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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.160 OF 2016
WITH
CIVIL APPLICATION NO.267 OF 2016

Umabai S. Bhawe & Ors. ...Appellants
V/s.
Kalyan Dombivali Municipal Corporation ...Respondent

Mr.S.R. Page for the Appellants.
Mr.P.K. Dhakephalkar, Senior Counsel i/b Mr.A.S. Rao for the
Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 26TH OCTOBER, 2016.

P.C. :-

1. By this second appeal filed by the appellants under section 100 of the Code of Civil Procedure, 1908, the appellants have impugned the judgment and decree dated 12th January, 2016 passed by the learned District Judge – 2, Kalyan, dismissing Civil Appeal No.67 of 2002 filed by the respondent (original defendant) by which the impugned judgment and decree passed by the learned trial Judge in Regular Civil Suit No.514 of 1997 dated 30th April, 2002 filed by the appellants herein *inter-alia* praying for a declaration and injunction in respect of the suit property is reversed. Some of the relevant facts for the purpose of deciding this appeal are as under :

2. It was the case of the plaintiffs that they are the owners of the land bearing Survey No.61, Hissa No.1 (part) admeasuring 493 sq. yards, Survey No.61, Hissa No.(O) and Survey No.62, Hissa No.1 (part) situated at Adharwadi, Taluka Kalyan.

3. It was the case of the plaintiffs that there is Adharwadi road towards western side of the plaintiffs' property and there are Government godowns towards southern road. The respondent is the public body and had proposed to acquire the property on which the impugned structure is constructed for the purpose of road winding. Various notices were issued by the respondent while acquiring the said portion of the land. It was the case of the appellants that the respondents however, did not follow the mandatory procedure under sections 209 to 216 of the Bombay Provincial Municipal Corporations Act, 1949 (B.P.M.C. Act) for acquiring the property of the appellants and others for the purpose of road widening. It was their case that no notice was issued by the Corporation under section 53 of the Maharashtra Regional & Town Planning Act, 1966 (M.R.T.P. Act) before acquiring the property of the appellants.

4. The appellants accordingly filed a suit for a declaration and for perpetual injunction against the respondent. The suit was resisted by the respondent corporation. The respondent denied the allegations made in the plaint. It was mentioned in the written statement that after

the appellants prove the ownership right over the suit property, the respondent was ready and willing to give compensation by way of T.D.R. or F.S.I. to the appellants. The learned trial Judge framed seven issues, including the issue whether the plaintiffs prove the action on the part of the defendant corporation changing the alignment was illegal. The learned trial Judge has answered the said issue in affirmative. The learned trial Judge also held that the plaintiffs have proved that the defendant has no right to put up the road to the suit property without following due procedure of law. The learned trial Judge accordingly passed the judgment and decree dated 30th April, 2002, decreeing the suit filed by the appellants and declared that the defendant has no right to acquire the property of the appellants without following due process of law for the road widening. The learned trial Judge also passed an order of injunction restraining the respondent Corporation not to acquire the property of the appellants without following due process of law.

5. Being aggrieved by the said judgment and decree dated 30th April, 2002 passed by the learned trial Judge. The respondent (original defendant) filed an appeal (Civil Appeal No.67 of 2002) before the learned District Judge – 2, Kalyan.

6. Learned District Judge – 2, Kalyan formulated seven points for determination. The learned District Judge – 2, Kalyan held

that the appellants herein have not established the title over the suit property and house and have also not proved that the action of the respondent Corporation was illegal. It is held that the appellants were not entitled for any relief as claimed.

7. By an order and judgment dated 12th January, 2016 passed by the Learned District Judge – 2, Kalyan, the first appellate Court allowed the said Civil Appeal No.67 of 2002 filed by the respondent herein and has set aside the judgment and decree passed by the learned trial Judge in Regular Civil Suit No.514 of 1997, which was in favour of the appellants herein. Being aggrieved by the said judgment and decree dated 12th January, 2016, the appellants herein have preferred this second appeal under section 100 of the Code of Civil Procedure, 1908.

8. Mr. Page, learned counsel appearing for the appellants invited my attention to some of the notices issued by the respondent which are annexed to the additional compilation filed before this Court and would submit that the appellants were not issued the notices by the respondent while taking steps of acquisition of the suit plot. He submits that the appellants are exclusive owners of the suit plot, part of which was the subject matter of acquisition proceedings initiated by the respondent. He submits that the structure constructed is ancestral structure and if acquisition is not set aside, harm and great prejudice

would be caused to the appellants and their family members.

