

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5815 OF 2015

Gangamai Bhajibazar Mitra Mandal and others ... Petitioners
Vs.
Nashik Municipal Corporation and others ... Respondents

Mr. Sandeep K. Shinde i/b. Mr. Sham Walve for Petitioners.
Mr. Shekhar Jagtap i/b. J. Shekhar & Co. for Respondents.

CORAM : R. G. KETKAR, J.
DATE : 3RD JULY, 2015

ORDER :

Heard Mr. Shinde, learned Counsel for petitioners and Mr. Jagtap, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 20.06.2015 passed by the learned District Judge-8, Nashik in Civil Miscellaneous Appeal No.94 of 2011. By that order, the learned District Judge allowed the Appeal preferred by the respondents, hereinafter referred to as the defendants, and quashed and set aside the judgment and order dated 13.07.2011 passed by the learned 7th Joint Civil Judge, Senior Division, Nashik below exhibit-26 in Regular Civil Suit No.128 of 2005 and dismissed the application at exhibit-26.

3. In support of this Petition, Mr. Shinde submitted that the petitioners, hereinafter referred to as the plaintiffs are carrying on their business of selling vegetables / agricultural produce. Plaintiffs are running their respective business at CTS No.5231 which is known as 'Municipal Gangaghat Bhaji Market', hereinafter referred to as the suit property. Plaintiffs and others are vegetable vendors and are carrying on

business of eating houses, tea stalls, grocery shops since several decades. By virtue of this, they have their own fixed places to carry on their respective businesses. Plaintiffs bring their goods, sell them and further take away rest of the remainders and again repeat the same every day. Plaintiffs have obtained various licences and are also paying taxes to the Corporation. He submitted that the suit property stands in the name of His Highness Maharaja of Kapurthala. Thereafter, the ownership was with Punjab Government, Patiyala. Defendants have no right of ownership over the suit property. The suit property does not belong to the defendants nor they have any right to possess the suit property. He submitted that in the plaint, the plaintiffs have specifically asserted that they have customary right as contemplated by Section 2(b) of the Indian Easements Act, 1882 (for short 'Act'). Plaintiffs are not claiming customary easements as contemplated by Section 18 thereof. He submitted that for generations together, the plaintiffs and their predecessors are / were carrying on their respective businesses for the last 100 years.

4. Mr. Shinde submitted that Nashik city hosts “Maha Kumbh Mela” once in every twelve years. For attending this Kumbha Mela, Sadhus as well as pilgrims are supposed to attend ceremonial bathing (Shahisnan) on certain dates during the “Parva” and for which large gathering of people across the whole world is witnessed by the bank of Godavari River, and in particular near Ramkunda (the holy lake). The suit property is adjacent to the Ramkunda and therefore, the vegetable vendors are required to vacate their respective places of business during the days of Shahisnan. With a view to ensuring that the Kumbha Parva is organised smoothly, the vendors voluntarily vacate their places and avoid obstruction to the Parva in any manner. In the year 2003 as well, when Maha Kumbha Mela was organized, plaintiffs vacated their

respective places on the respective dates of Shahisnan. After the Maha Kumbha Mela was over, plaintiffs returned to their respective places when defendants without having any legal right started obstructing in a day-to-day business activities with an intention of driving away plaintiffs from the suit property.

5. Mr. Shinde submitted that even in the year 2005, attempts were made by the defendants by causing obstructions so that plaintiffs will remove themselves from the suit property. Plaintiffs were, therefore, constrained to institute Regular Civil Suit No.128 of 2005 before the Court of Civil Judge, Senior Division, Nashik. Along with that Suit, application at exhibit-5 seeking temporary injunction was filed. Defendants filed reply-cum-written statement opposing the Suit as also application at exhibit-5. Since there was no immediate apprehension from being dispossessed from the suit property, plaintiffs chose not to press the application for interim injunction and the same was disposed of as not pressed. He submitted that Section 2(33) of the Maharashtra Municipal Corporations Act (for short 'Corporation Act') defines expression "market". Section 2(36) defines expression "municipal market" to mean a market vested in or managed by the Corporation. He submitted that Section 327 provides that all markets and slaughter-houses which belong to or are maintained by the Corporation are called "municipal markets" or "municipal slaughter-houses". All other markets and slaughter-houses shall be deemed to be private. He submitted that Section 334 empowers the Municipal Commissioner to expel person contravening rule, bye-law or standing order. Defendants have no authority of law to invoke Section 334 as suit property does not belong to the Corporation. Market in the suit property is also not maintained by the Corporation. Plaintiffs have specifically pleaded their customary rights. He has taken me through paragraphs 6 to 9 and 12 of the plaint

