

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 12012 OF 2014

MANJEETSINGH SHIVSINH THAKUR AND OTHERS
VERSUS
NARAYANSINH MAROTISINH THAKUR

...
Advocate for Petitioners : Shri Shendurnikar Pushkar S.
Advocate for Respondent : Shri Mukhedkar Amit A.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: January 07, 2015
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PER COURT :-

1. I have heard the learned Advocates for the respective sides at length.
2. After considering their submissions and the contentious issues involved, I am not adverting to their contentions in their entirety. In the light of the order that I am inclined to pass with reasons, which I would be assigning, the aspect as regards the framing of points for determination by the appeal Court needs to be considered.
3. It is undisputed that the trial Court has granted application Exhibit 5 and clamped injunction upon the petitioners herein in RCS No.111 of 2014 on 5.5.2014.
4. The petitioners have preferred Misc. Civil Appeal No.33 of 2014 under Order XLIII Rules 1 and 2 of the CPC. By the impugned judgment, dated 29.11.2014, the Misc. Appeal has been rejected.

5. It is pointed out by the petitioners that the appeal Court has travelled on an altogether incorrect premises. The petitioners were the original defendants before the trial Court. Needless to state that an application Exhibit 5 seeking injunction was filed by the respondent / plaintiff.

6. The appeal Court has framed the following points for determination:-

- "1. Whether the defendants have made out ..No prima facie case in their favour ?
2. Whether the balance of convenience lies in ..No. favour of the defendants ?
3. Whether the defendants would suffer ..No. irreparable loss in case application is rejected?
4. What order ? ..As per final order."

7. Grievance of the petitioners is that the appeal Court has erroneously framed the points for determination, by which the entire burden was cast upon the defendants.

8. The points for determination, as recorded herein above are self explanatory. The appeal Court, while considering the Misc. Civil Appeal filed by the petitioners was required to scrutinise whether the impugned order, granting injunction, was sustainable or not and as to whether the plaintiff had made out a strong prima facie case, coupled with the balance of convenience, in his favour so as to be benefited by the injunctory orders.

9. In the submissions of the petitioners, the appeal Court has mis-directed itself and has scrutinized the impugned order of injunction from an altogether erroneous perspective as if the petitioners / defendants had to establish a ground as against the claim of the respondent / plaintiff.

10. The learned Advocate for the respondent, appearing on caveat, submits that though the Appeal Court may have used the term "defendant" in the points for determination, the reasons assigned in the judgment are in tune with the tenets of law. Nevertheless, he submits that the points for determination are to be framed in the discretionary powers of the appeal Court and the same cannot be called in question, more so, in the writ jurisdiction of this Court.

11. I find from the impugned order that the appeal Court has considered the appeal as if it were the petitioners on whose shoulder lay the burden of disproving the claim of the plaintiff as regards the order of injunction. In my view, when the order of injunction was called in question by the petitioners, the appeal Court was expected to consider whether the impugned order could be said to be perverse and erroneous. In doing so, the appeal Court was required to consider the aspect of alleged illegal construction resorted to by the plaintiff and whether permitting the plaintiff to proceed with the construction by injunctioning the petitioners was justifiable. In embarking upon this exercise, the appeal Court should have attempted to trace out from the impugned order as to whether the plaintiff had indeed made out a prima facie case and whether the balance of

convenience lay in his favour, vis-a-vis, whether injunctory orders, if granted, were likely to cause irreparable loss or manifest inconvenience to the petitioners / defendants.

12. As such in my view, the appeal Court has addressed the issue from a perspective which does not fit into the scheme of law. As such, the impugned judgment and order dated 29.11.2014 delivered in Misc. Civil Appeal No.33 of 2014 is quashed and set aside. The said appeal is relegated back to the appeal Court for framing of appropriate issues. Thereafter, the appeal Court shall hear the litigating parties and decide the said appeal.

13. It is informed by the litigating parties that the status quo as regards the construction was granted initially when the appeal was instituted. The same stood automatically vacated by the passing of the impugned judgment. However, this Court (Vacation Court) on 26.12.2014 has directed the parties to maintain status quo as regards the possession of the plot including the construction until further orders.

14. As such, in the light of the order that is being passed, the litigating parties shall maintain status quo and the respondent shall not proceed with the construction for a period up to 19.3.2016. The appeal Court upon recasting the points for determination, shall hear the litigating parties and decide Misc. Civil Appeal No.33 of 2014 as expeditiously as possible and preferably on/or before 19.3.2016. It is assured that the litigating sides will cooperate with the appeal Court.

15. Writ Petition stands accordingly partly allowed.

(RAVINDRA V. GHUGE, J.)

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