

Sequeira

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

WRIT PETITION NO. 423 OF 2016

Umesh Shivappa Jadhav & ors.

... Petitioners

Vs.

Yuvraj Laxman Jadhav & ors.

... Respondents

Mr.Ketan Joshi a/w Mr.Sanjiv A. Sawant, for Petitioners.

Mr.Aaditya Gore h/f Mr.Varad Deore, for Respondent No.1.

Mr.I.M.Khairdi, for Respondent No.3.

***CORAM : N.M.Jamdar, J.
Tuesday, 30 August 2016.***

P.C. :

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for disposal forthwith by consent.

2. The Petitioners challenge the order passed by the District Judge, Solapur dated 24 November 2015 in Civil Miscellaneous Appeal No.165 of 2015. By the impugned order the learned District Judge has allowed the Appeal filed by the Respondents setting aside the order passed by the learned Civil Judge below Exhibit 63 and has confirmed the order passed by the learned Civil Judge below Exhibit 5.

3 The Respondent-Plaintiff filed a Regular Civil Suit No.221 of 2013 in the Court of Civil Judge Senior Division Solapur for mandatory injunction. On 11 June 2013, the learned Civil Judge allowed the application and granted an order of injunction against the Petitioner thereby restraining the Petitioner not to construct upon the suit plot. The order was challenged by the Petitioner by filing the Miscellaneous Civil Appeal in the District Court. The Appeal was dismissed on 5 August 2014 and a writ petition was filed. The writ petition was disposed of on 17 September 2014 giving liberty to the Petitioner to file an application as per Order XXXIX Rule 4 of the Code of Civil Procedure. From the decision of this application and the application below Exhibit 63, the present Writ Petition arises.

4. Heard learned counsel for the parties. On 26 July 2016, the learned Single Judge (K.K.Tated, J.) passed the following order -

'1. Heard. By this petition under Article 227 of the Constitution of India the Petitioner defendant challenges the order dated 24.11.2015 passed by the learned District Judge 2, Solapur in Civil Misc. application No.165/2011 restraining the petitioner from carrying out any construction activities on the suit plot.

2. The respondent plaintiff filed suit restraining the petitioner defendant from carrying out any unauthorised construction on the suit plot.

3. On the other hand, it is contention of the petitioner defendant that they are carrying out construction activities according to sanctioned plan on their plot.

4. To solve this dispute between the parties, it is necessary to direct the petitioner to join Solapur Municipal Corporation as party respondent.

5. Hence, following order is passed:

a. The petitioner is directed to join Solapur Municipal Corporation as respondent in the Writ Petition.

b. Amendment to be carried out during the course of the day.

c. Liberty granted to the petitioner to serve the respondent Solapur Municipal Corporation by hand delivery and file an Affidavit of service.

d. If copy is served within stipulated time as stated hereinabove, the Solapur Municipal Corporation is directed to point out whether the respondent has carried out construction activities on their plot as per the Rules.

e. Affidavit/reply shall be filed by the Solapur Municipal Corporation within a week from the date of receipt of a copy of the Writ Petition.'

5. Pursuant to this order the Municipal Corporation has been joined in this petition. The learned counsel for the Municipal Corporation appears and seeks time to file the report.

6. This Court has already directed the Planning Authority to file a report to point out whether the parties have carried on construction activities on the plot as per rules. After such report is filed there are bound to be arguments of the parties on the said report and based on

this report which will entail an inquiry into factual aspects. This Court in view of earlier litigation between the parties, to put an end has directed that Planning Authority to join as a party to the dispute so that factual aspects of the matter will be clear. In these circumstances the appropriate course of action would be to direct the learned District Judge, who is last fact finding Court, to decide the issue based on the report to be filed by the Municipal Corporation by giving opportunity to parties to comment on the said report. It is not possible for the Court to carry out this exercise of determination of factual aspects for the first time under the power of superintendence. The learned counsel for the parties also agree that this will be the correct course of action to be taken. In view of the fact that this Court has already directed the Municipal Corporation to be joined as a party, the Respondent-Plaintiff will join the Municipal Corporation as a party Defendant in the suit. In the circumstances, the Writ Petition is disposed of by the following order-

(a) The impugned order passed by the learned District Judge Solapur dated 24 November 2015 in Miscellaneous Civil Appeal No.165 of 2015 is quashed and set aside.

(b) Miscellaneous Civil Appeal No.165 of 2015 stands restored to file.

(c) Respondent-Plaintiff will join Solapur Municipal Corporation as party Defendant in the Regular Civil Suit No.221 of 2013.

Amendment to be carried out within period of three weeks from today.

(d) The Petitioners will carry out the amendment in the Miscellaneous Civil Appeal and join Solapur Municipal Corporation as a party Respondent to the Appeal.

(e) The Solapur Municipal Corporation will submit a report as directed by this Court by order dated 26 July 2016 within period of four weeks from today in the Court of District Judge Solapur in Civil Miscellaneous Appeal No.165 of 2011.

(f) The learned District Judge will dispose of the Civil Miscellaneous Appeal No.165 of 2015 after perusal of the report submitted by Solapur Municipal Corporation by giving opportunity to the parties.

(g) All contentions of the parties in respect of the report to be submitted are kept open.

(h) The learned counsel for the Petitioners on instructions makes a statement that till the disposal of the Appeal, the Petitioners will not carry out any construction activities in the suit plot. This statement made on instructions is accepted.

(i) After the above formalities are completed the learned District Judge will make endeavour to dispose of the Civil Miscellaneous Appeal within period of eight weeks thereafter.

(j) The parties will appear before the learned District Judge, on 19 September 2016. Rule is made absolute in above terms.

7. No order as to costs.

(N.M.Jamdar, J.)