

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO.14069 OF 2015**

Pravin Prakash Herwade & Ors
Vs
1. Shri Shantinath Bapusa
Herwade and Ors.

Petitioners
.. Respondents

Mr. Manoj A. Patil, Advocate for Petitioners.
Ms. Kranti Anand i/b Jitendra M. Mulik, Advocate for Respondent no.1.
Mr. Rajesh Pawar, A.G.P. for State.

CORAM : R.G.KETKAR,J.
RESERVED ON : 05/05/2016
PRONOUNCED ON: 07/06/2016.

PC:

1. Heard Mr. Manoj Patil, learned counsel for the petitioners, Ms Kranti Anand, learned counsel for respondent no.1 and Mr Rajesh Pawar, learned A.G.P for State, at length.
2. Mr. Patil states that the plaintiff and State are only contesting respondents and, therefore, seeks leave to delete rest of the respondents. On the oral application made by Mr. Patil, leave, as prayed for, is granted. Amendment shall be carried out forthwith.
3. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.
4. By this Petition under Article 227 of the Constitution of

India, the petitioners have challenged the Judgment and order dated 16.3.2015 passed by the learned District Judge-2, Sangli in Misc. Civil Appeal No. 45 of 2011. By that order, the learned District Judge allowed the appeal preferred by respondent no.1, hereinafter referred to as 'plaintiff', and quashed and set aside the Judgment and order dated 30.10.2010 passed by the learned Civil Judge, Sr. Dn., Sangli below Exhibit 5 in Regular civil Suit No. 348 of 2010. The learned District Judge directed the trial Court to expedite the main suit and dispose it off as early as possible by giving full opportunity to both the parties.

5. The plaintiff has instituted suit against the petitioners, hereinafter referred to as 'defendants no. 4 and 5' and others, challenging the licence dated 23.8.2010 issued by respondent no.2, hereinafter referred to as 'defendant no.3'-Executive Engineer, Kolhapur Irrigation Division, Kolhapur; for perpetual injunction restraining defendant no.1 - Maharashtra State Electricity Distribution Co. Ltd (for short, 'MSEDCL'). During the pendency of that suit, the plaintiff took out application - Exh.5 for temporary injunction restraining defendants no. 4 to 11 from fetching water through common pipeline without the plaintiff's permission. By the Judgment and order dated 30.10.2010, the learned trial Judge dismissed the application. Aggrieved by that decision, the plaintiff preferred Appeal which is allowed by the impugned order. It is against this order, defendants no. 4 and 5

have preferred this petition.

6. In support of this petition, Mr. Patil submitted that while rejecting the application, the learned trial Judge specifically observed in paragraph 24 that the plaintiff has not established a prima facie case. Defendants no.1 to 3 have given electricity supply and also licence after ensuring compliance of all the conditions by defendants no. 4 and 5. That apart, the plaintiff is also fetching water through the common pipeline. Under these circumstances, if the defendants are restrained from fetching water from the pipeline, there would not be water supply for crops which will result in irreparable loss and hardship which cannot be compensated in terms of money. The learned trial Judge came to the conclusion that the plaintiff has no prima facie case, balance of convenience does not lie in his favour and that irreparable loss and hardship will be caused to defendants no. 4 to 11, in case injunction is granted.

7. The learned District Judge, however, interfered with the discretionary order passed by the learned trial Judge on the ground that Gat nos. 1 to 999 of village Dudhgaon are under the Command Area of Vasantdada Shetkari Sahakari Sakhar Karkhana Ltd, Sangli (for short, 'Vasantdada karkhana') and under its "Dhadak" Irrigation Scheme, Dudhgaon. Defendants no. 4 and 5 have not obtained N.O.C from Vasantdada Karkhana as also from the Irrigation Department. Even the plaintiff's no

objection was not obtained. There is breach of condition no.5 as also Rules and Regulations framed under the Maharashtra Irrigation Act, 1976.

8. In paragraph 28, the learned District Judge observed that the learned trial Judge hastily decided temporary injunction application Exhibit-5 and should have decided that application along with Exhibit-31. He submitted that perusal of the operative part of the order shows that after allowing the appeal and setting aside the trial Court's order, the learned District Judge, however, has not passed further order. He submitted that the plaintiff has not challenged the impugned order. For all these reasons, he submitted that the impugned order deserves to be set aside, thereby, confirming the trial Court order.

