rough sketch map along with the plaint by which she has shown that, defendant No.1 encroached on her plot towards her western side by demolishing her compound wall. Plaintiff has filed copy of her sale deed, copy of map, copy of sanctioned map, Prarambha Pramanpatra dt.27/04/2016, form No.8, application dt.07/12/2017, photographs and power of attorney.

11 Defendant No.1 has filed copy of his sale deed, copy of mutation entry, 7/12 extract, map of layout plan, copy of tax receipt, copy of receipt for construction permission, form No.8, copy of construction permission dt.18/12/2017 along with map. They admitted that plaintiff is owner of her plot and defendant No.1 is owner of his plot.

12. Plaintiff did not file any documents to show that, she carried out construction as per the construction permission given by defendant No.2. Moreover from W.S. of defendant No.2 it is clear that, plaintiff did not take permission for carrying out construction of compound wall. So also plaintiff did not file earlier photographs to show that, compound wall was in existence. Plaintiff has filed some photographs to show that, one wall is demolished however, it is not clear from the photographs that her compound wall is demolished.

13. It is the case of plaintiff that her compound wall is

constructed in her plot. But she did not file any document to show that, her compound wall was constructed as per construction permission. In the plaint also she did not ever that the compound wall was constructed after getting construction permission. It is true that, any person shall not demolish the construction which is not carried out as per construction permission. But the plaintiff did not file any document or photographs to show that her compound wall was in existence.

14 Moreover, she did not file any document to show that, she constructed compound wall within her plot. It is the case of plaintiff that, defendant No.1 encroached on her plot whereas it is the case of defendant No.1 that plaintiff encroached on his plot. Under such circumstances it was necessary for plaintiff to file any map of competent authority or map drawn by private measurer to prima-facie show that, defendant No.1 has encroached on plaintiffs plot. It is her case that she demanded documents for joint measurement, but defendant no.1 did not provide it. But she could have filed map of her own plot alongwith measurements to prima-facie show that defendant no.1 encroached on her plot and she constructed within her plot.

15. Plaintiff did not file any such map to show that, defendant No.1 encroached on her land. Only of the basis of rough sketch map and photographs it cannot be concluded that defendant No.1 encroached on her plot. It was the responsibility plaintiff to show her prima-facie case that is to show that, her all construction is legal

and defendant No. 1 encroached on her land.

16. Moreover, plaintiff averred that defendant No.1 carried out construction without obtaining permission on local authority. However, defendant No.1 produced his construction permission. If plaintiff feels that, defendant No.1 is not carrying out construction as per the construction permission she may approach to proper authority that defendant No.1 is not carrying out construction as per the construction permission granted to him. Therefore, it is clear that she is having equally efficacious remedy. Plaintiff did not file any document to show that her alleged compound was constructed after obtaining required permission particularly when defendant no.2 says that it is not constructed after obtaining required permission. Therefore, it is cleat that plaintiff has no prima-facie case.

17 Plaintiff has relied upon decision of Hon'ble Orissa High Court, in **Dharuba Charom Parivda Vs- State of Orissa & Ors., reported in AIR 2003 Orissa 219**. In that case, injunction against construction of public road in petitioner's land was granted . However, in that case, it was held that acquisition of land without following due process of law is illegal. In the present case, there is no question of acquisition of land. So also plaintiff has failed to show prima-facie that defendant encroached on her land.

18 Plaintiff has also relied upon decision of **Hon'ble Supreme Court, in Anand Prasad Agarwalla -Vs- Tarleshwar**

Prasad & Ors, reported in AIR 2001 SC-2367, in which, it has been held that, court cannot hold mini trial at the stage of grant of temporary injunction and examine various aspects of case under which sale certificate had been issued. It is settled law that, mini trial cannot be held at the stage of deciding temporary application. But, when both the parties say that, they have encroached on each other's land, the party who is claiming injunction, is duty bound to show his prima-facie case and to show that defendant encroached on his land. Defendant no. 1 also relied upon bench of citations.

19. If defendant No. 1 is restrained from carrying out construction till final disposal of the suit, he would suffer from irreparable loss. If after conclusion of trial plaintiff proves that, defendant No.1 encroached on her land, construction of defendant No.1 can be ordered to be demolished. Therefore, balance of convenience tilts in favour of defendant no.1. Therefore, also it is clear that, she is having remedy and she would not suffer from irreparable loss. But at present plaintiff has failed to show her prima-facie case that defendant No.1 encroached on her land therefore she is not entitled for order of temporary injunction. Hence, answer points No. 1 to 3 in the negative.

<u>As to Point No. 04 :</u>

20. In view of the negative findings recorded to the point nos. 01 to 03, the application of plaintiff for temporary injunction is liable to be rejected. Costs of the application may be left to be considered at

the time of final adjudication of the costs of the litigation. In the result, I pass the following order.

O R D E R

1) Application is rejected.

2) Costs in cause.

Date: 23/01/2018.

(Revati R.Deshpande)
Jt. Civil Judge (Jr.Dn.)
Buldana.