

Regular Civil Suit No. 81/2015

Nirmala Thombre Vs. MCA & Otrs.

(Order Below Exh.-5)

(Passed on 12th February 2016)

Perused application and say. Heard learned Advocate for the parties. Seen documents.

02. Considering facts of the application following points arise for my determination and I have recorded my findings thereon for the reasons stated below :-

POINTS

FINDINGS

- | | |
|---|--------------------|
| 01. Whether plaintiff is having prima-facie case? | In the affirmative |
| 02. Whether balance of convenience lies in favour of plaintiff ? | In the affirmative |
| 03. Whether plaintiff made out that temporary injunction as prayed, if not granted, he will suffer an irreparable loss? | In the affirmative |
| 04. What order? | As per final order |

REASONS

03. **As to point nos. 01 to 04** :- Present application is filed by plaintiff for issuance of temporary injunction restraining defendants from causing any sort of obstruction and interference in the possession of plaintiff over plot no.1/Part admeasuring 800 square feet situated at land Gut No.176/2 situated at Harsool, Aurangabad bounded as towards East :- Survey no.179, West – Twenty meters Jalgaon road, South – Land of Mr. Autade, North – Part

of plot no.01 (hereinafter referred to as suit property) by marking and erecting any sort of structure from western side of Harsool Jail to CIDCO bus stand road till the disposal of suit.

04. Brief facts of the plaintiffs case are as under :-

Suit property is purchased by deceased Vithal Kisan Thombre vide registered sale-deeds bearing no. 2905 dated 14.11.1994 who is husband of plaintiff and father of plaintiff nos. 02 to 05. After death of Vithal Thombre, names of plaintiffs are recorded in the revenue record for the suit property. Suit property is constructed in the year 1994 in Tin shade shops and there is open premises such as passage towards western side of the suit property and thereafter road from Harsool to CIDCO bus stand known as Jalgaon High Way is situated. On 23.09.2015 officers of defendant corporation visited the suit property and took measurement from western side of road and over the suit property. On inquiry they disclosed about development plan whereby 60-meters road is to be developed and marked over the suit property. Plaintiff visited the office of defendant corporation on 29.09.2015 and intimated vide letter that they are ready for development plan of defendant corporation but it should be by following due procedure of compensation. On 24.09.2015 defendant corporation issued publication in daily news paper Lokmat and Divya Marathi about carrying out execution of development plan and intimated for leaving the space which is demarcated by

their officers within twenty-four hours else it will be demolished. By said publication, defendant corporation attempted to demolish the structure without following due procedure and without making any acquisition proceedings in respect of 60-meters road. The certain property holders approached before the Honourable High Court for the act and publication of defendant by filing Writ Petition 9853/2015 and in reply defendant corporation intimated that they have no plan for the said purposes for coming ten days. Therefore, all of them withdrawn the Writ Petition. Accordingly present suit is filed. Defendant corporation tried to take coercive action. Therefore, present application is filed.

05. Defendant corporation have filed written statement/say and denied about execution of lease-deed stating that it is unlawful and illegal. Further in absence of having ownership of the executant of the lease agreement the ownership cannot be inferred. The plots on which lease agreement was taken place are not from sanctioned lay-out and construction carried out by plaintiff is not authorized or with the permission. The construction carried out is on development plan road of 60-meters i.e. on service road. The development plan approved by the Government in the year 1991. Alleged road is State High Way of 60-meters having service road of 15-

meters from both side of High Way of 30-meters. Plaintiff have made construction over the service road by making encroachment. Defendant is implementing drive to remove encroachment made over on sanction plan of Government of Maharashtra dated 15.10.1991 vide sanction letter TPS/3088/451/CR/59/99/OD-12, the road passing from Harsool Jail to CIDCO bus stand of 60-meters road so accordingly answering respondent issued publication by the Commissioner, Aurangabad Municipal Corporation on 24.09.2015. Construction of plaintiff is unauthorized and fallse within the zone of 60-meters development plan. Government of Maharashtra, issued notification dated 10.06.2004 and defendant corporation also passed resolution in standing committee on 07.08.2006 for removal of encroachment which comes under said development plan road of 60-meters. Defendant also objected maintainability of suit for want of issuance of notice under section 487 of the Maharashtra Municipal Corporation Act. Lastly defendant corporation prayed to reject the application.