and submitted that plaintiffs have specifically pleaded their customary rights. He submitted that the learned trial Judge, after considering the material on record, granted injunction on 13.07.2011. However, by the impugned order, the learned District Judge has dismissed the application at exhibit-26. He further submitted that as and by way of stop-gap arrangement, plaintiffs are ready and willing to shift to some other place during those 5 days called 'Parvani'. This will ensure that the ensuing Maha Kumbha Mela is organised smoothly and without causing any obstruction.

6. Mr. Shinde further submitted that though defendants are claiming to have constructed municipal market on Survey No.307, no scheme is formulated for allotment of Stalls / Galas in the municipal market. Till such time, the scheme is formulated, defendants should be restrained from evicting / shifting the plaintiffs from the suit property. He submitted that the distinction between customary right and customary easement is considered in the case of *Radha Krishna Kandolkar Vs. Tukaram Pundalik Homkhandi*, **AIR 1991 Bombay 119**, and in particular paragraph 6 thereof. He submitted that since the plaintiffs have specifically pleaded customary rights and the defendants are not owners of the suit property, the learned District Judge ought not to have interfered with the discretionary order passed by the learned trial Judge. He submitted that the learned District Judge committed error in allowing the Appeal and dismissing the application for injunction.

7. On the other hand, Mr. Jagtap supported the impugned order. He submitted that though in the plaint, and in particular paragraph 12, plaintiffs alleged obstruction at the hands of the defendants in the year 2003, the Suit was not instituted immediately in the year 2003. In fact, the plaintiffs made grievance before the Maharashtra State Human Right

Commission (for short 'Commission'). The Commission suggested Corporation to provide alternate suitable site for vegetable market as a stop-gap arrangement till regular market is erected. In pursuance thereof, the Corporation has constructed new market place which is adjoining to the suit property having all basic facilities and amenities. Plaintiffs though accepted construction of new market place, they declined to shift there as it was not safe and suitable to them. He further submitted that the plaintiffs have made permanent construction as is evident from paragraphs 3, 6 and 9. He submitted that some of the plaintiffs are carrying on hotel business, grocery business and have come with the case that some of the plaintiffs are also carrying on business of selling vegetables. He submitted that this is just a bogey with a view to gaining sympathy of this Court. On instructions, he further stated that the Corporation will follow due process of law in allotment of Stalls / Galas in the newly constructed municipal market and in particular provisions of Chapter XIX and other enabling provisions of the Corporation Act in that regard.

8. Mr. Jagtap further submitted that the application at exhibit-5, taken out in 2005, was not pressed and the present application exhibit-26 was taken out in the year 2011. That itself, is sufficient ground to decline injunction as the Suit is admittedly instituted in the year 2005. He submitted that the learned trial Judge has observed in paragraph 12 that “as there is immediate apprehension of dispossession, demolition of their sheds, structures will result in frustrating the plaintiffs' long standing possession. Issuance of licences under the Shops and Establishment Act, supply of electric connection makes out a prima facie case for establishment of rights and interest in the market. The learned trial Judge further observed that if plaintiffs are forcibly shifted, it will cause inconvenience to the large number of plaintiffs and others.”

In view thereof, the learned trial Judge held that irreparable loss would be caused to the plaintiffs if injunction is not granted. He submitted that the learned trial Judge however, did not consider larger public interest as also the fact that the application exhibit-5 was not pressed in the year 2005 and the present application is taken out in the year 2011, which clearly shows that findings recorded in paragraph 12 are perverse.

