

IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.3750 OF 2015

Jai Sai Developers through its partner  
Mr. Mahesh Jaywant Powar ... Petitioner  
Vs.  
Kolhapur Central Prison, Kalamba through its  
Superintendent Bhararat M. Bhosale and others ... Respondents

Mr. Yuvraj P. Narvankar for Petitioner.  
Ms Vaishali Nimbalkar, AGP for Respondent No.1-State.  
Mr. Suresh M. Kamble for Respondent No.2.

**CORAM : R. G. KETKAR, J.**  
**DATE : DECEMBER 21, 2015**

**P.C. :**

Heard Mr. Narvankar, learned Counsel for petitioner and Ms Nimbalkar, learned AGP for respondent No.1 and Mr. Kamble, learned Counsel for respondent No.2 at length.

2. On the application made by Mr. Narvankar, leave to delete respondent No.3 is granted. Amendment shall be carried out forthwith. Rule. Learned Counsel for respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, original defendant No.1 has challenged the judgment and order dated 28.01.2015 passed by the learned Ad-hoc District Judge-4, Kolhapur in Miscellaneous Civil Appeal No.319 of 2014. By that order, the learned District Judge allowed the appeal preferred by the respondent No.1, hereinafter referred to as the plaintiff, and directed the defendants to place the issue of the construction of the suit property before the

Standing Advisory Committee (for short 'Committee') established by the Government and then proceed as per the direction of the said Standing Advisory Committee. Till then, defendants No.2 and 3 (petitioner and respondent No.3 herein) were restrained from completing inner construction work of the suit property. Further, they were restrained from selling flats on 4<sup>th</sup> and 5<sup>th</sup> floor so that the purchaser shall not suffer any loss in future in case the Committee refuses to approve the construction of 4<sup>th</sup> and 5<sup>th</sup> floor.

4. Mr. Narvankar submitted that plaintiff instituted Suit on or about 24.06.2014 for perpetual injunction restraining respondent No.2, hereinafter referred to as defendant No.1 and petitioner, hereinafter referred to as defendant No.2 and respondent No.3, hereinafter referred to as defendant No.3 from carrying out any unauthorized construction. During the pendency of the Suit, plaintiff sought temporary injunction restraining defendants No.2 and 3 from carrying out further construction. During the pendency of the Suit, plaintiff took out application exhibit-5 for temporary injunction restraining defendants No.2 and 3 from carrying out any construction.

5. By order dated 15.12.2014, the learned trial Judge rejected the application. Aggrieved by that decision, plaintiff preferred Miscellaneous Civil Appeal on or about 19.12.2014. By the impugned order, the learned District Judge allowed the appeal.

6. Mr. Narvankar submitted that the learned District Judge committed serious error apparent on the face of the record. The learned District Judge issued injunction restraining defendants No.2 and 3 from completing any internal work as also from alienating flats on 4<sup>th</sup> and 5<sup>th</sup> floor. That was not even prayed for by the plaintiff. He submitted that

this clearly shows non-application of mind on the part of the learned District Judge. He further submitted that even before passing of the impugned order, the Committee in its meeting convened on 07.01.2015 had discussed the subject relating to construction carried out by defendant No.2. He submitted that in fact plaintiff should have produced the decision of the committee before the District Court. In short, he submitted that the said information was withheld by the plaintiff from the District Court and thus, plaintiff did not approach the Court with clean hands. Mr. Narvankar has tendered decision dated 07.01.2015 taken by the said Committee in respect of the construction carried out by the defendant No.2. The same is taken on record and marked 'X' for identification.

7. On the other hand, Ms Nimbalkar supported the impugned order. She submitted that in paragraph 4 of the Appeal memo, plaintiff specifically asserted that the learned trial Judge passed order dated 25.11.2014 below exhibit 46 directing defendants No.2 and 3 to maintain the status-quo till 15.12.2014. However on 13.12.2014, defendant No.2 gave advertisement in daily newspaper “Daily Pudhari” for booking of the flats in the suit property thereby committing contempt of the order of the Court dated 25.11.2014. She however, could not point out any overt act of defendants No.2 and 3. She also could not defend the order passed by the learned District Judge issuing injunction restraining defendants No.2 and 3 from alienating flats on 4<sup>th</sup> and 5<sup>th</sup> floor. She further submits that in case the Court is inclined to set aside the impugned order, the order restraining defendants No.2 and 3 from creating third party interest in respect of flats on 4<sup>th</sup> and 5<sup>th</sup> floor may be continued for a period of two weeks from today so as to enable the plaintiff to take out appropriate application in the trial Court.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit for perpetual injunction restraining defendants from carrying out any unauthorized construction as also pending the hearing and final disposal of the Suit, restrained defendants No.2 and 3 from creating third party interest. Perusal of paragraph 5 of the plaint shows that on 04.12.2013, Urban Development Department of Government of Maharashtra constituted Standing Advisory Committee consisting of (i) Municipal Commissioner of the Corporation as a Chairman, (ii) Police Commissioner as a Member and (iii) Deputy Superintendent of Jail as a Member. During the pendency of the Suit, plaintiff took out application exhibit-5 for temporary injunction restraining defendants No.2 and 3 from carrying out any construction. Plaintiff however, did not seek any injunction restraining defendants No.2 and 3 from creating third party interest.

9. The learned trial Judge rejected the application. Aggrieved by this order, plaintiff preferred appeal. The learned District Judge did not issue injunction restraining the defendants No.2 and 3 from carrying out any construction. However, the learned District Judge issued injunction restraining defendants No.2 and 3 from carrying out internal work as also from alienating flats on 4<sup>th</sup> and 5<sup>th</sup> floor. In view thereof, the learned District Judge was not justified in issuing injunction which was not even sought for by the plaintiff.

10. Mr. Narvankar submits that defendant No.2 will produce this decision before the trial Court for passing further appropriate orders. He further submits that defendant No.2 has challenged that decision of the Committee dated 07.01.2005 by filing Writ Petition No.5388 of 2015

and the said Petition is pending.

11. In view thereof, Petition deserves to be allowed in the following terms:

- a. Impugned order dated 28.01.2015 is quashed and set aside and Appeal is dismissed;
- b. Notwithstanding dismissal of the appeal, for a period of two weeks from today, without prejudice to the rights of defendants No.2 and 3, by way of ad-interim relief, there shall be injunction restraining them from creating third party interest in respect of flats situate on 4<sup>th</sup> and 5<sup>th</sup> floor;
- c. Grant of ad-interim order shall not be construed as an expression of merit either way and the learned trial Judge will decide the proposed application, if made by the plaintiff on the basis of material on record and on its own merits and in accordance with law;
- d. All contentions of the parties in that regard are expressly kept open;
- e. Rule is made absolute in the aforesaid terms with no order as to costs.

12. Defendants No.2 and 3 are at liberty to produce decision dated 07.01.2015 before the trial Court. If such decision is produced, the learned trial Judge shall pass appropriate order in accordance with law. All contentions of the parties in that regard are expressly kept open.

**(R. G. KETKAR, J.)**