06. Defendant CIDCO also filed its say and denied contentions of plaintiff in-toto submitting that area of CIDCO ends at the western side of Aurangabad-Jalgaon Highway runs south-north direction, therefore, CIDCO has no claim on the eastern side of Aurangabad-Jalgaon Highway. It is also submitted that since 2006 CIDCO notified area is handed over to the defendant corporation, accordingly it has no concern with the suit property.

Lastly defendant CIDCO prayed to reject the application.

07. In spite of service of notice and giving sufficient opportunities, defendant no.03 Public Work Department failed to appear and file its say. Therefore, suit proceeded further without say of defendant no.03.

08. There are other near about twenty five matters are pending for the adjudication of temporary injunction application related to the proclamation dated 24.09.2015 which is under dispute in the present case. Advocate for the defendant corporation argued that the authorities filed in the present case, as well as, in other cases be referred while deciding temporary injunction application.

09. Plaintiffs have filed copies of registered sale-deeds, paper publication, 7/12 extracts, property tax, Gunthewari tax receipt, death certificate, complaint made by plaintiff and copy of Honourable High Court in Writ Petition No. 9852/2015.

10. Defendants have filed xerox copies of road map from CIDCO to Jalgaon. In the similar other matters defendant have filed documents with the written statement which includes Government Resolution of Government of Maharashtra, Urban Development Section dated 10.06.2004. It is in respect of service road towards the side of State High Way. Further said Government

Resolution shown order of keeping 12-meters without service road in the plan in respect of State High Way. The defendants filed copy of order by the Commissioner, Aurangabad Municipal Corporation dated 07.08.2006. It is in respect of not giving any compensation for 15-meters service road adjacent to the State/National High Way till the change in the rules for leaving 15-meters service road by the holder of property adjacent to the State High Way/National High Way. In said letter it has been mentioned that in any of the development plan, no 15-meter service road is proposed but Public Work Department during inquiry disclosed about existing of 30-meters Higy Way and not any proposal for extension of the same. Further, there is no any provisions of leaving 15-meters service road in the development plan of Aurangabad Municipal Corporation. Due to not having provisions in the DCR for leaving 15-meters service road adjacent to the State High Way, holder of properties claims compensation and in that circumstances, said order was passed. Defendants also filed map of development plan which shows 60-meters road and defendant further filed building by-laws of the Aurangabad Municipal Corporation.

11. After perusing documents filed by the plaintiffs and defendants, it shows that defendants contended about existence of 60-meters wide road, but defendants miserably failed to file any documentary evidence showing existence of 60-meters road as shown in the development plan. Plaintiffs

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specifically objected for existence of 60-meters wide road. After perusing proclamation under challenged dated 24.09.2015, it shows that Aurangabad Municipal Corporation and Public Works Department have plan of 60-meters width road from Harsool Jail to CIDCO bus stand on behalf of Maharashtra Government and found some encroachment over the said road by making unauthorized construction. Construction is directed to remove within twenty four hours else corporation will take action in respect of unauthorized construction. Said proclamation shows about planning of 60-meters road on behalf of Government of Maharashtra. Defendant counsel were specifically directed for submitting documents showing existence of 60-meters wide road as alleged. Moreover, they were also directed to produce documents of acquisition or award, but defendant failed to produce the same. In the present matter, defendant contended that plaintiffs have no any right, title or interest in respect of suit properties and they have made encroachment over the 60-meters wide road. Defendant also contended that plaintiffs have also made construction over the service road without any permission and same can be demolished without giving notice. So far as, considering title of plaintiffs, if documents filed on record are perused, it shows documents containing registered sale-deeds and lease-deeds in respect of suit properties and 7/12

extract. Further plaintiffs have filed document contending that suit properties does not falls within CIDCO notified area. At this stage, considering documents filed on record, it shows that plaintiffs have filed documents relating to show any right, title or interest over the suit properties. Defendant have further objected on the point of encroachment on the road. While considering this aspect firstly defendant have to brought on record documentary evidence showing existence of 60-meters road by following due procedure and thereafter defendant can make submissions of encroachment. Defendant though contended about existence of 60-meters road but failed to file any documentary evidence about the acquisition proceedings for the same, as well as, following due procedure. Defendant also failed to brought on record showing ownership of corporation or of the Public Works Department over the service road or handing over same to the competent authority. Plaintiff failed to file any construction permission for the suit properties which shows that the construction of plaintiff is unauthorized, but considering subject matter it shows that defendant have not followed the procedure. If, defendant wants to take any action in respect of encroachment, then they are at liberty to do so by following due procedure. The plaintiff have relied on oral judgment of Writ Petition No. 2840/2012 dated 24.04.2012, which is in respect of demolition of structure by the Municipal Corporation Aurangabad without following due procedure of law. In said oral judgment, Honourable

High Court have categorically disclosed about remedies available to the defendant corporation under the Land Acquisition Act and the Maharashtra Regional Town Planning Act for road widening purposes and also directed to dispossessed the petitioners only by taking recourse to the due process of law as indicated in that judgment.

