

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8295 OF 2017

Municipal Council, Pathri,
Tq. Pathri, District-Parbhani,
Through: its Chief Officer

...Petitioner
(Ori. Defendant No. 1)

Versus

1. Dilip s/o Mariba Dhawale
Age-47 years, Occu. Agri.,
R/o Bhimnagar, Pathri,
Tq. Pathri Dist. Parbhani.
2. Shaikh Shafi Shaikh Vajir,
Age-53 years, Occu. Business,
R/o c/o Ruksana Chaus,
Shahu Nagar, Pathri, Tq. Pathri,
District-Parthani

...Respondents
(No. 1-Ori. Plaintiff)
(No.2-Ori. Deft. No. 2)

...

Mr. Manish P. Tripathi, Advocate for petitioner
Mr. Suresh P. Salgar, Advocate for respondent no. 1

...

[CORAM: SUNIL P. DESHMUKH, J.]

Date: 25th July, 2017

JUDGMENT :

1. Heard learned counsel for the parties.
2. Petitioner is Municipal Council established as per the provisions of Maharashtra Municipal Council, Nagar Panchayat and Industrial Township Act, 1966.
3. Petitioner – Municipal Council issued notice to respondents to remove structure alleging encroachment over public road situated at Shahu Nagar. Respondent no. 1 challenged demolition notice dated 24th September, 2015 by way of filing regular civil suit no. 69 of 2015 before learned civil judge, junior division, Pathri and prayed for perpetual injunction. Petitioner – Municipal Council appeared and filed its written statement and resisted the claim of respondent no. 1. After hearing the parties, civil judge, junior division, Pathri dismissed the suit filed by respondent no. 1.
4. Being aggrieved by the judgment and decree dated 10th November, 2016, respondent no. 1 approached the district judge, Parbhani in regular civil appeal bearing no. 137 of 2016 which is pending.

5. Writ petition has been moved against Judgment and order dated 21st January, 2017 passed by district judge-2, Parbhani on application exhibit-5 in regular civil appeal no. 137 of 2016, staying operation of demolition notice dated 24th September, 2015.

6. Learned counsel for the petitioner contends that trial court has decided the suit on merits after considering evidence on record and, hence, the application ought to have been rejected.

7. Learned counsel for respondent no. 1, however, submits that appeal against decree in regular civil suit no. 69 of 2015 is pending. He points out that interim relief had been operating in favour of respondent no. 1, during the pendency of suit.

8. Learned counsel for respondent no. 1, further submits that looking at *prima facie* case, irreparable loss and balance of convenience appellate court had observed that if execution of notice dated 24th September, 2015 is allowed then the purpose of preferring appeal may be frustrated. Appellate court has further referred to section 107 of the Code of Civil Procedure, pursuant to which appellate court

has all the power of the court of original jurisdiction. Section 151 of the Code of Civil Procedure empowers the court to pass appropriate order as may be necessary to meet the ends of justice.

9. Appellate court in paragraph no. 5 of the impugned order has observed thus;

“ 5. After hearing both the parties, I have gone through the record. Preferring the first appeal is statutory right given to the aggrieved party. This is being the first appeal and if respondent No. 1 executed it's act as shown in the show cause notice dated 24.09.2015 then very purpose of preferring the appeal will be frustrated. Technical objection raised by the respondent No. 1 that the Trial Court has not passed any executable decree. As per section 107 of the Code of Civil Procedure, appellate Court has all the powers of the Court of original jurisdiction. Section 151 of the Code of the Civil Procedure also empowers the court to pas any order as may be necessary for the ends of justice. In the facts and circumstances of the case, in my opinion, it is just and proper to allow the application as the right of the

parties yet not determined finally. Hence, application (Exh.5) deserves to be allowed”.

10. Having regard to aforesaid, it does not appear that appellate court has committed any error and it is not the case whereunder discretion under writ jurisdiction shall be exercised. Impugned order, as such, does not call for interference.

11. Writ petition, therefore, stands rejected.

12. Learned counsel for petitioner at this stage submits that appeal may be directed to be proceeded with expeditiously.

13. Having regard to aforesaid, it is expedient that if the appeal is ready, same would be proceeded with expeditiously and be disposed of preferably within a period of nine months from the date of receipt of writ of this order.

[SUNIL P. DESHMUKH, J.]