

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5094 OF 2016**

Gangadhar Bhaguji Makhare

Petitioner

Vs

1. Yashwant Sambhaji Bansode
and Ors.

.. Respondents

Mr. P.G.Sarda, Advocate for Petitioner.

Mr. R.S.Datar, Advocate for Respondents no.1 to 3.

CORAM : R.G.KETKAR,J.

DATE : 29/04/2016

PC:

1. Heard Mr. P.G.Sarda, learned counsel for the petitioner and Mr. R.S.Datar, learned counsel for respondents no. 1 to 3 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 16.4.2016 passed by the learned District Judge-1, Baramati in Misc. Civil Appeal No.63 of 2014. By that order, the learned District Judge allowed the Appeal preferred by respondents no.1 to 5 herein and quashed and set aside the Judgment and order dated 15.9.2014 passed by the learned Civil Judge, Jr. Dn., Baramati below Exhibit-5 in Regular civil suit No.270 of 2014. The learned District Judge rejected the application made by the petitioner, hereinafter referred to as 'plaintiff, for temporary injunction.

3. Mr. Sarda strenuously contended that the construction

carried out by respondents no.1 to 5 is unauthorised. He invited my attention to the finding recorded by the learned trial Judge in paragraph 9. He submitted that for the construction which they are carrying out, respondents no.1 to 5 have not obtained any permission from Competent Authority. House property is assessed for payment of tax. The learned trial Judge further held that no sufficient side margin has been kept by the defendants. The learned trial Judge further held that the plaintiff has legal right of enjoyment of the suit property without any disturbance. Accordingly, the learned trial Judge allowed the application.

4. As against this, the learned District Judge, however, without considering the letter dated 21.7.2014 issued by Village Development Officer of Gram Panchayat, Gunwadi Taluka-Baramati, allowed the Appeal. The learned District Judge did not consider whether the construction carried out by the defendants is authorised or not. He, therefore, submitted that the impugned order deserves to be set aside.

5. On the other hand, Mr. Datar supported the impugned order. He invited my attention to paragraph 20 of the District Court Order as also rough sketch produced by the plaintiff which is at page 94 of the writ petition. He submitted that the learned trial Judge as also learned District Judge held that the plaintiff cannot claim any easementary right of air and light to an open space.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. By application at Exh.5, the plaintiff has sought injunction restraining the defendants from carrying out construction till final decision of the suit as also causing obstruction to the plaintiff from enjoyment of free air and light and also restraining the defendants from ensuring that rain water does not fall in his property. By order dated 15.9.2014, the learned trial Judge issued injunction restraining defendants no. 1 to 9 from completing permanent construction of their building till final disposal of the suit. While allowing the application, in paragraph 8, the learned trial Judge recorded a finding that the plaintiff is claiming easement by prescription but a right to the free passage of light or air by way of prescription cannot be acquired to an open space. Thus, the question remains about discharge of rain water on the suit property. After considering the material on record, the learned trial Judge came to the conclusion that the construction carried out by defendants no. 1 to 9 is illegal.

7. As against this, in paragraph 20 of the impugned order, the learned District Judge has considered rough sketch produced by the plaintiff on record. After considering this, the learned District Judge has recorded a categorical finding that there is much difference between plaintiff's dwelling house and alleged

construction by the defendants. Question of rain water falling on plaintiff's property absolutely does not arise. The learned District Judge also recorded a finding that the plaintiff cannot acquire easementary right to free air and light to an open space. In paragraph 16, the learned District Judge observed that whether the alleged construction is legal or illegal and whether defendants no. 1 to 9 have obtained necessary permissions from the Government Authorities or not, is not within the jurisdiction of the Court. In paragraph 9, the learned trial Judge observed that the defendants have not obtained any permission from the Competent Authority which means that the construction is illegal. It was further observed that the defendants have not kept sufficient side margin. Prima facie, the findings recorded by the learned trial Judge in this regard are not supported by any provision of law. The learned trial Judge did not consider whether permission for carrying out construction in the agricultural land is necessary or not and if yes the provisions prescribing maintenance of side margin. In view thereof, I do not find that the learned District Judge has committed any error in passing the impugned order. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)