9. In paragraph 11 also, though the learned trial Judge referred to the documents relied by the defendants as also the order passed by the Commission in Case No.2219 of 2003, which recommends the Corporation to provide alternative to vegetable and grocery vendors and the compliance report was to be submitted to the Corporation. It was further observed that the defendant had acted accordingly and made arrangement in Survey No.307. Though this aspect was referred, the learned trial Judge did not consider it at all as also refusal on the part of the plaintiffs to shift there. For all these reasons, he submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Sections 2(33) and 2(36) of the Corporation Act define expressions 'market' and 'municipal market' and the same read as under:

“2. Definitions.- In this Act, unless there be something repugnant in the subject or context,-

...

(33) “market” includes any place where persons assembly for the sale of, or for the purpose of exposing for sale, live-stock or food for live-stock or meat, fish, fruit, vegetables, animals intended for human food or any other articles of human food whatsoever with or without the consent of the owner of such place, notwithstanding that there may be no common regulation of the concourse of buyers and sellers and whether or not any control is exercised over the business of or the persons frequenting the market by the owner of the place or any other person;

...
 (36) “municipal market” means a market vested in or managed by the Corporation;”

11. Perusal of Section 2(33) shows that the expression “market” is inclusive. Section 2(36) extracted hereinabove shows that municipal market means a market vested in **or managed by the Corporation**. Section 327 lays down that all markets and slaughter-houses which belong to **or are maintained by the Corporation are called “municipal markets”** or “municipal slaughter-houses”. Perusal of the pleadings in the plaint and in particular paragraphs 9, 10 and 16 shows that plaintiffs have obtained various licences from the Corporation. Thus, on plaintiffs' own showing, Corporation manages and maintains the market situate in the suit property. Section 52 of the Act defines the expression 'licence' to mean where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license. Section 2(b) of the Act lays down that nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from any customary or other right (not being a license) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property. Perusal of Section 2(b) prima facie indicates that customary right does not include license. Plaintiffs are not claiming either to be owners or lessees of the suit property. Having regard to the assertions made in paragraphs 9, 10 and 16, prima facie, plaintiffs are licensees of the Corporation.

12. That apart, in paragraph 12 of the plaint, it is alleged that in the previous Maha Kumbha Mela of 2003, defendants have caused

obstruction to the plaintiffs. However, it is material to note that plaintiffs did not institute Suit in the year 2003. What is also relevant to note is that plaintiffs approached Commission and the Commission had submitted report dated 09.04.2004 recommending Corporation to provide alternative suitable site for vegetable market as a stop-gap arrangement till regular market is erected. In paragraph 16, the learned District Judge observed that the President of Vegetable Vendors declined to receive the proposal of stop-gap arrangement and insisted that the persons may be permitted to carry on their business as before in the suit property. In that paragraph, the learned District Judge also noted that the Corporation issued second reminder letter to the plaintiffs calling upon them to the meeting in respect of shifting of vegetable market in the newly constructed premises. Plaintiffs replied that letter by stating that the matter is “subjudice”. It is not in dispute and rather is matter of record that in the year 2012, the Corporation has constructed new market in Survey No.307 adjoining suit property. Plaintiffs have also accepted the construction of new market place. They have reservation to shift there on the ground that it is not safe and suitable for them. The learned District Judge has considered this in paragraph 17 and observed that the constructed market is always suitable and safe than the open market, as presently is the situation.

13. It is also material to note that though the Suit was filed in the year 2005 and the application exhibit-5 for injunction was taken out, the said application was not pressed. Plaintiffs took out application at exhibit-26 in the year 2011 that is to say nearly after 6 years. Even this is also relevant circumstance for declining to grant interim relief. Mr. Jagtap submitted that the learned District Judge has also considered larger public interest vis-a-vis private interest of the plaintiffs. He relied upon the decision of the Apex Court in the case of *Mahadeo Savlaram Shelke*

Vs. Pune Municipal Corporation, (1995) 3 SCC 33. In paragraph 18, the learned District Judge observed thus,