9. It is submitted by the learned counsel that though the respondent herein had not raised any dispute about the title of the appellants in respect of the suit property, the first appellate Court has erroneously rendered a finding in respect of the title of the appellants in respect of the suit property and has held that the appellants had failed to prove the title in respect of the suit property and the house.

10. Mr.Dhakephalkar, learned senior counsel appearing for the respondent corporation on the other hand submits that the respondent has followed the procedure for acquiring the suit property which is required for the road widening. He submits that without prejudice to the rights and contentions of the respondent on the issue whether the appellants had proved their title in respect of the suit property or not, the respondent had offered alternate F.S.I., T.D.R. or appropriate compensation to the appellants in lieu of the suit property acquired by the respondent for the road widening, however the appellants have refused to accept any proposal of the respondent. It is submitted by the learned senior counsel for the respondent that the first appellate Court has rightly appreciated the oral and documentary evidence led by both the parties and has considered the same in right perspective. He submits that since the appellants have not vacated the structure on the portion of land acquired for the purpose of road

widening, serious prejudice is caused to the respondent and the members of public. It is submitted that the public project cannot be stalled by the appellants by not handing over the suit property.

11. A perusal of the impugned judgment and decree passed by the first appellate Court indicates that the first appellate Court has considered the oral as well as documentary evidence relied upon upon by both the parties. The first appellate Court also considered the issue whether the appellants had title in respect of the suit property or not. It is held that there are three co-sharers in the suit property, however the appellants had not given the exact location of the Modi and Shah's name and thus in absence of the description of the suit property, the appellants could not substantiate the title towards the suit property.

12. The first appellant Court has after considering the oral evidence of the witness examined by the appellants, who had admitted in deposition that only in front of the suit property, the proposed road widening was to the extent of 12 x 14 in width. The first appellate Court considered the obstructive attitude of the appellants, who categorically stated that they were not ready and willing to surrender the vacant possession of the suit property even if the respondent corporation would offer FSI, TDR and compensation.

13. During the pendency of the civil appeal, the first appellate

Court appointed a Court Commissioner to measure the suit property and has rightly come to the conclusion that the appellants had encroached on the proposed road. The first appellate Court in paragraph 22 of the impugned judgment and decree has clarified that after completion of the road widening, the appellant may institute a suit for compensation if they are having any title, but the blanket injunction cannot be granted against the defendant corporation. The first appellate Court accordingly held that the action on the part of the corporation is legal, proper and valid. The public interest was required to be considered by the learned trial Judge.

14. During the course of arguments by the learned counsel for the appellants in this appeal also, the respondent through the learned senior counsel repeated the offer made by the respondent in the appeal vide letter dated 2nd March, 2016. However, learned counsel for the appellants, on instructions refused to accept any of such offer made by the respondent which in my view was a reasonable offer. In any event public project cannot be stalled by the appellants by refusing to hand over possession of the acquired portion. If the appellants succeed in proving title in appropriate proceedings, the appellants can be compensated. In my view, the first appellate Court was thus justified in allowing the appeal filed by the respondent and also on the ground of unreasonable and obstructive attitude of the

appellants by recording various reasons. In my view, the findings rendered by the first appellate Court are not perverse and thus cannot be interfered with by this Court in this appeal filed under section 100 of the Code of Civil Procedure, 1908. The appeal is devoid of merits and is accordingly dismissed. No substantial question of law arises. No order as to costs.

15. In view of dismissal of the second appeal, Civil Appeal No.267 of 2016 does not survive and is accordingly disposed of. It is made clear that the issue of title in respect of the suit property is kept open and can be agitated in appropriate proceedings.

16. At this stage Mr.Page, learned counsel for the appellants seeks continuation of the *ad-interim* protection granted by this Court, which is vehemently opposed by the learned senior counsel for the respondent.

17. *Ad-interim* protection granted by this Court to the appellants to continue for a period of four weeks from today. It is made clear that the appellants shall not create any third party rights in respect of the suit property or handover possession thereof in favour of any third party during the continuation of the *ad-interim* protection granted by this Court.

(R.D. DHANUKA, J.)