

(2023) 01 BOM CK 0109
In the Bombay High Court
Case No : Writ Petition No. 12657 Of 2022

Dr. Ravindra Rajaram Patil And Others	APPELLANT
Vs	
Yuvraj Appaso Neharkar	RESPONDENT

Date of Decision : 24-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Maharashtra Gunthewari Developments (Regulation, Upgradation And Control) Act,
2001 — Section 5, 20
Monopolies And Restrictive Trade Practices Act, 1969 — Section 37

Citation : (2023) 01 BOM CK 0109

Hon'ble Judges : Milind N. Jadhav, J

Bench : Single Bench

Advocate : Ashutosh M. Kulkarni, Akshay Kulkarni, Surel S. Shah, Ranjeet Patil

Final Decision : Allowed

Judgement

Milind N. Jadhav, J

1. By the present Writ Petition filed under Article 226 of the Constitution of India, Petitioners have challenged the impugned Judgment and Order dated 28.09.2022 passed by the learned District Judge-1, Sangli (for short "Appellate Court") in Misc. Civil Appeal No.199 of 2022. By the impugned Judgment, the learned Appellate Court has set aside the order dated 05.09.2022 passed below Exhibit-5 in Regular Civil Suit No.265 of 2022 filed by Respondent in the Trial Court.

2. Such of the relevant facts which are necessary to decide the present Writ Petition are as under: -

2.1. Plaintiff (Respondent herein) filed Regular Civil Suit No.265 of 2022 for seeking perpetual injunction against Defendants (Petitioners herein) in respect of suit property described in paragraph No.1-B of the plaint. Plaintiff was aggrieved with the use of an area admeasuring 130 ft. into 12 ft. D.P. Road situated in between his property and Defendants' property which are adjacent to each other.

Admittedly, Defendants developed their property on Survey No.32 after following the due process of law and have constructed a hospital after adhering to the sanctioned development plan and left the set back area i.e. open spaces on all four sides of the developed building. According to the sanctioned plan, there is a right of ingress and egress on the eastern side and western side provided in the plan for parking of vehicles into the basement below the hospital building.

2.2. Plaintiff is the owner of Survey No.34-A(1) on the western side adjacent to Survey No.32 and separated by the alleged disputed area of D.P. Road in between the two properties.

2.3. Plaintiff is aggrieved and claims to be the owner of the entire disputed road area and on that ground he has filed a suit in the Trial Court. He is aggrieved with the Defendants regarding the ingress and egress provided by the Corporation in the sanctioned plan to Defendants on the ground that he is the owner of this disputed road area.

2.4. Though it is claimed by Plaintiff that this disputed road area belongs to him, there are disputed questions of fact which have been pleaded by him in the plaint which will require evidence to prove that this disputed road area indeed belongs to his ownership.

2.5. Alongwith the Civil Suit, Plaintiff filed Application below Exhibit-5 for temporary injunction to restrain the Defendants from completing construction on this disputed portion so as to enable them to access their parking facility in the basement of their building.

2.6. According to Defendants, the primary defence is that description and claim of the suit property made by Plaintiff in the suit plaint is incorrect. That the entire description of suit property given by Plaintiff in the suit plaint claiming to be its owner and in possession is false and contrary to the record of ownership. According to Defendants, on the western side of the suit property there are two hotels / eateries; viz. Radhey Garden and Gavthi Katta and the old wall description claimed to be owned by Plaintiff which in fact belongs to the ownership of Chatrapati Shahu Institute in old Survey No.875 situated adjacently.

2.7. Defendants have also placed on record material to show the existence of the suit property and Plaintiff's property distinctly. Plaintiff has been running an eatery called Kolhapuri Jhatka Hotel on the adjacent plot i.e. Survey No.34-A(1). Admittedly, his eatery has a barbed wire fencing which distinctly separates it the Petitioners' property on Survey No.32 and the alleged contentious D.P. Road area in between the two properties.

2.8. According to Defendants, the D.P. Road area in between two properties belonged to the State Government, but has now been cancelled after following the due process of law by the Corporation.

