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**IN THE COURT OF 2nd ADDITIONAL DISTRICT JUDGE OF
NAVSARI AT NAVSARI**

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Regular Civil Appeal No.26 of 2012

Exh.116

Dilipbhai Ratilal Joshi,

Age : 60 yrs., Occ.Business,
Resi. At Jay Bhole Chambers,
Opp.Brahman Vadi, Navsari.

... .. **Appellant**
(Orig. Plaintiff)

Versus

- (1) **Chief Officer,**
Navsari Nagar Palika, Navsari.
- (2) **Dalichand Mulatanmal Shah,**
Age : 63 yrs., Occ.Business,
- (3) **Santoshben Dalichand Shah,**
Age : 58 yrs., Occ.Household,
- (4) **Nirav Dalichand Shah,**
Age : 36 yrs., Occ.Business,
- (5) **Dimpalben Nirav Shah,**
Age : 31 yrs., Occ.Business,
- (6) **Bhavesh Dalichand Shah,**
Age : 33 yrs., Occ.Business,
- (7) **Purviben Bhavesh Shah,**
Age : 31 yrs., Occ.Business,

All Residing Resi. At Joshi Mohallo,
Navsari, Dist.Navsari.

Respondents
(Orig. Defendants)

-: APPEARANCE :-

Learned Advocate, Mr.N.K.Bhavsar for the Appellant

Learned Advocate, Mr.V.D.Naik for Respondent No.1

Learned Advocate, Mr.S.K.Desai for Resp.No.2 to 7

Appeal against the judgment and decree passed by the learned
Principal Senior Civil Judge, Navsari in Regular Civil Suit
No.73/2003 dated 09/05/2012

-: JUDGMENT :-

- (1) The appellant qua plaintiff has challenged the judgment and decree dated 09/05/2012 of learned Principal Sr. Civil Judge, Navsari in Regular Civil Suit No.73/2003 dismissing the suit of appellant-plaintiff.
- (2) The short facts leading to the present appeal are that:-
- (2.1) The Plaintiff/Appellant has filed a suit against the Defendants for declaration and permanent injunction, wherein, it has been contended by the Plaintiff that, the property bearing House No.2931 and 2932 are belonging to the plaintiff and he is in possession of the suit property. The property situated at Dudhia Talav, Navsari, bearing Tikka No.3/1, Ward No.6, S. No.77/B and 79/A, it consists of

ground floor and two stories and basement for parking it bears Municipal No.2931 and 2932 (hereinafter referred to 'suit property'). The suit property was purchased and becoming owner, he reconstructed property with the permission of Navsari Nagar Palika. On completion of construction work Nagar Palika issued Occupancy Certificate to him. The property has two stories and on the ground floor shops are established, in some of the shops are rented out. On the first floor and second floor of property there is facility of latrine, bath room. The drainage and water pipe line of the suit property is established in the northern side compound wall of the property. In the northern side of suit property one property bearing Tika No.3/1, S.No.77/A is situated which belongs to Nirav Dalichand Shah and Bhavesh Dalichand Shah since 10/04/2002 and since then they utilize it for their commercial purpose. It is contended that by the instruction and instigation of above two brothers, the defendant Nagar Palika initiated notice proceeding against the plaintiff and he has replied to the notice. It is contended that, in notice defendant has directed him to remove the encroachment and to transfer and install his drainage and water pipe line in his ownership land and on failure in compliance to the notice, Nagar Palika will removed it. It is further contended that there are many illegal construction in the limit of Nagar Palika which intentionally over looked by it. On 30/06/2003 defendant no.1 Nagar

Palika and Deft.No.4 and 6 have forcibly and illegally removed his water connection and drainage pipe line and thereby willfully keep away from the basic facilities. Therefore, the present suit has been filed.

- (3) The defendant no.1 Navsari Nagar Palika and Deft.No.2 to 7 have appeared before the Trial Court and filed their written reply vide Exh.18 and 56, all the contentions of the plaint, except which are specifically accepted, are denied and it is further contended that, description of property is inappropriate and suppressed the some material facts. That the plaintiff has made construction on the defendants' property. The deft.no.2 to 7 have sought that to remove the encroachment in the property of defendants and handed over the possession to deft.no.2 to 7 and hence present suit is deserves to be rejected therefore the present suit is filed by the plaintiff.
- (4) Being aggrieved and dissatisfied by the judgment and decree of learned Trial Judge, plaintiff has preferred this appeal and *inter alia* contended that order of Trial Court is illegal and against the principles of law and therefore requires to be set aside. It is contended that Trial Court has not properly appreciated the evidence on record. It is contended that Trial Court has wrongly relied on the affidavit of third party. The Trial Court has not properly appreciated

the point raised by the plaintiff and defendants. The trial Court has not properly appreciated evidence on record so that this order is erroneous one and deserves to be set aside. It is contended that order of Trial Court is otherwise unjust, improper and required to be set aside.

