

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3419 OF 2015
WITH
WRIT PETITION NO.3420 OF 2015

Atur India Pvt. Ltd. ... Petitioner
Vs.
Nivrutti Ganpatrao Gawari and another ... Respondents

Mr. S. R. Ganbavale for Petitioner.
Mr. G. S. Godbole, Senior Advocate i/b. Mr. Avinash B. Patil for Respondents.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 17, 2015

P.C. :

Heard Mr. Ganbavale, learned Counsel for petitioner and Mr. Godbole, learned Senior Counsel for respondents in both the Petitions at length.

2. Writ Petition No.3419 of 2015 is instituted by Atur India Private Limited (for short 'Atur India') challenging the judgment and order dated 05.03.2015 passed by the learned District Judge-18, Pune in Miscellaneous Civil Appeal No.372 of 2014. By that order, the learned District Judge allowed the Appeal preferred by Nivrutti Ganpat Gaware and Ms Manisha Vijay Gaware (for short 'Gawares') and set aside the judgment and order dated 25.09.2014 passed by the learned Joint Civil Judge, Junior Division, Ghodnadi below exhibit-5 in Regular Civil Suit No.250 of 2014. R.C.S. No.250 of 2014 is instituted by the Gawares for a perpetual injunction restraining Atur India from encroaching upon and / or causing obstruction to their use and occupation of Gat No.944 admeasuring 1 H 93 Ares situate at Village Sanaswadi, Taluka Shirur, District Pune.

3. Writ Petition No.3420 of 2015 is instituted by Atur India challenging the judgment and order dated 05.03.2015 passed by the learned District Judge-18, Pune in Miscellaneous Civil Application No.373 of 2014. By that order, the learned District Judge allowed the appeal preferred by Gawares and quashed and set aside the judgment and order dated 25.09.2014 passed by the learned Civil Judge, Junior Division, Ghodnadi below exhibit-5 in Regular Civil Suit No.208 of 2014. R.C.S.No.208 of 2014 is instituted by Atur India for perpetual injunction restraining Gawares from causing any obstruction to them from carrying out construction of compound wall on the western side of its property viz. Gat No.946 admeasuring 2 H 28 Ares. Since the impugned orders arise out of proceedings filed in two Suits by Gawares and Atul India, the same can conveniently be disposed of by this common order.

4. In support of these Petitions, Mr. Ganbavale submitted that perusal of the description given by Gawares in their Suit show that Gat No.944 admeasures 1 H 93 Ares and the property of Atur India namely Gat No.946 is on the eastern side of Gat No.944. On the southern side of Gat No.944, there is a petrol pump in the area of 42 Ares and for approaching this petrol pump from the eastern side, there is access road in Gat No.944. In short, his submission is that the approach road is within Gat No.944 and is not on the eastern side of Gat No.944. Gawares, who claimed road on the eastern side of Gat No.944, in fact, is part of Atur India's property namely Gat No.946. The learned District Judge, therefore, was not justified in issuing injunction in favour of Gawares. He submitted that after the Appeal was decided, Atur India have filed applications under Order 26, Rule 9 of the Code of Civil Procedure, 1908 for appointment of T.I.L.R. for carrying out measurement and fixation of boundary marks in respect of Gat No.944 admeasuring 1 H 93 Ares as also Gat No.946 admeasuring 2 H 28 Ares.

5. On the other hand, Mr. Godbole supported the impugned orders. He submitted that after considering the – (1) photographs as also (2) plan approved by the Assistant Director of Town Planning, the learned District Judge recorded a finding that adjacent to the petrol pump, there is a road which can be used for approaching the backside of the land of Gawares. He further submitted that Gawares had filed application at exhibit-5 in their Suit and ad-interim injunction was granted on 01.09.2014 and the same is operating till today. He, therefore, submitted that if Atur India takes out application for disposal of the Suits in time bound manner, they will support such application.

6. The short question is whether the learned District Judge is justified in allowing the appeals preferred by Gawares. After considering the material on record, and in particular – (1) photographs produced on record as also (2) map sanctioned by the Assistant Director of Town Planning, the learned District Judge has recorded prima facie finding that road portion is left just and adjacent to the petrol pump, which can be used for approaching remaining backside land of the Gawares. The learned District Judge considered documents received under RTI Act. The learned District Judge also considered that though Gawares took out application for appointment of Court Commissioner for measurement of the land, Atur India objected to that application. The learned District Judge, therefore, recorded a finding that that Atur India has not come to the Court with clean hands. In short, after considering the prima facie case, balance of convenience as also irreparable loss and injury, the learned District Judge allowed the appeals. As against this, the learned trial Judge, without properly applying the principles governing the grant or refusal of interim injunction, refused injunction.

7. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph

14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Limited Vs. Pothan Joseph*, (1960) 3 SCR 713, (SCR 721)

“....These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. V. Jhanton*, 1942 AC 130' ... the law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'.”

8. Applying the tests laid down by the Apex Court, I do not find that the learned District Judge committed any error in interfering with the order passed by the learned trial Judge. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petitions dismissed and are disposed of as such.

9. In case Atur India applies for disposal of the Suits in a time bound manner, Gawares will support the said application and the learned trial Judge will consider the same and pass appropriate order. As noted earlier, Atur India has also filed applications for appointment of T.I.L.R. for carrying out measurement and fixation of boundary marks after dismissal of the Miscellaneous Civil Appeals. The learned trial Judge

will consider those applications in the light of the fact that there is boundary dispute between the parties and pass appropriate orders.

(R. G. KETKAR, J.)

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