2.9. Defendants have pleaded that the Planning Authority has sanctioned the

development of the property in accordance with the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short "MRTP Act") and permitted them to construct the ramp and the boundary wall for ingress and egress to their parking area in the basement of their building on the contentious D.P. Road area. Necessary permissions are in place and are not challenged by the Plaintiff. That the construction of their building is now almost complete and it is only now at this stage that the suit has been filed with an ulterior motive.

2.10. The learned Trial Court by a detail and a reasoned order passed below Exhibit-5 rejected the Application for temporary injunction on 05.09.2022. The learned Appellate Court, however, by the impugned order dated 28.09.2022 reversed the Exhibit-5 order and directed an embargo on the Defendants restraining them from carrying out completion of the construction as sanctioned on the suit property and from obstructing the suit property.

2.11. Hence, the present Writ Petition.

3. Mr. Kulkarni, learned Advocate appearing for the Petitioners has painstakingly made the following submissions after taking me through the record of the case: -

3.1. He submitted that Respondent's property is situated beyond the western side boundary of the Petitioners' property and there exists a barbed wire fencing which clearly separates both properties which was in existence since much before the Petitioners had purchased their property in 2018. He submitted that there are two hotels and one pan shop in the Respondent's property which are immediately abutting the barbed wire fencing and hence, it is unbelievable that any portion of Respondent's property is beyond the barbed wire fencing which has been demarcated by the Respondent himself. The ramp constructed by Petitioners is on the Petitioners' side of the barbed wire fencing and existence of the barbed wire fencing is therefore sufficient enough to demonstrate that the Respondent does not have any area of his property beyond the said barbed wire fencing.

3.2. He submitted that before filing the present suit, Respondent had earlier filed Regular Civil Suit No.375 of 2005 against one Shri. Sunil Patil (Defendant therein and predecessor in title of Petitioners) seeking perpetual injunction in respect of the entire 40 R area of Survey No. 32 i.e. the Petitioners' property. In the said suit, Respondent claimed that he was in possession of the entire 40 R area of Survey No.32. In that suit, the learned Trial Court passed order on 28.04.2008 below Exhibit-38 and Exhibit-1 which reveals that Respondent himself had remained present in Court and accepted the contents of the pursis and was permitted by the Court to withdraw the suit after admitting to the possession of the suit area with the Defendant therein. Therefore, Respondent had lost possession of the suit property and it is seen that since 2008, Respondent is not in possession of the suit property. That Respondent has not pleaded as to when thereafter he came into possession of the suit property. He further submitted that Respondent has miserably failed to demonstrate as to how and when he

came into possession of the suit property after passing of the order dated 28.04.2008 in the earlier Regular Civil Suit No.375 of 2005 and hence Respondent is not entitled to any relief of injunction in the present suit as the Respondent's claim is illegal, baseless and untrustworthy.

3.3. He submitted that Petitioners vide commencement certificate dated 10.05.2021 started construction of their hospital. That after completion of the building, permission to construct the ramp and compound wall was sanctioned by the Planning Authority to the Petitioners. When the construction commenced, Respondent filed the present Suit on 26.07.2022, clearly to harass the Petitioners. That Respondent is also guilty of suppression of material facts from the Court.

3.4. He submitted that the Planning Authority has sanctioned all building plans, granted all permission / approvals in respect of the construction undertaken, and hence the reasoned order passed by the learned Trial Court be upheld.

4. PER-CONTRA, Mr. Shah, Advocate appearing for the Respondent has also relied upon the record and vehemently made the following submissions:

4.1. He submitted that the learned Trial Court rejected the Application for temporary injunction vide Judgment and Order dated 05.09.2022, inter alia, holding that the Respondent's map prepared after measurement of the suit property was at the instance of a third party, and hence it cannot be relied upon. The learned Trial Court also held that since the construction of the ramp and compound wall has been commenced, there is no prima facie proof to show that the Petitioners have been flouting any Municipal Laws. Further that the amalgamation plan submitted by Petitioners for sanction would fortify the Petitioners' case that on the western side of the Petitioners' property there is a D.P. Road and thereafter there lies the property of the Respondent. In response to these findings, he submitted that Petitioners in the Trial Court relied upon the Zone Certificate which infact is a forged and fabricated document. He submitted that the contention of Petitioners that the DP Road was cancelled is incorrect as any modification in the sanctioned plan, especially a reservation can only be made by a statutory process prescribed under Section 37 of the MRTP Act. That in the present case, such procedure has not been followed by the Corporation before giving permission to the Petitioners and sanctioning their development.

