

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/APPEAL FROM ORDER NO. 16 of 2022
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/APPEAL FROM ORDER NO. 16 of 2022

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SHANTABEN AMBALAL PATEL & 1 other(s)
Versus
SUNITABEN VIJAYKUMAR JOSHI

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Appearance:

MR MUKESH A PATEL(636) for the Appellant(s) No. 1,2
SUNILSINH J CHAUHAN(8334) for the Appellant(s) No. 1,2
MR ANKITKUMAR B PATEL(9939) for the Respondent(s) No. 1

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CORAM: HONOURABLE DR. JUSTICE A. P. THAKER

Date : 02/03/2022

ORAL ORDER

1. The appellants- original plaintiffs have preferred this Appeal under Section 104 read with Order 43 Rule 1 of Code of Civil Procedure, against the order dated 5.1.2022, passed below Exh-6-7 injunction application, filed in Civil Suit No. 1836 of 2016 by the learned Judge, Court No. 21, City Civil Court, Ahmedabad whereby the injunction application of the Appellants- original plaintiffs came to be dismissed.
2. The Appellants are the original plaintiffs and the respondent is the original Defendant before the trial Court. For the sake of brevity and convenience, the parties are

referred to here as per their status before the trial Court.

3. It is the case of the plaintiffs that they owned residential premises Tenement No. 0513-35-0216-0003-1 admeasuring 30.93.68 sq. mtrs, City Survey No. 53 (present 53/2) of Municipal Census No. 1383 of village Mithakali, Ellisbridge Ward No. 513 is owned and possessed by the appellants and are staying with the family since the time of their predecessors. It is the case of the plaintiffs that on eastern side wall of his property, on the first floor of the premises, there is window and balcony through which the appellants used to get easementary right of air and sunlight, etc. since long. According to the plaintiffs, they are using the said balcony and window for their said easementary since beginning, uninterruptedly and consistently. It is the case of the plaintiffs that the defendant is raising construction of the wall resulting into closure of their window and balcony on the first floor on the eastern side. It is contended that the defendant had started movement for construction on 18.9.2016 touching to the eastern wall of the plaintiffs in a manner that window and the balcony will get closed. That the plaintiff tried to persuade the

defendant for not making such type of construction, but the defendant had threatened of carrying out the construction and, therefore, they have filed Civil Suit along with injunction application.

- 3.1 Upon notice on the defendant, the defendant has appeared and has filed reply and also filed counter-claim raising the objection to the effect that the Suit is not maintainable in its present form and the plaintiff has suppressed the material fact. It is contended by the defendant that plaintiff has no cause of action and plaintiff has not right of such easement. The defendant has contended that the defendant is making construction on her own property and that too with the approval of the concerned authorities.
4. After hearing both the parties, ultimately trial Court has rejected the application filed by the plaintiffs based on the observation that there is no specific recital qua the right of easement in respect of window and balcony on the eastern side of the property of the plaintiffs at the first floor. It has also observed that on perusal of the Sale Deed at Exh-4/1 reveals that no such right of easement has been mentioned in Exh-4/1. It has also observed that the defendant is raising the construction in her own property and Ahmedabad

Municipal Corporation or any other authority is not a party to the present suit as well as there are no pleadings that defendant is raising construction in violation of any law or without obtaining any prior permission from any concerned authorities. On this ground, trial Court has rejected the application of the plaintiff.

5. Heard Mr. Mukesh Patel, learned advocate for the plaintiff and Mr. Ankit Patel, learned advocate for the defendant through video-conferencing. Perused the material placed on record and the impugned order of the trial Court.
6. Mr. Mukesh Patel, learned advocate for the appellant has vehemently submitted that the trial Court has committed serious error of facts and law in rejecting interim injunction application of the plaintiff. He has submitted that the plaintiff's property has been constructed after appropriate approval by the concerned authority in the past and there is a window and balcony in the eastern side wall of the property of the plaintiffs. He has also submitted that the defendant is trying to put up construction in such a manner that the window and balcony of the plaintiff would be closed and there will be no air and light available to the

