

Sequeira

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 527 OF 2014
Along with
CIVIL APPLICATION NO. 1272 OF 2014
(For injunction)**

Shree. Datta Co-operative Housing
Society Ltd., Kolhapur & ors. .. Appellants / Applicants
Versus.
Swantrya Sainik Co-op. Housing
Society Ltd. Kolhapur & ors. .. Respondents

Mr.Amit Borkar a/w Mr.Harshad Shingnapurkar, for Appellants /
Applicants.
Mr.Tejpai Ingale, for Respondent No.1.
Mr.R.S.Pawar-Assistant Government Pleader, for Respondent No.2.

**CORAM: N.M. JAMDAR, J.
Wednesday, 30 March 2016.**

Oral Order :

The Appellants challenge the concurrent findings rendered by Civil Judge, Senior division Kolhapur and the District Judge Kolhapur whereby the suit and Appeal filed by the Appellants are dismissed.

2. The Appellant-Shree Datta Co-operative Housing Society and the Respondent No.1 -Swantrya Sainik Co-op. Housing Society have their plots adjoining to each other. The suit was filed by the Appellants for injunction as regards a strip of land admeasuring 25 x 300 feet. The Appellants prayed for an injunction that the Respondent No.1-Society should not construct on the suit land. It was a case of the Appellants that this strip of land is a public road

which is being used for the purpose of drainage. It was also the case of the Appellants that lay out plan No.185/1976 which has been sanctioned by the Planning Authority has shown this strip of land as public road. Both Courts have come to the conclusion that this strip of land is not a public road.

3. The learned counsel for the Appellants firstly relied upon the lay out plan of 1976, which is part of the record. However a Written statement has been filed by the Planning Authority in which it is pointed out by the Planning Authority that the lay out plan of 1976 showed the strip of land as an internal road for the Respondent No.1- Housing society and it was never for public use or for drainage. It was also placed on record by the Planning Authority that the lay out was changed in the year 1991 and this internal road was shifted from the edge of the plot to the centre of the plot. If this position placed on record by the Planning Authority is considered, it clearly shows that the strip of land was never a public road as alleged by the Appellants but was only an internal road, which by a change of lay out, shifted in its location.

4. The learned counsel for the Appellants submitted that in any case since the Respondent No.1-Society has not been able to show its ownership to the suit land the order of injunction ought to have been granted. This submission cannot be accepted. The Appellants with full knowledge of the revised lay out of 1991 filed a suit in the year 1992 based on old lay out alleging that the strip of land is a public road and is meant for the use of drainage of the

Appellant-Society. Once this was found to be factually incorrect by the Planning Authority, atleast in the appellate Court the argument which is sought to be advanced today could have been made. Instead the Appellant persisted with its stand based on old layout. The Appellants cannot be permitted to keep changing its stand as to why the Respondent No.1-Society is not entitled to construct on this land. In spite of the lay out being sanctioned in the year 1992, the Respondent No.1-Society has not been able to carry out the construction in the suit land because of the litigation instituted by the Appellants.

5. The learned counsel for the Appellants submitted that the application for additional evidence ought to have been granted especially when the finding rendered was that the Appellants have failed to prove that the suit land is a public road. This submission also cannot be accepted. Once the Planning Authority has placed on record the position that the suit land was not a public road then in any case deference had to be given to the statement made by Planning Authority pursuant to the official record.

6. As stated above, the Appellants came to the Court with a clear case that the suit land is a public road which was not found to be correct. It is pointed out by the learned counsel for the Respondent that the Appellant had full knowledge that lay out was changed still suit was filed on the old lay out. The argument sought to be made today is being made for the first time. Once the Planning Authority has placed on record, with particulars, that

only thing that was done was to change the lay out, the argument that still the Respondent No.1 should be injuncted from constructing on the suit land cannot be accepted.

7. No other question was urged. What is sought to be urged was never raised in the appellate Court and cannot be permitted to be urged in the Second appeal for the first time. The Second Appeal does not involve any question of law and is dismissed. Civil application stands disposed of.

(N.M. JAMDAR, J.)