4.2. He has referred to and relied upon the decision of the Division Bench of this Court in the case of Madhukar Sampatrao Patil Vs. State of Maharashtra and Ors. (2019) 5 Mh.LJ 652 : (2019) 2 AIR Bom R. 692 which states that unauthorized construction on any public utility land cannot be regularized by the Corporation unless the prescribed procedure for modification is followed.

4.3. According to him Petitioners have carried out construction upon the D.P. Road and are attempting to encroach upon the Respondent's property by constructing the ramp to approach their basement. He has also complained about dumping of construction material on Respondent's property and has

therefore urged the Court to uphold the Appellate Court's order rejecting the Exh. 5 Application of Petitioners.

5. I have heard Mr. Kulkarni and Mr. Shah, learned Advocates appearing for the respective parties and with their able assistance perused the pleadings and record of the case. Both of them have heavily relied upon the sanctioned plan annexed at page 251 of the Petition while making their submissions. Submissions made by the learned Advocates has received due consideration of the Court.

6. It is the Respondent's case that he is the owner of the suit land i.e. the intervening portion between the Petitioners' hospital and his eatery viz, Kolhapuri Jhatka. Hence, in the first instance, if the Respondent was indeed aggrieved he ought to have challenged the Petitioners development permission granted by the Planning Authority at the stage of inception. It cannot be now argued by Respondent that Petitioners' building was constructed suddenly and he was completely unaware about the ingress and egress to the basement from the western side of the Petitioners' plot. The Respondent also admits that the Planning Authority has given permission to Petitioners for development and if that be so and if he is aggrieved that the development is carried out on his land he would certainly have to challenge the same. Admittedly, such a challenge is not maintained at all and a suit for simplicitor injunction is filed only against the Petitioners. Record clearly indicates that Respondent has put up a barbed wire fencing on his property i.e. Survey No.34-A(1) segregating the same and hence the disputed suit property beyond the fencing i.e. the alleged D.P. Road area cannot be claimed by Respondent to belong to his ownership unless he shows cogent documentary evidence to that effect. No such evidence or material of ownership of the said area has been placed on record. Further, the said disputed suit property i.e. road, whether it is a D.P. road or it no longer subsists can only be a matter of evidence and is a disputed question of fact. Record indicates and it is not denied that in the year 2005 Respondent filed an identical suit against the predecessor-in-title of the Petitioners, but has withdrawn the said suit. Perusal of pleadings indicate that Respondent is not clear as to whether the suit property belongs to him or whether it belongs to the Municipal Corporation. There is a dichotomy on this aspect in so far as the Respondent's case is concerned.

7. It is pertinent to note that if Respondent claims to be the owner of the suit property, then Respondent has to prima facie show that he has some documentary evidence to prove it and also that he is in possession of the suit property. This is not shown at all and hence a prima facie case has not been made out by the Respondent. The consideration which weighed with the learned Appellate Court in reversing the findings of the Trial Court's order under Exh. 5 is only on the basis of one particular document i.e. a Map which in fact would require evidence. For grant of temporary injunction prima facie case has to be made out by the Plaintiff which in this case was not made out before the Trial Court. It is pertinent to note that Respondent waited all along for more than 2

years until the entire hospital building was ready and has now filed the present suit seeking permanent injunction on the basis of his claim of ownership of the suit land on which the said construction of the ramp approaching the basement has been carried out and claims to be the owner of the same. Admittedly, the construction of the building started with excavation of the suit property more than 2 years ago and Respondent has not reacted at all, until recently. He did not make any complaint to the Planning Authority if it was his case that his property was encroached upon. He cannot be heard to say that he realized only now that his property was being constructed upon or would be used by the Petitioners for ingress and egress. This clearly shows that he has never been in possession of the alleged suit property which he claims to own. Perusal of record further reveals that the Zone Certificate issued by the Planning Authority has been cancelled. In view thereof, development permissions have been granted to the Petitioners. It is only when the proposed D.P. Road reservation is cancelled and the said reservation no longer subsists which is prima facie evident from the record, that permissions have been given to the Petitioners for development, construction of ramp, construction of boundary wall etc. by the Planning Authority.

