

ORDER BELOW EXH. 5

This is an application seeking temporary injunction under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure.

2. It is submitted for plaintiff that, plaintiff is resident of Dondaicha and doing business of blacksmith since his last five generations. Defendant no.1 Municipal Corporation is local body and defendant no.2 is the Chief Executive Officer of the said body. Grandfather of the plaintiff Sultan Bhura Lohar started business of blacksmith 80 years ago. For said business he had taken a land on leasehold from owner of the land Janglu Natthu Bhoi and built a shop in a shade on said land near to Bhogavati river bearing old City Survey no. 3959 and new Municipal property bearing no.7000298. Said land is having four boundaries as towards East side- remaining part of said property, West side- road to crematorium, South side- road and North side – land of Aashabai Rajendra Chaudhari (hereinafter it is referred as 'the suit property' for brevity). Business of blacksmith is running on the suit property since lifetime of grandfather of plaintiff and after his death, father of plaintiff Rasul Sultan Lohar was running it. Said business of the plaintiff was registered under the Bombay Shop and Establishment Act, 1948 and license was issued on 30.03.1962 by the Municipal Corporation in that regard.

3. Grandfather and father of plaintiff and plaintiff paid rent regularly to original owner of the suit property namely Janglu Natthu Bhoi. They were also paying property tax of the suit property regularly to the Municipal Corporation. Electricity connection was also connected to the suit property and plaintiff is paying its bill regularly. The suit property is mutated in the name of plaintiff, his father and grandfather and their names are

mentioned as occupant in record of the Municipal Corporation. Original owner of the suit property Janglu Natthu Bhoi and his wife Tejabai died 15 to 20 years ago and nobody knows whereabouts of their heirs. As plaintiff is having possession over the suit property as tenant since last 80 years, he became owner of suit property. In year 2006 there was flood in river Bhogavati and everything in the shop was washed away in flood. Accordingly, plaintiff received benefit from the government for flood in respect of the suit property as flood victim.

4. In the meanwhile, the ruling party of the Municipal Corporation, in order to grab the suit property illegally in the name of road, without acquiring it started illegal activities against the plaintiff. Accordingly, the Municipal Corporation on 17/06/2021 issued notice to the plaintiff and asked for documents of ownership. Plaintiff replied said notice of defendant on 25/06/2021 informing his legal ownership and possession and opposed illegal action of defendant. After receipt of said reply, defendant Municipal Corporation again issued notice on 14/07/2021 and asked for documents of tenancy and informed that upon failure action of acquisition will be taken against him. The plaintiff again replied said notice on 22/07/2021 and taken objection. While plaintiff is having possession of the suit land since long, paying property tax regularly and his name is mentioned as occupant in record of Municipal Corporation, without following procedure of acquiring for private land, issued notice to plaintiff on 26/11/2021. In said notice plaintiff was directed to remove encroachment within 24 hours otherwise, they will remove unauthorized construction as per section 55 and 56 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred as 'the Act').

5. In fact, the suit property is private property and not an encroachment on any public land. Initially, defendant Municipal Corporation called plaintiff as owner for acquire the suit property. But, when defendant failed to do so, they by using their power and post, trying to dispossess the

plaintiff illegally by shortcuts. Since, notice issued by defendants is illegal, they will take disadvantage of the same and will dispossess the plaintiff. It is the only business of plaintiff and there is no other place for business except the suit property. If defendants proceeds to take proposed action and demolish construction on the suit property then, plaintiff will be deprived of his only means of subsistence and his family will suffer irreparable loss. On the other hand, no such loss will cause to defendants. It will take time to decide the suit finally and therefore prayed to grant temporary injunction restraining defendants from dispossessing the plaintiff till final disposal of the suit.

6. Defendants filed their say at Exh.14 and contended that, contents of application are not true, correct, legal and proper and thereby denied all contentions of the application. It is submitted for defendants that, plaintiff had concealed several facts from the Court and mentioned it wrongly only to gain sympathy. Entry gate of Dondaicha city is the only major road from Dhule district and Shindkheda taluka. The road near Amravati river is less wide and due to its slope there are always traffic jams and accidents are taking place. Thus, there was need of new road and bridge and as per town development plan 2012 the road was proposed and since then the funds were demanded by the Municipal Corporation. Accordingly, said fund was approved and the work has reached the final stage. While defendants were doing their duty as per the Maharashtra Regional and Town Planning Act, they started the work by giving its information to the rightful land owners.