- (5) Learned advocate for appellant has argued that, the learned trial Court is erred while deciding suit, the learned trial Court is not considered deposition of plaintiff at Exh.67. The learned trial Court is not considered Exh.67 to 76 and Exh.78, 79 and 80, that documents are very important to prove the plaintiff case. Even though Court is not considered above said documents. The learned trial Court is also not properly considered Exh.160, 162 and 169 documents. The learned trial Court is also not appreciate oral as well as documentary evidence of the plaintiff and when it is decided Issue No.3 in partly affirmative and committed mistake of law. The learned trial Court is not decided Issue No.4 in proper way and also not considered the evidence on record. The Resp.No.1 was passed pursis at Exh.53 and declared that drainage and pipe line was restored. Even though the Court is not considered that point. The learned trial Court is not considered that the plaintiff have drainage and pipe line with the permission of Nagar Palika. The learned trial Court is not decided that

originally plaintiff presented the suit and claim prayer against only deft.no.1. Even though the Court is not considered that point also. The learned trial Court is decided in Issue No.8 given in affirmative, even though trial Court is decided that the defendants are entitled for open way. Looking written statement, deft.no.2 to 7 there is a different cause of action and they should be filed a separate suit. The learned trial Court is not properly considered Exh.145, the deft.no.1 is not examined City Survey Officer of Chief Officer and even though the Court is considered encroachment by the plaintiff over the defendants' property and deciding that issue learned trial Court has erred error. The order of learned trial Court is erroneous, capricious and it should be set aside.

- (6) Considering the pleadings by both the parties, following issues are required to be decided for this appeal:-

ISSUES

1. Whether the appellant point out that the decree of civil suit is not just and proper but erroneous, capacious and perverse ?
2. Whether the order of the Trial Court requires any interference ?
3. What order and decree?

(7) My findings as to above issues are as follows:-

1. In Negative
2. In Negative
3. As per final order

REASONS

I have given my thoughtful consideration to the submission made by Learned Advocates of the both the parties at length.

Issue Nos. 1 to 3:-

- (8) Looking to the evidence of plaintiff oral as well as documentary . The plaintiff in his deposition admitted that when defendant have made measurement and during measurement it is found that plaintiff had made encroachment over the defendant's property, and a notice was also given by Nagar Palika for removing encroachment. Looking to the Para-11 of the judgment of learned trial Court,it is held that, the plaintiff had constructed drainage pipe line in open place which is between plaintiff and defendants land,which was defendant's land. In that circumstances, the plaintiff had made encroachment over the defendants' property. Looking to the record of the learned trial Court, the plaintiff didn't produce any document and shows that he obtained

permission from Nagar Palika when there is no permission from the Nagar Palika. In that circumstances, the construction is illegal. whenever someone desire to construct over his land, he must obtained permission from the authority. Looking to the evidence produced by the plaintiff, there is not a single evidence to suggest that the plaintiff had obtained permission from Nagar Palika, Navsari. Looking to the evidence on record, it is transpires that, the plaintiff had made construction over the open space and it is for air and light circulation and in that circumstances the plaintiff has obstructed air and light circulation. In that circumstances, the Deft.No.2 to 7 are affected their rights. Looking to the map, it is transpires that, the plaintiff has made encroachment over the defendants' property in 2.78 sq.mtrs. and looking to the Exh.145 is also transpires that plaintiff and defendants also made some encroachment, the deft.no.2 to7 made encroachment over the Nagar Palika road up to 3.62 sq.mtrs and plaintiff had made encroachment over the defendant's property in 2.78 sq.mtrs. The learned advocate for the resp.no.2 to 7 is relied upon some authorities of Gujarat High Court but these authorities is not applicable in this matter.