8. It is further seen that, Respondent's entire case is based on a copy of the sale deed bearing No.1896 of 2002 which is placed at Exhibit 32/1. That apart, on the aspect of possession of the suit property, he has relied upon the 7/12 extract dated 26.07.2019 which is placed at Exhibit 3/1. It is pertinent to note that this 7/12 extract contains a Mutation Entry No.1890 which is not produced by the Respondent. In so far as the sale deed is concerned, Respondent has suppressed the facts of the earlier Regular Civil Suit No.375 of 2005 instituted by him for the same cause of action and hence is guilty of suppressio veri and suggestio falsi. The copy of the earlier suit plaint and the order of withdrawal of the same passed on 28.04.2008 is placed on record at Exhibit 27/25 before the learned Trial Court and has been perused by the Court. The learned Trial Court has seen the recital of the withdrawal which is at page No.56 filed by the Respondent which clearly shows that Respondent does not have any ownership right as also possession of the suit property. Equally the Petitioners have placed on record their permission of construction alongwith their sanctioned plan at Exhibit 27/23 before the learned Trial Court and at page No. 251 of the present Writ Petition in the sanctioned plan. It is the grievance of the Respondent that Petitioners have violated 5 conditions stipulated by the Corporation in the sanctioned plan. The learned Trial Court has gone into this aspect minutely and after examining the documents, has prima facie concluded that the document of Zone Certificate at Exhibit 41/1 clearly shows cancellation of the D.P. Road by the order of the Planning Authority within the purport of Sections 5 and 20 of the Maharashtra Gunthewari Developments (Regulation, Upgradation and Control) Act, 2001 by regularization and conversion. The learned Trial Court has therefore come to the conclusion that there is no infraction of any of the stipulated conditions of development or municipal laws by the Petitioners. These aspect have not been

dealt with at all by the learned Appellate Court while reversing the order of the Trial Court.

9. That apart, on the issue on equity, the learned Trial Court has also returned its findings and held that the balance of convenience is in favour of the Petitioners. Perusal of the impugned order by the Appellate Court shows that the learned Appellate Court ought to have seen that the development carried out by the Petitioners was in accordance with the development permission or otherwise. Perusal of pleadings clearly show that there are disputed questions of fact raised by the Respondent, however at the time of hearing the Application for temporary injunction, the well settled principles of prima facie case, conduct of Respondent and irreparable loss / balance of convenience are to be adhere to and the same have been adequately gone into by the learned Trial Court and I find that completely missing in the order of the learned Appellate Court.

10. I find that the learned Trial Court has adequately dealt with the aforementioned principles and given its findings. The learned Appellate Court however has merely given cursory findings. Hence, the impugned order passed by the learned Appellate Court dated 28.09.2022 calls for interference and deserves to be set aside. For the above reasons, the impugned order 28.09.2022 is quashed and set aside and the order dated 05.09.2022 passed below Exhibit-5 by the Trial Court is upheld.

11. Writ Petition is allowed in terms of prayer clause 'b' which reads thus:-

(b) To quash and set aside the impugned judgment, decree and order dated 28.09.2022 passed by the learned District Judge-1, Sangli in Misc. Civil Appeal No. 199 of 2022 (Exh. 'F') and further to confirm well-reasoned order dated 05.09.2022 passed by the learned 3rd Jt. Civil Judge, Junior Division, Sangli below Exh. 5 in Regular Civil Suit No. 265 of 2022 (Exh. 'D'.)"

12. Writ Petition is disposed.

13. At the request of Mr. Shah, this order shall stand stayed for a period of four weeks from today to enable the Respondent to approach the Supreme Court.