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

WRIT PETITION NO.11945 OF 2015

Janardahan Dadasaheb Kale ..PETITIONER

VERSUS

The State of Mah. & ors. ..RESPONDENTS

Mr Shailesh S. Chapalgaonkar, Advocate for petitioner;
Mr S.Y. Mahajan, A.G.P. for respondents no.1 & 3

**CORAM : N.W. SAMBRE, J.
DATE : 15th December, 2015**

ORAL ORDER :

By this petition, the petitioner-original plaintiff challenges the order dated 7th September, 2015, passed by District Judge, Koparagaon, in Misc. Civil Appeal No.27 of 2015, whereby the order dated 30th October, 2015, passed by 2nd Joint Civil Judge Senior Division, Kopargaon, below Exh.20, in Regular Civil Suit No.144 of 2015, has been confirmed.

2. The petitioner-plaintiff has instituted Regular Civil Suit No.144 of 2015 for declaration and permanent injunction. In the said suit, the petitioner moved an application Exh.6 for grant of temporary injunction. It is the claim of the petitioner that he is owner of survey no.160/5 and no water channel was constructed by the respondent – Irrigation Department which passes through it. According to him, the notices served upon him with threat of action under the Maharashtra Irrigation Act, 1976 for

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restoration of the water channel which was earlier existing through his field and further penal action, has promoted him to file the suit.

3. Mr Chapalgaonkar, learned Counsel appearing on behalf of the petitioner would urge that both the Courts below, while rejecting application for temporary injunction have committed an error of law and misdirected itself, particularly in relation to appreciation of evidence, i.e. location of water channel through the field of the petitioner. So as to substantiate his contentions, learned Counsel has invited attention of this Court to the two maps which are placed on record depicting water channel location, which is passing through the other land adjoining to the land of the petitioner. He would then urge that the Trial Court has wrongly appreciated the fact as regards non acquisition of the property from the petitioner, for construction of water channel, for which the burden is on the respondents.

4. Learned Asstt. Govt. Pleader, while opposing the claim would urge that this Court, in extraordinary jurisdiction should be slow in interfering with the concurrent findings recorded by both the Courts below. He would then submit that it is upon the complaint made by the adjoining land owners that the water channel was disturbed by the present petitioner, the Department was promoted to initiate action against the petitioner. According to the learned Asstt. Govt. Pleader, though the petitioner is drawing water from the channel in question, yet the adjoining land owners were unable because of the damage caused by the petitioner to the channel. According to him, the petition is liable to be dismissed.

5. From the record it is noted that the Trial Court rejected the application for grant of temporary injunction on 7th September, 2015, based on the evidence, viz. extract of Khatavani books, water supply vide field channel No.10/3 and the copy of location of the water channel. The learned Trial Court then noted that the adjoining field owners who have filed complaint against the petitioner were not impleaded as parties, though they were necessary.

6. The learned lower appellate court, while dismissing Misc. Civil Appeal No.27 of 2015, has dealt with the provisions of the Maharashtra Irrigation Act, 1976 and then proceeded to analyze the submissions made by the petitioner, in the background thereof.

7. What is noticed from the observations made by both the Courts below is that it is upon the complaint of the adjoining land owners, the action of issuance of notice directing the petitioner to restore the water channel came to be ordered. Admittedly, adjoining owners are not parties to the proceedings. Both the Courts below have appreciated the location of the water channel, particularly in the background of the location of the land of the petitioner and have drawn *prima facie* opinion that the water channel passes through the land of the petitioner. Once both the courts below have recorded findings of facts against the petitioner, unless a perversity is demonstrated to that effect, this Court should not interfere under Article 227 of the Constitution of India.

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8. Having perused both the maps and 7/12 extracts, it is noted that both the Courts below have rightly proceeded, particularly on the background of provisions of section 114 of the Evidence Act.

9. Apart from above, the adjoining field owners who have filed complaint against the petitioner, were not impleaded as parties to the suit though they were necessary parties.

10. In my opinion, both the Courts below, having appreciated all the principles for grant of temporary injunction, were right in rejecting the claim. Thus, the petition fails and stands dismissed with no order as to costs.

(N.W. SAMBRE, J.)

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