

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION St. NO.25280 OF 2015**

Dharam Deo Jaipath Prasad

..Petitioner

Vs.

Sandeep Sawant

..Respondent

Ms Firdaus Moosa a/w Mr. Prakash Mahadik for the Petitioner

Mr. R. D. Soni a/w Mr. R. A. Tekale for the Respondent

**CORAM : R. M. SAVANT, J.
DATE : 13th OCTOBER, 2015**

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 30-4-2015 passed by the Learned Ad-hoc District Judge-3, Thane, by the order, the Appeal in question being Misc Civil Appeal No.140 of 2014 filed by the Respondent came to be allowed, resultantly the order dated 1-8-2014 passed by the Learned 8th Joint Civil Judge Junior Division, Vashi, came to be set aside resulting in the injunction granted in favour of the Petitioner/Plaintiff being set aside.

2 The bone of contention is the passage admeasuring 8ft x 10 ft which is to the West and the South side of the shop in question owned by the

Plaintiff. The Plaintiff claims exclusive use of the said passage, whereas it is the case of the Defendant that it is the common passage being marginal open space. The Petitioner herein as indicated above is the original Plaintiff who has purchased a shop and a flat in the building known as Blacksmith Cottage from one Seawood Developers who are the successors of the said Blacksmith Cottage building. The Defendant has also purchased a flat in the same building which is also on the 1st floor adjacent to the flat of the Plaintiff. As indicated above, the bone of contention is the said passage admeasuring 8 ft x 10 ft running alongside the shop of the Plaintiff. In so far as the said passage is concerned, beyond the said passage is the 20 meters wide road. It seems that notices under Section 53 of the Maharashtra Regional Town Planning Act came to be issued to the original owner Khimji Karamsi, pursuant to which the wall which was in the passage enclosing the said passage came to be demolished and the said passage accordingly was made free for use of the residents of the said building. The Plaintiff has filed the Suit in question being Regular Civil Suit No.288 of 2013 for declaration and injunction in respect of the said passage. In the said Suit, the Plaintiff filed an application for temporary injunction for restraining the Defendants from using the said passage. In support of his case, the Plaintiff relied upon the allotment letter dated 20-12-2002 issued by the said Seawood Developers wherein it is stated that the said developers had given peaceful and vacant possession of the open space (passage) admeasuring about 8 x 10 ft near the wall admeasuring about 10 x 2 outside the shop No.1

in Blacksmith Cottage. The Plaintiff also relied upon the tax receipt issued by the Navi Mumbai Municipal Corporation (NMMC) in support of his case of exclusivity of the use of the said passage. The said application filed by the Plaintiff was opposed to on behalf of the Defendant. It was the case of the Defendant that the said passage is an open space and could not be sold to the Plaintiff by the builder.

3 The Trial Court considered the said application for temporary injunction and allowed the same by its order dated 1-8-2014. The Trial Court relied upon the possession letter dated 20-12-2002. The Trial Court also adverted to the tax receipt issued by the NMMC and principally on the ground that the Defendant has an alternative access for ingress and egress held that that the Plaintiff has made out a prima facie case and that the balance of convenience was also in favour of the Plaintiff and that if injunction is not granted, irreparable loss would be caused to the Plaintiff.

4 The Defendant carried the matter in Appeal by way of Misc Civil Appeal No.140 of 2014. The Lower Appellate Court on a re-appreciation of the material on record held that the order passed by the Trial Court granting injunction could not be sustained and accordingly allowed the Appeal. The Lower Appellate Court whilst deciding the Appeal observed that the real question in the Appeal is whether the disputed space is a marginal open space

or it is a space owned by the Plaintiff. The Lower Appellate Court observed that the Plaintiff though produced the said possession letter dated 20-12-2002, observed that the said letter could not be said to be the document of title to the said open space. The Lower Appellate Court also adverted to the action initiated pursuant to the notice under Section 53 and the demolition of the wall in question. The Lower Appellate Court has observed that the said letter of possession or the tax receipt relied upon by the Plaintiff do not confer title over the open space. The Lower Appellate Court observed that the Trial Court ought to have appreciated that the marginal open space in front of the commercial building is meant for the passerby and it cannot be sold out by the developer. The Lower Appellate Court has accordingly as indicated above allowed the Appeal and set aside the order passed by the Trial Court and thereby vacated the injunction.

5 The Learned Counsel appearing for the Petitioner Ms. Moosa would contend that the Plaintiff's interest pending the Suit ought to have been protected as was done by the Trial Court and therefore the Lower Appellate Court has erred in upsetting the order passed by the Trial Court granting injunction. The Learned Counsel would seek to reiterate the case of the Plaintiff before the Trial Court by relying upon the possession receipt dated 20-12-2002, tax receipt issued by NMMC in support of her submission that the Plaintiff is entitled to the exclusive use of the said marginal open space. The

Learned Counsel would contend that no prejudice is going to be caused to the Defendant i.e. the Respondent herein if injunction was granted in favour of the Plaintiff.

6 Per contra Mr. Soni the Learned Counsel appearing for the Respondent would support the impugned order. It was the submission of the Learned Counsel that having regard to the fact that the Plaintiff lays a claim to the marginal open space which is shown as such in the plan in question of the building, the order passed by the Lower Appellate Court vacating the injunction cannot be faulted with. The Learned Counsel sought to draw this Courts attention to the plan annexed to the above Petition which is part of the record as also the photographs in support of his contention that the area claimed by the Plaintiff is the marginal open space of the building.

7 Having heard the Learned Counsel for the parties, in my view, the order passed by the Lower Appellate court cannot be faulted with having regard to the fact that the Plaintiff lays a claim to the marginal open space as recorded by the Lower Appellate Court. The possession letter as also the tax receipt do not confer any title to the said marginal open space to which a claim is laid by the Plaintiff. The fact that the NMMC has demolished the wall enclosing the said space cannot be lost sight of. The said demolition had to be undertaken in view of the fact that the marginal open space around the

building was sought to be enclosed upon and sought to be used exclusively. It is well settled that common amenities cannot be sold by the builder having regard to the provisions of the Maharashtra Ownership of Flats Act. The Lower Appellate Court in the instant case can therefore be said to have upset the order passed by the Trial Court for cogent reasons. The Trial Court had erred in granting injunction in respect of the use of a common amenity. In my view therefore no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

8 Needless to state that the Suit would be tried on its own merits and in accordance with law, uninfluenced by the impugned order or the instant order which have been passed whilst considering the application for temporary injunction.

[R.M.SAVANT, J]