7. Plaintiff is not the owner of the suit property and only on the basis of documents of the Municipal Corporation, possession and ownership of the plaintiff cannot be decided. If work of proposed road stops which is in final stage of construction, then earlier development will become useless and the funds will be returned and city will not be developed. Notice issued and action taken as per development plan is having its finality as per section 149 of the Maharashtra Regional and Town Planning Act, 1966. The Civil Court

has no jurisdiction to entertain such a suit regarding the action taken for the implementation of the development plan. Development plan was finalized in the year 2012-13 and plaintiff has not raised any objections in this regard and thus he cannot claim injunction. Defendants have taken appropriate action within the framework of the law while discharging their duty for development of city as per the provisions of the said Act. If injunction is granted against defendants, then it will suffer loss in respect of development of the city as fund received from the government is to be utilized within time.

8. Perused the application and say. Heard the Ld. Advocates for both sides at length. After going through the rival submission and the documents filed therein following points arises for determination, which I have reproduced with reasons stated hereinafter :

<u>SR.</u> <u>NO.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether the plaintiff prove <i>prima-facie</i> case in his favour ?	Yes.
2.	Whether balance of convenience lies in favour of the plaintiff ?	Yes.
3.	Whether the plaintiff suffer irreparable loss in the event relief is refused ?	Yes.
4.	What order ?	The application is allowed.

REASONS

AS TO POINT NO.1 to 3 :

9. All these points are interlinked with each other and in order to avoid repetitions those points are taken jointly for discussion. Ld. Advocate for plaintiff Shri. P.G. Patil submitted that, the plaintiff has filed present suit for declaration and injunction. It is contended by plaintiff that, the suit property was owned by Janglu Natthu Bhoi and his grandfather had taken the suit property on leasehold. Plaintiff, his father and grandfather paid rent to said owner and after death of original owner, nobody knows whereabouts of

his heirs. Thus, as plaintiff is in possession of the land since long he became possessor and owner of the suit property. In support of his claim plaintiff has filed certain documents on record. On perusal of property cards filed by plaintiff it appears that, these are of the suit property for the years 1969 to 1973, 1977 to 1978 and 1997 to 2000, issued by the Municipal Corporation. It is in the name of grandfather and father of plaintiff. It also appears that, in the column of owner name of Janglu Natthu Bhoi and in the column of occupant names of father and grandfather of plaintiff are mentioned. Further, on perusal of receipts of payment of property tax it appears that, property tax is paid to the Municipal Corporation in the name of owner and possessor of the suit property for the years 2006-07, 2012-13, 2016-17 and 2019-20. As per electricity bills it appears that, it is in the name of plaintiff. So also, as per Shop Act licence in was issued by the municipal corporation in the name of father of the plaintiff in the year 1989 and mentioned in it as it was registered on 30/03/1962.

10. On the other hand, it is submitted by the Ld. Advocate Shri. N.P. Ayachit for defendants that, plaintiff is not the owner of land of the suit property. Defendants being local body and its executive officer are having obligations on them to remove unauthorized constructions and encroachments. So also, defendants have contacted the heirs of original owner Janglu Natthu Bhoi and talk is going on with them in respect of acquiring the suit property. Further, the plaintiff is not having right to file suit in the Civil Court as per section 149 of the Maharashtra Regional and Town Planning act, 1966. The notice and order of the planning authority are having finality and no suit can be filed against those actions. In support of their contentions defendants also filed certain documents such as map of development plan, map of city, resolution of the Municipal Corporation, notice issued to heirs of Janglu Natthu Bhoi, public notices and proclamation published in newspaper by the Municipal Corporation, letters and other documents of heirs of Janglu

Natthu Bhoi.

11. Considering submissions of both sides and documents placed on record prima-facie it appears that, as per record of the Municipal Corporation name of Janglu Natthu Bhoi is mentioned as an owner and names of grandfather and father of plaintiff are mentioned as occupant in respective columns of the suit property since year 1969. So also, as per receipts of payment of property tax, plaintiff paid property tax to the Municipal Corporation since 2006. On the other hand, in order to substantiate their claim, defendants have not placed any material on record to prima-facie show that, plaintiff is an encroacher on the suit property. On the contrary, defendants have placed material in respect of original owner of the suit property i.e. Janglu Natthu Bhoi such as notice issued to his legal heirs and their other documents. From these documents it is clear that, defendant also admits the fact that, the suit property is owned by some private person and it is not a public land. Thus, from all these documents, many of which are issued by the Municipal Corporation itself prima-facie it appears that, the suit property is owned by Janglu Natthu Bhoi and plaintiff is occupant of the suit property since year 1969.