Looking to the judgment of learned trial Court, the learned trial Court discussed all evidence at length and appreciate properly evidence of plaintiff and defendants

and also consider oral as well as documentary evidence on record and learned trial Court rightly find out that the plaintiff as well as deft.no.2 to 7 are made encroachment and looking to the Exh.145 the deft.no.2 to 7 made encroachment over the deft.no.1 property of Nagar Palika road and plaintiff had made encroachment over the defendants land, they both are made encroachment and looking to the Exh.114, 133 and 134 registered sale-deed and Exh.134 registered sale-deed of Jeliben Vanmalibhai Patel and looking to the above mentioned registered sale-deed, it is transpires that, deft.no.2 to 7 have a right for pass the way and plaintiff have no right to close the way of deft.no.2 to 7 and it is affected the rights of deft.no.2 to 7. The deft.no.2 to 7 are made an application and praying that the encroachment may be removed and ordered to plaintiff to remove all the obstruction and construction and remove the encroachment. Looking to the trial Court also ordered to open the way of deft.no.2 to 7 in that circumstances when there is an encroachment, it may be removed by Nagar Palika, Nagar Palika is proper authority to remove it and for removal of encroachment There is no need to order of Court, it may be removed by Nagar Palika by giving him application and in that circumstances when there is an order to open the way of deft.no.2 to 7 no need to pass any other order.

International Pvt. Ltd. and Ors. V/s State of Assam and Ors, reported in A.I.R 2010 S. C 1030, is required to be considered at this stage, where in it is held that :-

"Para-66. It is not necessary to deal with the aforesaid judgments of this Court in greater detail as the consistent ratio decidendi of this Court is that if the constructions are in absolute violation of sanctioned or approved plans and are not likely to fall in the category of compoundable items, then the necessary consequence is to order its demolition and seal of approval for such illegal activities is not required to be given by this Court."

"Para-73. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the Builder."

Hon'ble Gujarat High court in case of ***Vishwanath Mohanlal Shetty Vs Chief Officer Shri*** is required to be considered at this stage, where in it is held that:

"encroachment over the plot owned by the Corporation – illegal construction put up by appellant without taking any permission in the said plot and not paid any rent or taxes since last many years – further, appellant had also not given any statutory notice before instituting the suit as required u/s.253 of the Gujarat Municipalities Act and, therefore, suit was not maintainable in the eye of law – Courts below have rightly appreciated the evidence on record and come to the conclusion that appellant had made encroachment over the disputed land and put up illegal construction and, therefore,

was not entitled to any declaration or injunction as prayed for by him – concurrent findings of facts recorded by both the Courts below – appellant failed to point out any question of law, much less the substantial question of law being involved in the Second Appeal – appeal dismissed.”

Looking to the above mentioned judgments and looking to the averments made by parties oral as well as documentary evidence, it is transpires that, the learned trial Court while deciding plaint, considered all the factual and legal aspects and after considering the all the facts, legal aspects, oral as well as documentary evidence truly rejected plaint of plaintiff and in my opinion, I am of the view that the learned trial Court has not made any mistake or error to pass this order and there is no any interference in the learned trial Court order.

- (9) In light of the findings arrived by the trial Court, I find the same do not warrant any interference herein. the learned Trial Judge has rightly and appropriately appreciated the material on record, has rightly and correctly interpreted the facts and evidence and it is submitted that in such circumstances, it cannot for a moment be said that the learned Trial Judge has erred in coming to the conclusion that he arrived at by delivering the impugned judgment. The appellant has failed to make out a valid and sustainable case for appeal and I do not find any material, which is pointed out to me come to a conclusion that the trial Court has not erred in rejecting the plaintiff's suit. I find that the impugned order does not deserve to be interfered with.

(10) In view of the above said discussion, finding arrived, reasons recorded and observation made, the order of the trial Court is judicious, according to law and order of trial Court is not erroneous, capricious and perverse. In view of the above discussion the present appeal is required to be dismissed and it deserves to be dismissed. I reply answer for Issue No.1 and 2 in negative and following final order is passed in the interest of justice.

-: ORDER :-

1. The present appeal filed by the Appellant/Plaintiff is hereby dismissed.
2. The judgment and decree passed by the learned Principal Senior Civil Judge, Navsari dated 09/05/2012, in Regular Civil Suit No.73/2003, is confirmed.
3. The Appellant shall bear cost of present appeal.
4. Decree be drawn accordingly.
5. Record & Proceeding along with the copy of this judgment, be sent to concern trial Court.

Pronounced and signed in the open Court today.

Date : 20/08/2019
Place: Navsari.

Saranga Vinodchandra Vyas
2nd (Ad-Hoc) Additional District Judge,
Navsari.
UID. No. GJ00675