12. Counsel for the defendant relied on following authorities :-

A) *Saminussa Tawakal Hussein and others Vs. Municipal Corporation of OR. Bombay and another, (2006) 0 Supreme (Mah) 2075* in which it has been held that :-

“ Municipal Corporation Act, 1888, Sections 314 and 2(x) – Removal of encroachment and construction of road - “Public Street” - Land Acquired for the purpose of construction of road, is a public place – Encroachment made on public place could be dealt with under section 314 of the Mumbai Municipal Corporation Act.”

B) *V.K.Najappan Vs. Ambalavanan and another, (2005) 0 Supreme (Mad) 434* in which it has been held that :-

“ Specific Relief Act, 1963 – Section 38 – Removal of encroachment – Suit for mandatory injunction – Plaintiff not producing sufficient materials – Case of plaintiff disapproved – No decree can be granted.”

C) *Gautam Nagar Redisents Assn. (Regd) Vs. Municipal Corporation of Delhi, (2007) 0 Supreme (Del) 2701* in which it has been held

that :-

“Article 226 – Large scale encroachment on public road – writ petition praying for a directions that encroachments should be removed – Concerned authorities made efforts for removal encroachments – Held that no encroachment on the public/government land is allowed and will be allowed – Writ petition disposed off, accordingly.”

Facts of present case and the cited cases are different as cited case is in respect of encroachment covered under section 314 of the Mumbai Municipal Corporation Act, 1888, but in the present case defendant failed to file any documentary evidence showing encroachment of the plaintiffs as alleged, as well as, existence of 60-meters wide road in that regard.

D) *Prathamesh Tower Co-operative Housing Society Limited Vs. Gorai Road (Borivali) Shree Ganesh Co-operative Housing Society Ltd. And Others (2013) 0 Supreme (Mah) 759* in which it has been held that :-

“ Maharashtra Regional and Town Planning Act (1966), Ss. 53(1), 149 – Demolition of illegal construction – Notice cannot be challenged or questioned in any civil Court – Notice would stand withdrawn only if permission is granted under S.44 on application made within time prescribed – In absence of such permission Municipal Corporation is obliged carry out demolition of illegal construction.”

Facts of the present case and of cited case are different. In the present case, there is no challenge of notice in respect of demolition of illegal construction as per section 53(1) of the Maharashtra Regional and Town Planning Act, 1966.

E) Shri Ganesh D. Daivajna Vs. Shri Prakash S. Salkar, (2000) 0

Supreme (Mah) 123 in which it has been held that :-

“ Order XXXIX, Rules 1 and 2 – Section 115 – Injunction – Possession ought to be lawful to enable party to seek protection from Court by way of equitable relief.”

In the present case plaintiffs have filed copies of registered sale-deeds, lease-deeds executed by their vendor to assist their contentions.

F) Laxmi Chand Vs. Gram Panchayat, Kararia, (1995) 0 Supreme

(SC) 1096 It is in respect of maintainability of suit under Land Acquisition

Act in which it has been held that :-

“jurisdiction of the Civil Court to take cognizance of the cases arising under the Act, by necessary implication, stood barred.”

G) Anupam Rekadi Cabin Association Vs. Jamnagar Municipal

Corporation, (1994) 0 Supreme (Guj) 356 in which it has been held that :-

“Bombay Provincial Municipal Corporation Act, 1949 – Sec.23(a) – Power of Commissioner to remove encroachment on public places without notice – Constitutional validity – Held, procedure prescribed for removal of encroachment on places over which public has a right of passage or access cannot be regarded as unreasonable unfair or unjust constituting violation of Arts. 14, 19 and 21 of Constitution.”

Defendant though relied on above citation but failed to file

documentary evidence showing encroachment by the plaintiffs over the properties on which public have right of passage or access.

