

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5727 OF 2015

Champalal Lakhichand Abbad
(Deceased) through legal heirs
Basvantabai Champalal Abbad
(Deceased), through legal heirs i.e.
Petitioner Nos.2 to 5 and Ors.

.. Petitioners

vs.

Vijay Datttray Joshi & Ors.

.. Respondents

Mr.S.M.Sabrad for the petitioner

Mr.Vivek V. Salunkhe for the respondent nos.1 to 6

CORAM : K. K. TATED, J.
DATE : JULY 11, 2016

PC.:

1 Heard the learned counsel for the parties.

2 By this petition, under Article 227 of the Constitution of India, the Petitioner defendant nos.1 challenges the order dated 26.4.2013 passed by learned District Judge-I, Niphad in Miscellaneous Civil Appeal No.18 of 2012 restraining petitioner defendant no.1 from selling the flats in the building constructed by him on Gram Panchayat

House Nos.337/1, 337/2 and 347 i.e. CTS No. 1229 and 946 situated at Lasalgaon, Tal. Niphad until final disposal of the Suit.

3 The petitioner also challenges the order dated 5.1.2015 passed by learned District Judge-I, Niphad below Exhibit 15 in Miscellaneous Civil Application No.44 of 2013 dismissing the defendant no.1's application for condonation of 73 days delay in filing the application for review of the order dated 26.4.2013 passed in Miscellaneous Civil Appeal No.18 of 2012.

4 In the present proceeding, the respondent plaintiff filed Regular Civil Suit No.129 of 2011 before Civil Judge, Senior Division, Niphad for declaration that the defendant no.1 carried out unauthorised construction on Gram Panchayat Road and for other reliefs. In that Suit, the plaintiff preferred application below Exhibit – 5 under Order XXXIX Rule 1 and 2 of the Civil Procedure Code, 1908 for order of injunction restraining the defendant no.1 from creating any third party right, title and interest in respect of flats constructed by him during the pendency of the Suit.

5 In Regular Civil Suit No.129 of 2011, Civil Judge, Senior Division, Niphad by order dated 30.3.2012 below Exhibit 5 and 7 directed TILR, Niphad to measure the suit site and fix boundaries of public way, on depositing necessary fees of the measurement by GramPanchayat-Lasalgaon. The Trial Court further directed that on the basis of TILR's reports if any, unauthorised construction is found on public way, same shall be removed immediately by taking steps under

section 52 of the Bombay Village Panchayat Act. Operative Part of the order dated 30.3.2012 passed by Trial Court below Exhibit 5 and 7 reads thus:

“ORDER

1. Defendant no.2 Grampanchayat-Lasalgaon is directed to deposit necessary fees of measurement of public way near to the suit sites for making measurement through T.I.L.R. Niphad.
2. T.I.L.R. Niphad is directed to measure the suit site and fixed the boundaries of public way on depositing necessary fees of measurement from Grampanchayat-Lasalgaon.
3. After ascertainment of the encroachment, if any, made by defendant no.1 on public way it shall be removed immediately by taking steps under Section 52 of Bombay Village Panchayat Act.
4. Accordingly, Exh.5 and 7 are disposed of.”

6 As per the order passed by Trial Court, the Court Commissioner TILR carried out measurement of the Suit Property and submitted his report dated 4.10.2012. In the said report, the Court Commissioner specifically stated that the defendant no.1 has not carried out any unauthorised construction on the public road.

7 Being aggrieved by the order passed by Trial Court dated 30.3.2012 below Exhibit 5 and TILR report, the respondent plaintiff preferred Misc. Civil Appeal No.18 of 2012 in the court of District Judge, Niphad. Before the appellate court, no one appeared on behalf

of defendant no.1 on 24.4.2013, 25.4.2013 and 26.4.2013. Hence, the Appellate Court decided the Appeal against defendant no.1. The Appellate Court by impugned order dated 26.4.2013 restrained defendant no.1 from creating third party right, title and interest in respect of flats in the building constructed by him on Gram Panchayat House 337/1, 337/2 and 347/6 i.e. CTS No.1229 and 946 situated at Lasalgaon, Taluka Nasik until final disposal of the Suit. Hence, the present Writ Petition.