plaintiff. According to him, there is a easementary right of air and light in favour of the plaintiff from window and balcony in the eastern side of the wall. He has invited the attention of this Court to the various photographs produced in the matter showing that the proposed construction would close the window and balcony of the plaintiff's property. He has also submitted that the defendant has filed a counter claim in the suit. He has submitted that the plaintiff has also placed on record the written arguments before the trial Court which has not been considered by the trial Court. According to him, even in the year 2014, the defendant has specifically issued notice wherein it has been stated that the plaintiff was putting construction on his property in his own land. He has also invited the attention of the Court regarding the alleged Notice dated 21.1.2014 wherein there is specific averment made by the defendant's husband namely Vijaykumar that Plaintiff Atulbhai is putting construction after leaving certain operation on the eastern side and has not put up any common wall and has started construction in his own portion of land leaving certain portion on the eastern side. He has also contended that the wall on the

eastern side where the gap is made on the eastern side should be closed immediately. In this regard, it is submitted by the plaintiff that the averment itself suggest that the plaintiff has left certain portion from his property for being used for common purpose and thereafter they have erected their house. According to him, the defendant has filed counter-claim against the plaintiff for the closure of the window. According to him, when there is dispute pertaining to easementary right of air and light, since there was status-quo maintained since 2016, same arrangement may be continued for further time and plaintiff is ready to cooperate for early disposal of the suit. He has also submitted that there is no case of common wall.

- 6.1 Mr. Patel, learned advocate for the plaintiff has also submitted that even if any permission is granted by the concerned authority to the defendant for making any construction in her own plots, that permission cannot affect the easementary right of the neighbor in any manner. While inviting the attention of this Court to the illegal permission, a copy of which is on record, Mr. Patel has submitted that there is a clause that it will not affect

the right of the others. He has submitted that the trial Court has committed serious error of facts and law and, therefore, this Court may interfere in the matter and interim injunction be granted in favour of the plaintiff restraining the defendant from raising the construction in a manner which closes the window and balcony in the eastern wall of the plaintiff.

7. Mr. Ankit Patel, learned advocate for the defendant has vehemently submitted that the plaintiff is relying upon the so-called plan of 1993 which is of the village Changispur whereas now the vicinity is known as Mithakali and that this plan is not authentic. The plaintiff has not put on record the construction permission of the year 1933. He has also submitted that even as per the Registration Act with every registered document, there must be proper description of the property with description of all the four sides. He has submitted that the so-called old documents of the plaintiff have no recital regarding the window and balcony. He has submitted that the plaintiffs have put up the construction of the first floor in 2014 and that too without any permission of the Ahmedabad Municipal Corporation. He

has submitted that the defendant has served notice to the plaintiff in the year 2014 which has not been replied by the plaintiff. He has also submitted that the plaintiffs have put up construction on 3rd floor during the pendency of the Suit. While relying upon the written statement of the plaintiff as well as the injunction application and the counter-claim, as filed by the defendant before the trial Court, he has submitted that this fact has been properly pleaded before the trial Court and the defendant has already claimed the counter-claim for removal of the construction put up by the plaintiffs with regard to window and balcony on the first floor of plaintiff's property. He has submitted that the defendant has been granted permission by the authority as per the plan and, therefore, the trial Court has rightly not granted injunction in favour of the plaintiff. He has also submitted that the defendant has raised construction in her own property and if the window and balcony of the plaintiff is kept as it is, then it will affect the privacy of the defendant. He has also submitted that in the guise of renovation due to damage caused due to earthquake, the plaintiffs have put up window and balcony on the eastern side wall of his property, creating alleged right of air and

light. He has submitted that the plaintiff has not come with clean hands and submitted that if the construction of the defendant is stopped, irreparable injury would be caused to the defendant, whereas by putting the construction, no injury would be caused to the plaintiff as they have illegally put window and balcony on eastern side wall of his property. He has supported the reasoning of the trial Court and has prayed to dismiss the present appeal.