H) *Abhishek Builders and Developers & Others Vs. City and Industrial Development Corporation of Maharashtra Limited & Others, (2012) 0 Supreme (Mah) 1021* in which it has been held that :-

“In our opinion, merely because authorities have granted permission for water connection, electricity supply or No Objection Certificate etc., that itself would not lead to the conclusion that, the respondent planning authority should regularize irregular construction over and above the permissible construction as per commencement certificate issued by the CIDCO on 23rd January, 2006 and the amended commencement certificate issued on 15th June, 2006. Therefore, there is no substance in the arguments of the Counsel appearing for the petitioners that, other authorities have granted no objected certificate or water connection or electricity supply connection etc., and therefore, the respondent planning authority is bounded to grant occupation certificate.”

Facts of the present case are different as plaintiffs have not sought any relief under the Maharashtra Regional and Town Planning Act in respect of construction over the suit properties.

I) *Ninad Sahakari Gruharachana Sanstha Maryadit Vs. Pune Municipal Corporation, 2012 (2) Mah.L.J. 665* in which it has been held that :-

“Bombay Provincial Municipal Corporation Act, 1949 – Section 478, 487 – Maharashtra Regional and Town Planning Act, 196 – Section 53 – Unauthorised construction – Notice for removal – Issuance of prior

notice.”

J) *The Poona City Municipal Corporation Vs. Dattatraya Nagesh Deodhar, AIR Supreme Court 555* in which it has been held that :-

“Bombay Provincial Municipal Corporation Act, (59 of 1949), S.127, S.147, S.466, S.490, S.487, App.IV, CL.(5) – Constitution of India, Sch.7, List 2, Entry 52 – Bombay District Municipal Act (3 of 1901), S.59(b)(xi) – Bombay Municipal Boroughs Act (18 of 1925), S.5(1), Proviso (b) – Municipalities – Levy of tax on refund of Octroi upon exportation of imported goods, is illegal after 15-2-1950 when Act of 1949 was applied to Municipality – Levy cannot be justified as fee also.”

Question of notice under section 487 of the Bombay Provincial Municipal Corporation Act, can be decided in due course by framing issue.

13. Defendant have also relied on judgment in *Writ Petition No. 3863/1999 dated 13.09.2001 delivered by Honourable High Court of Judicature at Bombay, Bench at Aurangabad* in which it has been held in para No.04 that :-

“The corporation shall be entitled to cause removal of such encroachment without notice to the concerned encroachers or their representative, successors, assignees.”

In the present case, defendant though contended about encroachment by the plaintiffs on service road, but unless and until defendant

file evidence showing existence of 60-meters wide road as alleged, it cannot be inferred that there is encroachment as alleged.

14. After perusing document filed by the plaintiff it shows that plaintiff is contending their possession on the basis of registered lease-deed agreement. Defendant, though contended about existence of 60-meters development plan road but failed to file any documentary evidence in that regard. Defendant have contended about making encroachment by the plaintiff over the development plan road, but unless and until defendant filed the documentary evidence about existence of 60-meters wide road, no any encroachment as alleged can be inferred. Defendant further raised objection about the unauthorized construction. Though, plaintiff failed to file any documentary evidence showing permission of construction, but for taking action in respect unauthorized construction, defendant have to follow procedure as observed in para no.19 and 21 of Sopan Maruti Thopte and another Vs. Pune Municipal Corporation and another (AIR 1996 BOMBAY 304).

15. Defendant also raised objection about making construction on service road, but unless and until defendant file documentary evidence of existence of 60-meters road and encroachment on it, defendant have to follow necessary provisions of law in respect of unauthorized construction. Considering documents and in absence of any specific document by defendant

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showing existence of 60-meters development plan road and showing taking steps as provided by it in respect of removing encroachment, I found that plaintiff is having prima-facie case which carries balance of convenience. If temporary injunction application is granted, it will not cause loss to the either party as defendant miserably failed to produce document about existence of 60-meters wide road as alleged. Accordingly I answered point No.01 to 03 are in affirmative and in answer to point No.04 I proceed to pass the following order.

ORDER

01. Application is allowed.

02. Defendant corporation or anybody claiming through it are hereby temporarily restrained from obstructing in the possession of the plaintiff over the suit property without following due procedure of law, till disposal of the suit.

03. Costs in cause.

Date :- 12.02.2016

Sd/-
(S.J.Biyani)
Civil Judge Senior Division
Corporation Court, Aurangabad

CERTIFICATE

I affirm that the contents of this P. D.F. file judgment/order are same, word to word, as per the original judgment/order.

Name of the Stenographer	: Manoj S. Nangre
Court	: Civil Judge S.D.(Corporation), A.bad
Date	: 12.02.2016
Order signed by the presiding officer on:	15.02.2016
Order uploaded on	: 15.02.2016