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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 42 OF 2017
WITH
CIVIL APPLICATION NO. 13601 OF 2015**

1. Aurangabad Municipal Corporation
Through the Commissioner,
Municipal Corporation,
Town Hall, Aurangabad,
District Aurangabad

2. The Assistant Director,
Town Planning Department,
Aurangabad Municipal Corpn.,
Town, Hall, Aurangabad,
District Aurangabad

..APPELLANTS
(Orig.respondents)

VERSUS

Jitendra s/o Ayodhyaprasad Bansal,
Age: 55 years, Occu: Business,
R/o Vidyaniketan Colony,
Aurangabad

..RESPONDENT
(Orig.appellant)

Mr S. S. Tope, Advocate for appellants;
Mr A. S. Shelke, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 5th July, 2017

ORAL ORDER

Respondent-plaintiff filed Regular Civil Suit No.151 of 2010 (Old No.890 of 2009) in the Court of Civil Judge Senior Division, Aurangabad for declaration and permanent injunction. It is the claim of the respondent that he is owner of plot no.23, ad measuring 469.70 Sq. Mtrs. out of Survey No.18/2, located at Garkheda, Aurangabad, which was purchased by him

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by registered sale deed dated 27th July, 1999 from one Kamlakar Laxman Patwari, who is owner of the said lay-out.

2. The lay-out plan was sanctioned by the planning authority on 29th July, 1975 in favour of said original owner Shri Patwari wherein some portion adjacent to plot nos.5 and 10 was left as open space.

3. In 1992, pursuant to the revised plan submitted by the lay-out owner, the defendants sanctioned revised lay-out plan on 1st March, 1993 and the original owner executed relinquishment deed dated 1st March, 1993, thereby relinquishing open space to the extent of 1070 Sq. Mtrs. and the roads in the lay-out in favour of the Corporation out of City Survey No.15301/56.

4. While approving revised lay-out, sanction was accorded to additional plot nos.23 and 24 of which plot no.23 is purchased by the respondent. It is then claimed that the respondent approached the competent authority for division of the said plot and on 20th January, 2007 approval was accorded by the competent authority to the division and as such respondent approached the Corporation for construction permission, which was granted on 24th January, 2008.

5. On 16th September, 2008, respondent was served with a notice asking him to stop construction, resulting into filing of the suit in question. The basis for issuance of the notice in question by the Corporation is that

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the boundaries of the plot of the appellant and that of the open space vested in the Corporation are required to be ascertained so that there should not be any over-lapping.

6. The present respondent-land owner filed a suit being Regular Civil Suit No.890 of 2009 (new No.151 of 2010), which was resisted by the appellants herein. The Trial Court decreed the suit in favour of present respondent vide judgment and decree dated 21st June, 2011 and appeal preferred by respondents-original defendants, being Regular Civil Appeal No.233 of 2011 came to be dismissed by learned District Judge-3, Aurangabad vide judgment and decree dated 22nd November, 2012. Thus, the present second appeal.

7. Learned Counsel appearing on behalf of the appellants made two-fold submissions; firstly, that the suit against the Commissioner was not maintainable as Commissioner and Corporation are two different entities within the meaning of Section 2 of the Bombay Provincial Municipal Corporations Act, 1949. According to him, it is the Corporation which is the planning authority and not the Commissioner and as such the judgments and decrees rendered by the Trial Court and lower appellate Court are not sustainable and secondly, that the lower appellate court has not considered the evidence of the respective parties and proceeded to confirm the findings recorded by the Trial Court.

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8. *Per contra*, Mr Shelke, learned Counsel appearing on behalf of the respondent would urge that before the Trial Court the respondent has examined himself and the appellants have examined their Engineer, who was unable to establish any encroachment by the respondent over the open space of the Corporation. According to him, the Courts below having concurrently held against the appellants, the appeal deserves to be dismissed.

9. Having considered rival submissions, it is no doubt true that Section 2 Bombay Provincial Municipal Corporations Act, 1949 defines the authorities under the said Act and Corporation and Commissioner are two different authorities under the said statute. Admittedly, the Corporation is the planning authority as per the provisions of the Maharashtra Regional Town Planning Act and it is pursuant to the provisions of the said Act notice in question is claimed to have been issued to the respondent – land owner. The said notice though was questioned in a suit in which the Commissioner is impleaded as party, however, the written statement and evidence is filed for and on behalf of the Corporation and not the Commissioner. Apart from above, it is the Corporation who has filed first appeal before the lower appellate Court, so also before this Court. As such, the submission of the learned Counsel for the appellants that the suit was instituted against the Commissioner and not the Corporation is liable to be rejected particularly when it is a case of acquiescence.

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10. Apart from above, with the assistance of respective Counsel, I have looked into the evidence of the witnesses examined on behalf of both the parties. The evidence of the witness of the Corporation does not establish in clear terms that the boundaries of the plot of the respondent are overlapping the open space. It is required to be noted that on the northern side of the plot of the present respondent there appears to be 25 ft. wide road and thereafter in north-west corner the open space is shown as per the lay-out plan map. The lay-out plan map was very much produced before the Courts below and appreciated.

11. In the aforesaid background, no infirmity or material illegality could be noticed in the judgments and decrees rendered by the Courts below. Thus, the Second Appeal lacks merit and stands dismissed. In view of dismissal of the appeal, Civil Application No.13601 of 2015 does not survive and stands dismissed.

(N.W. SAMBRE, J.)

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