“18] As stated in respect of point No.2 the plaintiffs are not claiming themselves to be the owners of the suit property. They are only claiming customary and easementary rights over the suit property. Both types of these rights needs to be proved after leading the evidence. It requires the detail hearing of the suit on merits. At this stage no reliable, sufficient and cogent evidence is there on record. The Trial Court has referred only the PR card, map of the suit property, licenses issued by the Nashik Municipal Corporation only on its fact. Learned Trial Court has not considered its prima facie effect, scope and limits. Learned Trial Court has also not considered the nature of suit property, to whom it actually belongs and the statutory authority of the defendants. The learned Trial Court after considering the report of Hon'ble Maharashtra State Human Rights Commission, Mumbai held that the defendants have acted accordingly and made arrangement of market in Survey No.307. At the same time, learned Trial Court has held that the corporation has breached the Human Rights of the vegetable hawkers by preventing them. These two findings of the Id. Trial Court are contradictory. **The reason is that Id. Trial Court has failed to consider that the defendants have taken care of and protected all the human rights of the plaintiffs by erecting new market premises. Defendants have not left the plaintiffs unattended and uncared.** Ld. Trial Court erred in holding that a prima-facie case is in favour of plaintiffs, when actually there is no document on record in favour of plaintiffs. Learned Trial Court failed to consider that the period for seeking easementary and customary rights against the government is 30 years. Undoubtedly, there is obstruction to the possession of plaintiffs from the defendants since 12 to 15 years. **The learned Trial Court erred in holding that plaintiffs are going to suffer irreparable loss. The reason is that the defendants are not preventing them from carrying the business, but are preventing them from carrying it at the suit property. Further defendants have erected new market premises for the plaintiffs. Instead of doing their business here and there during the Simhastha Kumbhamela it would be in the interest of plaintiffs to occupy the newly erected market premises. By doing so they are not going to suffer any irreparable loss.** Ld. Trial Court has not at all considered the point of balance of convenience. As stated above, in Nashik, the Simhastha Kumbhamela is held after every 12 years. Present suit property is in the way of Shahee Procession. Every time the vegetable market at suit property will be the problem for the Government and its agencies. The Ld. Advocates of both the parties has admitted in their arguments that in the last Kumbhamela also the same problem was there. Therefore, as

per the report of Hon'ble Maharashtra State Human Rights Commission a stop-gap arrangement was made. It is not practicable for every Kumbhamela to make a stop gap arrangement. In addition to that when there is no prima-facie case in favour of plaintiffs and plaintiffs are not going to suffer any irreparable loss, the balance of convenience does not lie in their favour. On the contrary, all these three principles lies in favour of defendants. At Ex.24 plaintiffs have filed an undertaking stating that they will vacate the suit premises on five auspicious days (Parvane) of Kumbhamela. On perusal of that undertaking, it appears that the respondents intend to come back on the suit premises within the period of two auspicious days. If that happens there will be chaos and stamped in the suit premises that too in the huge crowd of Kumbhamela. While arguing learned Advocates of both the parties have referred that same thing has happened in the last Kumbhamela. A minor problem of plaintiffs / vegetable vendors cannot be allowed to turn into a major problem for rest of the general public. So, the interference in the order of the learned Trial Court is necessary. For these reasons, points No.3 and 4 are answered in affirmative.”

(emphasis supplied)

14. The learned District Judge observed that the plaintiffs will have to prove their customary rights by leading evidence. In the case of Radha Krishna Kandolkar (supra), respondent-plaintiff claimed that he is tenant of Lote No.13 since about 30 years and defendant is tenant of Lote No.12. Plaintiff and defendant were tenants of Comunidade. In Lote No.12, which was in possession of defendant, there was a pond and the plaintiff had been taking water from that pond for the purpose of irrigation of his own “vaingan” crop which he used to make in Lote No.13. For doing that, he used to construct a “mer” in Lote No.12 in possession of the defendant. In paragraph 6 of that report, the learned Single Judge of this Court observed thus,

“[6] Difference between customary right and Customary easement.-- There is a word of difference between a customary right and customary easement. In fact easement is not a word even as much as whispered in the Plaint. An easement is required to be acquired by particular modalities. But the easement goes with the land or, rather with the lands : the land which claims the easement (dominant tenement) and the land which is subjected to

easement (servient tenement).

