

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

...

50 APEAL FROM ORDER NO. 67 OF 2015

PRABHAKAR YADAVRAO RAKH

VERSUS

SHAILENDRA SURENDRA CHAPALGAONKAR AND OTHERS

...

Advocate for Petitioner : Mr. Kishor R Doke And Mr.
Advocate for Respondents 1 & 2: Mr. G. K. Thigale-Naik

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CORAM : S. V. GANGAPURWALA, J.

DATE : 14th September, 2015

PER COURT :

1. The plaintiff has filed suit for declaration and injunction. The trial court dismissed the suit. Aggrieved thereby the plaintiff filed an appeal. In the appeal the plaintiff filed an application for temporary injunction. The same is rejected. Hence the present appeal.

2. Mr. Doke, the learned counsel for the appellant strenuously contends that the respondents 1 and 2 are making illegal construction. They are encroaching the land which is meant for use and enjoyment of plaintiff. The width of the lane is 7 feet. Because of the construction being carried out by the defendants, the

width of the lane is reduced to three feet, the same is illegal. The width of the lane, even as per the report of the commissioner, of a northern gate, is 6x6 feet. According to the learned counsel, the Commissioner's report also supports the said fact.

3. Even the defendant, in his deposition has admitted that one of the City Survey No. is of the plaintiff and he has not taken any objection for all these years in respect of the said area mentioned in the said City Survey No. According to the learned counsel if the construction activity of the respondents is not stopped, the plaintiff will suffer irreparable loss and injury and will not have access. From all the sides of the house of the plaintiff, the defendant has its property. According to the learned counsel, during the pendency of the suit, there was injunction prohibiting the respondents from carrying construction in that lane. The said position be maintained till disposal of the appeal.

4. Learned counsel appearing for the respondents submits that the construction is being carried out

after obtaining permission from the authorities. Lane is of 1.22 meters and the said area is kept as a lane and no construction is being made in the said width of 1.22 meter. According to learned counsel, the trial court, after appreciation of evidence has arrived at correct conclusion. The plaintiff himself has made illegal construction without leaving any margin and has utilized the whole area of his property for construction.

5. I have considered the submissions.

6. Initially when the injunction was clamped, the court was concerned with the prima facie case. The injunction application, during the pendency of the suit, and injunction application during the pendency of appeal, after the culmination of the suit would be on a different pedestal. The court, after recording evidence, has observed that the width of the lane is not 6 feet through out. At someplace it is 3.6 feet, at some places 4.3 feet and at the northern side, width is shown as 6 x 6.

7. The construction permission accorded by the planning authority would show the width of the road as 1.22 meter. No doubt the appellate court will have to decide the appeal on merits after re-appreciating the evidence on record, however, today, the statement is made by the respondent that no construction would be made so as to reduce the width of the lane beyond 4 feet. In light of that, I am not inclined to entertain the appeal from order. The Appeal from Order is accordingly disposed of. No costs.

8. The appellate court shall decide the appeal on its own merits, after re-appreciating the evidence.

9. Observations made by this Court are only prima facie in nature.

(S. V. GANGAPURWALA, J.)

JPC