12. Once it is prima-facie established that, the suit property is owned by private person and plaintiff is in settled possession of it, then to acquire the same for public purpose, defendant Municipal Corporation has to follow due procedure established by law. In order to acquire any land owned by private person for public purpose, detailed procedure is provided in the Maharashtra Regional and Town Planning Act, 1966. As per Chapter III of the Act, there must be a development plan and it shall be published in Official Gazette. As per section 43 of the Act, once development plan is published restrictions are imposed on owners of the land which falls in area of development, from making further development in the same. If, any persons makes any such

development in contraventions of the provisions of the Act, then the Planning Authority is having power to remove the same by following procedure given under sections 53, 54 and 55 of the Act. So also, to acquire the land by the Planning Authority, it has to follow procedure as per section 126 of the Act and has to compensate the owner or possessor of the land as the case may be accordingly.

13. In present case, defendants have filed copy of map of development plan, resolution of the Municipal Corporation dated 21/08/2020, public notices and publication of their intention of acquiring the land in newspaper. On perusal of these documents prima-facie it appears that, there is some development plan of defendant Municipal Corporation and in order to acquire the land for the purpose of said development plan it has issued notices as well as publication. From this prima-facie it appears that, defendant Municipal Corporation has followed somewhat procedure of development plan and its publication to some extent.

14. However, as earlier discussed plaintiff is in settled possession of the suit property and he has alleged that, defendants without following any procedure, declared him as encroacher and trying to dispossess him from the suit property. So also, on one hand defendants have contended that, the plaintiff is encroacher and on the other hand it is submitted on their behalf that, talk of acquisition is going on with heirs of Janglu Natthu Bhoi. Further, defendants have filed documents in respect of heirs of Janglu Natthu Bhoi on record. Thus, from these materials placed on record it appears that, though defendants came with stand of the plaintiff as encroacher on public land. But, they have admitted ownership of Janglu Natthu Bhoi and having talk with his heirs in respect of acquisition of the suit property.

15. Since, defendants admitted ownership of Janglu Natthu Bhoi and till date having only talks in respect of acquisition of the suit property, it

appears that, the procedure of acquisition is not yet completed. Thus, before settling the talk of acquisition with owner, defendants are trying to dispossess the plaintiff who is tenant in the suit property. So also, as per material placed on record it no where appears that, defendants have compensated owner or possessor of the suit property by any means. Therefore, though defendants have followed procedure as per the Act for development plan and its publication. But, in order to acquire the land defendants have not followed specific provisions provided under section 126 of the Act, whereby Planning Authority has to acquire the land by compensating the owner or possessor of the suit property. Unless and until, the procedure of acquiring private land for the public purpose as per the Act is not followed and the owner or possessor is not compensated, the Planning Authority is having no right to dispossess the person in possession of the property. Thus, defendants Municipal Corporation cannot dispossess the plaintiff without following the procedure of acquisition as required by law.

16. Ld. Advocate for defendants emphasized his arguments on the point of jurisdiction of this Court in view of section 149 of the Act. It is submitted that, since defendant no.2 is authorised person of the Municipal Corporation who is Planning Authority, issued notice to the plaintiff to remove unauthorized construction as per sections 53, 54 and 55 of the Act. Thus, notice issued by defendants is having its finality and cannot be challenged in the Civil Court. For the same he placed reliance of the judgments of the Hon'ble Bombay High Courts in cases of *Kalyan Dombivli Municipal Corporation Vs. Prakash Mutha*, 2008 (3) MhLJ 686 and *Ulhasnagar Municipal Corporation Vs. Kailash Tikamdas Mulchandani*, 2008 (5) AIR Bom R 250.

17. On the other hand Ld. Advocate for the plaintiff submitted that, defendants in order to grab the suit property misusing the powers as per the

Act. Defendant Municipal Corporation is having every right to acquire land of private person for development of the city, but they cannot do it by forcefully and without compensating its possessor. Therefore, where defendants are misusing the powers, section 149 of the Act is not applicable in the case and the Civil Court is having jurisdiction for providing protection from illegal act of defendants. For the same he placed reliance on the judgments of the Hon'ble Bombay High Courts in cases of *Municipal Commissioner, Nagpur Vs. M/s. Shivdatt and Sons, 2019 NearLaw (BombayHC Nagpur) Online 2659*.

18. Considering submissions of both sides it appears that, no doubt, in view of the provisions of section 149 of the Act, the notice issued or order passed by the Planning Authority is having its finality. However, to apply provisions of section 149 to the order or notice, it should be in consonance with other provisions of the said Act. As discussed earlier, defendants have not followed complete procedure as provided under the Act for acquisition of the suit property and trying to dispossess the plaintiff without following due procedure of law. Thus, the plaintiff is seeking injunction against such act of defendants and asking defendants to follow the prescribed procedure for acquisition. Thus, where there is absence of due procedure as prescribed under the Act at the hands of defendants, notice issued by defendants does not acquire the finality clause of section 149 of the Act at this stage. Therefore, where procedure provided under the Act is not followed by defendants, the Court is certainly having jurisdiction to grant injunction restraining defendants from dispossessing the plaintiff without following due procedure of law.