As regards the modalities of acquisition of easement, none has been either pleaded or proved. Customary easement vests in the dominant tenement; not in the particular person or a group of persons (unless they are rightfully in possession of the dominant tenement in question). A customary right, on the other hand, is claimed by a person or by a group of persons on the basis of the custom recognised by the community as a whole. From the very nature of things, a customary right is the one which results from a custom and hence, the custom has got to be pleaded and proved in the usual manner, indicated by the Evidence Act. The object of proof and the mode of proof are entirely different in the two cases. Failure to appreciate this distinction has resulted in a thoroughly illegal decree of injunction being passed by the Court below.”

15. Perusal of the above extracted portion shows that the learned Single Judge observed that a customary right is the one which results from a custom and hence, the custom has has to be pleaded and proved in the usual manner, indicated by the Evidence Act. In view thereof, the learned District Judge rightly observed in paragraph 18 that the plaintiffs will have to prove customary rights after leading evidence and the same requires detailed hearing of the Suit on merits.

16. In the case of **Mahadeo Savlaram Shelke** (*supra*), the Apex Court observed in paragraphs 12 and 14 thus,

12. In Modern Law Review, Vol.44, 1981 Edn. at page 447, it is stated that “the court considering an application for an interlocutory injunction has four factors to consider : first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation.”

14. It would thus be clear that in a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction

otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant an interim injunction. ...”

17. As noted earlier, in the present case, based on the recommendations made by the Commission, the Corporation has constructed municipal market in Survey No.307, which is adjoining the suit property. However, that aspect is not considered by the learned trial Judge while passing the impugned order. In paragraph 18, the learned District Judge after holding that the plaintiffs did not make out prima facie case; that the balance of convenience does not lie in favour of the plaintiffs; and that plaintiffs will not suffer irreparable losses also observed that the plaintiffs give undertaking stating therein that they will vacate the suit premises on 5 auspicious days (Parvane) of Kumbhamela. They intend to come back on the suit property within the period of 2 auspicious days. If that happens, there will be chaos and stampede in the suit property that too when huge crowd for Kumbhamela assembles there. Even during the last Kumbhamela, said thing had taken place. A minor problem of plaintiffs cannot be allowed to turn into a major problem for the rest of the general public. Thus, while dismissing the application for interim injunction, the learned District Judge also weighed private interest of plaintiffs vis-a-vis public interest at large.

18. 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 Oseinton & 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'.”

19. After considering the material on record and for the reasons indicated earlier, I am satisfied that the learned trial Judge has exercised the discretion arbitrarily, capriciously and perversely. In fact, though the learned trial Judge has observed in paragraph 11 that the defendants have acted according to the recommendations of the Commission and have made arrangements by constructing market in Survey No.307, the learned trial Judge did not consider this aspect at all. The learned trial Judge had ignored settled principles of law regulating grant or refusal of injunctions. In my opinion, the learned District Judge has rightly interfered with the trial Court's order. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is made clear that the observations and the findings recorded herein are tentative and prima facie. The learned trial Judge will decide the Suit on its own merits and in accordance with law and without being uninfluenced by the

observations made herein.

20. At this stage, Mr. Walve prays for stay of this order for a period of 4 weeks. Mr. Jagtap opposes this application on the ground that the Maha Kumbha Mela is to commence from 14.08.2015 and the process is already stalled.

21. As noted earlier, though the Suit was instituted in the year 2005 and application exhibit-5 for injunction was not pressed, application at exhibit-26 was taken out in the year 2011. The same was dismissed by the learned District Judge by the impugned order after weighing private interest of the plaintiffs vis-a-vis public interest at large. In view thereof, I do not find that any case is made out for stay of this order. Application is rejected. Authenticated copy of this order is expedited.

(R. G. KETKAR, J.)

Minal Parab