8 The learned counsel for the defendant no.1 submits that defendant no.1 in all constructed 23 flats on the suit property. Out of that, he sold 11 flats to the prospective buyers. He submits that remaining 12 flats are also ready in all means. He submits that defendant no.1 carried out construction as per the sanction plans from Gram Panchayat. He submits that the appellate court failed to consider the Court Commissioner report dated 4.10.2012 in which he specifically stated that defendant no.1 has not carried out any unauthorised construction on the public road. He further submits that the appellate court erred in coming to the conclusion that defendant no.1 carried out unauthorised construction on the public road just because as per the letter of Gram Panchayat dated 22.12.2010 defendant no.1 failed to carry out measurement of the land. He submits that at the time of passing impugned order the appellate court failed to consider the sanction granted by Gram Panchayat for construction activities as well as the Court Commissioner TILR's report. He submits that as the defendant no.1 carried out construction of the suit flats after obtaining permission from the Gram Panchayat,

impugned order passed by the appellate court is required to be set aside.

9 The learned counsel for the defendant no.1 further submits that appellate court erred in coming to the conclusion that defendant no.1 failed to disclose sufficient cause for condonation of 73 days delay in filing the Review Application for reviewing the order dated 26.4.2013. He submits that in the interest of Justice, this Hon'ble Court be pleased to set aside order dated 5.1.2015 passed by learned District Judge-1, Niphad below Exhibit 1 in Civil Misc.Application No.44 of 2013. He submits that if present Writ Petition is not allowed, irreparable loss and injury will be caused to him.

10 On the other hand the learned counsel for the respondent org.plaintiff vehemently opposed the present Writ Petition. He submits that defendant no.1 failed to make out a case for setting aside the impugned order passed by Appellate Court in 2013. He submits that for last more than 3 ½ years injunction order is in favour of the plaintiff. At the most, in the interest of Justice, this Hon'ble Court be pleased to direct the Trial Court to decide the Suit as early as possible.

11 The learned counsel for the plaintiff submits that as the Court Commissioner failed to carry out court commissioner's work according to law, they filed objection before the Trial Court. He submits that the objections are pending for hearing and final disposal before the Trial Court. He submits that TILR's report dated 4.10.2013 cannot be considered for deciding the present Writ Petition because the same is

not final. The objection raised by them are pending for hearing on its own merits. He further submits that if stay is vacated and defendant no.1 creates third party right, title and interest in respect of the suit flats then it will be very difficult for them to execute the decree in case same is passed in their favour. Hence, in the interest of Justice, during the pendency of Suit before Trial Court, defendant no.1 should not be allowed to create third party right, title and interest in respect of remaining suit flats. Hence, there is no substance in the present Writ Petition and same be dismissed with costs.

12 Heard the learned counsel for the parties.

13 In the present proceeding, plaintiff filed Suit for declaration that the defendant no.1 carried out construction unauthorisedly on public road. To that effect, Trial Court directed TILR to carry out the measurement and submit the report. TILR submitted his report and specifically made a statement in report that defendant no.1 has not carried out any construction on the public road.

14 The appellate court on the basis of Gram Panchayat's letter restrained the defendant no.1 from creating any third party right, title and interest in respect of remaining 12 flats.

15 It is to be noted that as on today the defendant no.1 is holding permission from the Gram Panchayat for carrying out construction activities. That permission is not set aside by any competent authority and or court. These facts were not considered by the appellate court at

the time of passing impugned order dated 26.4.2013.

16 Considering these facts, I am of the opinion that petitioner has made out a case for allowing this Writ Petition. But at the same time some conditions are required to be put on the defendant no.1 if he wants to sell the suit flat. Hence, following order is passed:

- a) Order dated 26.4.2013 passed by District Judge-I, Niphad in Misc. Civil Appeal No.18 of 2012 is set aside.
- b) At the time of creating third party right, title and interest in respect of the suit property, defendant no.1 should disclose to prospective buyer about the pending litigation in writing and same be shown as part and parcel of agreement for sale and / or sale deed.
- c) Hearing of Regular Civil Suit No.129 of 2011 is expedited.
- d) In view of setting aside the impugned order dated 26.4.2013 passed by learned District Judge-I, Niphad in Misc.Civil Appeal No.18 of 2012, application filed by defendant no.1 for review being Civil Misc. Application No.44 of 2013 and application below Exhibit 15 becomes infructuous.
- e) Writ Petition stands disposed of accordingly.

f) Trial Court should decide the Suit on its own merits without influencing the order passed by this court.

g) At this stage, the learned counsel for the plaintiff seeks continuation of interim relief granted by the appellate court. It is to be noted that defendant no.1 carried out construction after obtaining permission from the competent authority and also the Court Commissioner TILR held that defendant no.1 has not carried out any unauthorised construction on the public road. Therefore, I do not find any reason to continue the injunction order. Hence, oral request is rejected.

JUDGE