19. Further, as discussed earlier, as per section 43 of the Act once development plan is published restrictions are imposed on owners of the land which falls in area of development, from making further development in the

same. If, any persons makes any such development in contraventions of the provisions of the Act, then such development becomes unauthorized one. The Planning Authority is having all the powers to remove the said unauthorized development by following procedure given under sections 53, 54 and 55 of the Act. However, in case at hand, it is not the case of defendants that, plaintiff has made any such unauthorized development in the suit property. On the contrary, defendants have come with a case that, plaintiff is not the owner, but he is an encroacher. However, in view of discussion supra, plaintiff is in settled possession of the suit property since 1969 and as contended by defendants, development plan is of year 2012-13. Thus, the structure of the plaintiff on the suit property is much prior to the publication of the development plant. Therefore, the provisions of sections 53, 54 and 55 of the Act will not apply to the case of plaintiff.

20. In the case of *Kalyan Dombivli Municipal Corporation* and *Ulhasnagar Municipal Corporation* mentioned supra, the Hon'ble High Court observed that, notice issued under section 55(1) of the Act cannot be questioned in the Court. Said notice comes under the preview of section 149 of the Act and thus the Civil Court has no jurisdiction. Upon perusal of facts of these cases cited it appears that, there was unauthorized construction made by owners and the Municipal Corporation issued notice for removal of the same. However, in present case though defendants claimed it as unauthorized construction and issued notice, but as per record and as discussed earlier, the plaintiff has not made any unauthorized construction. Thus, facts of the case in hand and the cited cases are different and therefore, not applicable to present case.

21. Further, in the case of *Municipal Commissioner, Nagpur* mentioned supra, the Hon'ble High Court observed that, landlord and the Municipal Corporation acted in fraudulent manner and issued notice without

recourse to section 16 of the Rent Control Act and thereby violated protection of tenant provided under section 16(1)(i) of the Rent Control Act. Thus, suit filed before the Small Causes Court is maintainable despite of bar of jurisdiction contained under section 149 of the Act. Upon perusal of facts of the case cited it appears that, in that case plaintiff came with a specific case of fraud on his landlord and the Municipal Corporation, to evict him without following procedure envisaged under the Rent Control Act. However, in present case, there is no such fraud on the part of landlord or the Municipal Corporation to evict the tenant without taking recourse of section 16 of the Maharashtra Rent Control Act. On the contrary, defendant came with a case that, the plaintiff is an encroacher. Thus, facts of the case in hand and the cited case are different and therefore, not applicable to present case.

22. In view of the facts and circumstances of the case, the plaintiff has prima-facie established that, he is in settled possession of the suit property and defendants without following due procedure of law are trying to dispossess him. As per Order 39 Rule 1 of the Code of Civil Procedure, 1908, the Court can restrain the defendant, if the suit property is in danger of being wasted, damaged or alienate by any party to the suit, or wrongfully sold in execution of a decree. In present case, defendants have issued notice to the plaintiff on 26/11/2021 thereby directing him to remove the construction of the suit property within 24 hours and upon his failure they will remove the same. Thus, from such notice of defendants prima-facie it is seen that, defendants are intended to take action of dispossession of the plaintiff from the suit property. Thus, there is sufficient material on record in respect of fear of dispossession of the plaintiff from the acts of defendants which would cause loss of the suit property. Therefore, the plaintiff is having prima-facie case in his favour.

23. Therefore, if temporary injunction is not granted at this stage in

favour of the plaintiff and defendants proceeds to take any action of dispossession, then plaintiff will suffer irreparable loss in respect of the suit property. The peculiar facts and circumstances of the case projects that, the balance of convenience also lies in favour of the plaintiff. Therefore, point nos. 1 to 3 are answered in the affirmative accordingly.

AS TO POINT NO. 4:-

24. As aforesaid three material ingredients i.e. prima-facie case, balance of convenience and irreparable loss are established in favour of the plaintiff, he is entitled to temporary injunction to restraining defendants from obstructing his possession over the suit property. Hence, in answer to point no. 4, I pass following order.

ORDER

1. The application is allowed.
2. Defendants, through themselves, their agents, servants or anybody claiming through them etc., are hereby restrained by way of temporary injunction from causing obstruction to the peaceful possession of the plaintiff over the suit property, which is more particularly described in para 3 of the plaint, till disposal of the suit.
3. Costs in cause.

Date: 18/12/2021

(Sujit A. Rathod)
Civil Judge Junior Division,
Dondaicha.

- Certificate -

I certify that the contents of this PDF File are word to word as per Original Judgment / Order.

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