

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4710 OF 2015

Balaji s/o Babasaheb Choudhary,
Age: 61 years, Occ: Agri.,
R/o. Vidhutnagar, Nanded,
Tq. & Dist. Nanded.

...Petitioner

versus

1. Maltibai w/o Madhukar Gharapurkar,
Age: 50 years, Occ: Household,
R/o. Vidhutnagar, Nanded,
Tq. & Dist. Nanded.

2. Nanded Waghala City Municipal
Corporation, through its
Commissioner, Nanded.

...Respondents

.....
Mr. Arvind Deshmukh, Advocate for petitioner
Mr. Gangakhedkar, Advocate for respondent No.1
Mr. R.K. Ingole Patil, Advocate for respondent No. 2
.....

CORAM : N.W. SAMBRE, J.

DATE : 7th DECEMBER, 2015

ORAL ORDER :

In a suit, the plaintiff-petitioner prayed decree for perpetual injunction restraining the defendant No.1/respondent No.1 from making unauthorized construction abutting the western side of the plot of plaintiff with further direction to leave proper margin from the boundary line of western side for air and light and as such claimed easement.

2. In a civil suit, an application Exhibit-6 for grant of temporary injunction came to be filed restraining the respondent-defendant No1 from making any sort of illegal and unauthorized construction abutting the western side wall of the petitioner. Learned trial Court, by an order dated 09/02/2014, has allowed the application.

3. Respondent-defendant No. 1 preferred M.C.A. No. 25 of 2015 which came to be allowed by an order dated 04/04/2015 by the District Judge-2, Nanded, as such, present writ petition.

4. As a consequences of order of allowing the appeal, the injunction that was clamped against the respondent-defendant No.1 came to be vacated.

5. Mr. Deshmukh, learned Counsel for the petitioner would urge that in view of stage at which the suit has reached, the parties can be directed to maintain status quo and hearing of the suit can be expedited. He would urge that his predecessor in title has carried out construction, which was regularized under Gunthewari Act and the petitioner is enjoying the property in question since long. Once the respondent-defendant, who intend to start construction on the property, has not objected for all this period, particularly since more

than five years, hence till decision of the suit, the respondent is restrained from carrying out further construction so as to hamper easementary right of the petitioner. He would then urge that if the nature of construction that is carried out by respondent is noticed, it could be easily inferred that the construction is carried out on common wall and as such, according to him, learned lower appellate Court has committed an error in reversing the order of injunction passed by learned trial Court below Exhibit-6.

6. Learned Counsel for respondent No.1, while supporting the order passed by District Judge-2, Nanded, would urge that the petitioner has carried out illegal excess construction on his property. He has invited attention of this Court upon the panchnama and map drawn by officials of Nanded Waghala Municipal Corporation, so as to demonstrate that there is no open space left by the petitioner, particularly on the western side i.e. adjacent to the plot of defendant. He has also invited attention of this Court to the contents of panchnama so as to establish that the authority has already noted that second floor construction of the petitioner is illegal and also about non-leaving marginal space. He would then urge that the petition is liable to be dismissed.

7. Having bestowed my anxious thoughts over the issue

that is canvassed, it is not in dispute that both the parties are having sanctioned map from the local planning authority in relation to the construction, which they have carried out.

8. Now, it is required to be decided in the suit is whether plaintiff or defendant, without violating building control regulation by not keeping side margin carried out construction.

9. *Prima facie*, in 2009 inspection is made by the authorities of Municipal Corporation and has drawn map and panchnama, to which, attention of this Court is invited to demonstrate that the petitioner has not left marginal space while constructing on the plot in question. It is also required to be noted that plot of the petitioner was regularized under Gunthewari Act and construction thereto is required to be held illegal. It is not brought on record what steps, the petitioner has taken after panchnama of 27/07/2009 and as to whether, the petitioner has removed illegal construction made by him.

10. Once having noted that the petitioner's construction itself appears to be illegal, in my opinion, the petitioner is not entitled for claiming any equity, much less injunction in the matter. The above referred observations are made keeping in mind the fact of holding

building sanctioned permission issued under control building regulation by the defendant. Though the submission is made that the Court Commissioner can be appointed to verify the fact, however, application for injunction is required to be decided based on existing documentary evidence and affidavits on record. In my opinion, learned lower appellate Court has rightly appreciated same and reversing the order impugned thereof. In my opinion, no interference is called for. The writ petition fails, stands dismissed.

[N.W. SAMBRE, J.]