8. Now, considering the averments made on behalf of both the sides coupled with the material placed on record and the impugned order of the trial Court, it is undisputed fact that the plaintiffs and the defendant are neighbours. It also appears from the record that at present there is a balcony and window on the eastern side wall of the plaintiff's property facing to the property of the defendant. It also appears that the defendant has got permission of construction from Ahmedabad Municipal Corporation. It also appears from the record that in the year 2014, there was some construction of wall being carried out by the plaintiff in their property, against which the defendant's husband had issued notice to one of the plaintiffs, wherein

he has specifically referred that as per the instruction of Vijaykumar, the plaintiff Atulbhai has left certain portion of the land vacant and thereafter has started new construction upto first floor. It is also alleged that there is no common wall constructed between two properties and by leaving the portion of common wall, has completed the construction of first floor. It is also averred therein that on the side wall some portion has been kept open wherein no ventilation or window be put up and if it is put up, necessary legal action will be taken against him. Prima-facie, it appears that the plaintiffs have put up this construction in his own land keeping certain portion of land open for common wall. Now, on perusal of the Photograph produced in the matter, it clearly appears that the constructions of the defendant is completely adjacent with the wall of the plaintiffs. At this juncture, it is also pertaining to note that defendant has also filed counter claim for closure of the window and balcony of the plaintiffs which is on the eastern side wall of the property of the plaintiff. Thus, prima-facie it appears that when suit was filed there was no construction, obstructing the window and balcony of the plaintiff's property on the

eastern side. Now, there is allegation and counter allegation, regarding the easementary right as well as regarding illegal construction and there is also counter claim for removal of window and balcony. Under these facts and circumstances, it is necessary that status-quo be maintained till both the parties lead their evidence in support of their claim and counter-claim.

9. At this juncture, it is pertinent to note that it is settled law that so far as the appeal against the interim order is concerned, the Appellate Court is very much circumscribed and the Appellate Court may not disturb the discretionary order passed by the trial Court even if second view of the matter is possible. However, if it appears that the trial Court has not considered the material placed on record in its proper perspective or has mis-directed itself or the order is perverted one, the appellate Court can interfere in such order which is passed under discretionary authority at interim stage, by the trial Court. Now, admittedly in this case, the trial Court has only referred to the document ar Mark-4/1 and observed that there is no specific averment regarding the easementary right of air and light. But the

pleadings of both the sides as well as the Photographs and the notice issued by the defendant earlier wherein the stand of the defendant is that plaintiffs have put up the construction on first floor in 2014 after leaving certain portion of land for common wall, and the fact that there is a counter-claim put up by the defendant meaning thereby that at the time of filing of the suit, window and balcony were existing in the eastern wall of the plaintiff's property, all these facts are not considered by the trial Court . The trial Court has merely relied upon the construction permission granted by the Ahmedabad Municipal Corporation in favour of the defendant for the proposed construction. But even on perusal of the said permission, there are conditions prescribed therein that it will not affect the other right of the neighbours so far as the construction is concerned.

10. It also appears that even during the pendency of the interim injunction application, from 2016, there was interim status-quo order in existence. Considering the aforesaid fact, prima-facie it appears that if the defendant is permitted to carry out the construction towards eastern

wall of the plaintiff, obstructing the window and balcony then there would be closure of air and light permanently and if the defendant completes the construction then suit of the plaintiff would automatically stand dismissed without any adjudication. Further, if in the trial, the defendant succeeds to establish that the plaintiff has put up the window and balcony illegally then as prayed in the counter-claim, the said window and balcony may be ordered to be closed. Thus, there is a triable issue. Therefore, it is desirable that status-quo qua the construction towards the eastern wall of the plaintiff is maintained till the final disposal of the suit.

11. In view of the above, the present appeal from order is allowed. The impugned order dated 5.1.2022, passed below Exh-6-7 injunction application in Civil Suit (CCC) No. 1836 of 2016, passed by the learned Judge, Court No. 21, City Civil Court, Ahmedabad is set-aside. The defendant is directed to maintain status-quo of the construction towards eastern side wall of the plaintiff's property and will not carry out any further construction on the side of plaintiff's property till the final disposal of the suit.

12. It is made clear that whatever observations are made hereinabove is purely made for adjudication on the interim injunction application. The trial Court shall decide the suit in accordance with law on the basis of evidence produced by both the sides during trial, without being influenced by any of the observations made herein.
13. Considering the fact that the Suit is of the year 2016, the trial Court is directed to expedite the suit and dispose of the same as early as possible, preferably within four months from the date of receipt of copy of this order. Parties are directed to cooperate with the trial for disposal of the Suit in a time bound manner.

No order as to costs.

Civil Application, if any, stands, disposed of accordingly.

SAJ GEORGE

(DR. A. P. THAKER, J)