9. On the other hand, Ms. Anand submitted that the plaintiff came with the specific case that Gat nos 1 to 999 are under the Command area of Vasantdada Karkhana and under its "Dhadak" Irrigation Scheme, Dudhgaon. Defendants no. 4 and 5 have to make application to Vasantdada Karkhana for water supply. In the event of inability of Vasantdada karkhana in supplying water to defendants no. 4 and 5, then only application could be made to defendant no.3. Defendants no. 4 to 11 were under obligation to obtain N.O.C from Vasantdada Karkhana as also from Dhadak Irrigation Scheme and from the plaintiff. In fact, condition no.5 of licence dated 23.8.2010 is to that effect. Thus, defendants no. 4

to 11 have obtained licence by suppressing the material fact.

10. She further submitted that during the pendency of hearing of the application Exhibit-5, the plaintiff filed application dated 25.10.2010 at Exhibit-31 under section 151 of C.P.C. for staying licence dated 23.8.2010. Application Exhibit-5 was rejected on 30.10.2010 without deciding the application Exh.31. In fact, the learned trial Judge should have decided the application Exhibits 5 and 31 together. After rejecting the application Exh.5 on 30.10.2010, the learned trial Judge rejected the application Exh.31 on the ground that as Exhibit-5 is dismissed on merits, there was no substance in the application. She submitted that by the impugned order, the learned District Judge has allowed the appeal and set aside the trial Court's order below Exh.5. The sequitur is that application Exhibit 5 preferred by the plaintiff stands allowed. She, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Operative part of the impugned order reads thus:

“(1) Appeal is allowed.

(2) The impugned order, dated 30.10.2010 passed by learned Civil Judge, Senior Division, Sangli below Exhibit 5 in Regular civil Suit No.348/2010 rejecting temporary injunction application is hereby set aside and quashed.

- (3) Both parties to bear their own costs.
- (4) The learned trial Court is hereby directed to expedite the main suit and dispose it off, as early as possible, by giving full opportunity to both the parties.
- (5) A copy of this judgment be sent to the Civil Judge, Senior Division, Sangli.

Perusal of the operative order extracted herein above, shows that the learned District Judge allowed the appeal and set aside the trial Court's order dated 30.10.2010 passed below Exhibit-5. The learned District Judge, thereafter, has not passed any positive order allowing the application Exhibit-5. The learned District Judge, however, merely directed the learned trial Judge to decide the main suit expeditiously.

12. That apart, in paragraph 28 of the impugned order, the learned District Judge observed that the learned trial Judge hastily decided the application Exh.5 and should have decided the application Exh.5 together with application at Exh.31. Perusal of the Appeal Memo shows that the plaintiff did not challenge the order passed below Exh.31, though the same was passed pending the appeal. The plaintiff either should have amended the appeal so as to challenge the order passed below Exh.31 or the learned District Judge should have granted leave to amend to the plaintiff for challenging the order passed by the learned trial Judge below Exh.31.

13. In the light of the discussion, the impugned order cannot be

sustained and as such is liable to be set aside, thereby, restoring Misc. Civil Appeal no.45 of 2011 to the file of the learned District Judge. As I am remanding the matter, I deem it appropriate not to deal with the contentions raised in this petition, lest it may influence the lower court. Hence, the following order.

(i) Impugned order dated 16.3.2015 is quashed and set aside, thereby, Misc. Civil Appeal No. 45 of 2011 is restored to the file of the learned District Judge.

(ii) Plaintiff is granted leave to amend Appeal Memo so as to challenge the order dated 1.10.2012 passed by the learned trial Judge below Exhibit-31.

(iii) Parties appearing before this Court agree that they will appear before the learned District Judge on 16.06.2016 for which notices need not be issued to them. The learned District Judge will ensure that rest of the parties are served and thereafter proceed to decide Misc. Civil Appeal expeditiously and in any event within three months from completion of service. The learned District Judge will deal with the contentions recorded herein and all other contentions that may be available to the parties. All contentions on merits are expressly kept open.

(iv) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)