

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12824 OF 2017

Bholaprasad Foudar Bharti,	]
Age : 45 years, Occupation : Painter,	]
R/at C/of Shambaji Tatoba Kumbhar,	]
Plot No.21, E-Ward, Sainath Housing Society,	]
Tembhaiwadi, Tal. Karvir, Dist. Kolhapur.	] Petitioner

Versus

Kalavati Vitthalrao Khadake,	]
Age : 50 years, Occupation : Household,	]
R/at G.R. Colony, Ujlaiwadi, Tal. Karvir,	]
Dist. Kolhapur.	] Respondent

Mr. Chetan G. Patil for the Petitioner.

None for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 18TH DECEMBER 2017.

P.C. :

1. Heard Mr. Patil, learned counsel for the Petitioner.
2. By this Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the concurrent finding arrived at by the Court of 3rd Joint Civil Judge, Junior Division, Kolhapur, vide his order below "Exhibit-5" dated 6th July 2017 passed in Regular Civil Suit No.438 of 2017, which is confirmed by the Court of District Judge-7, Kolhapur, vide its order dated 19th September 2017 passed in Miscellaneous Civil Appeal No.192 of 2017.

3. By the Trial Court's order dated 6th July 2017, the application filed by the Petitioner for interim injunction restraining the Respondent from carrying out construction over the alleged encroached portion of the property came to be rejected and the said order is confirmed by the Appellate Court while dismissing the Petitioner's Miscellaneous Civil Appeal No.192 of 2017.

4. The submission of learned counsel for the Petitioner is that, the Petitioner-Plaintiff has come before the Court with a specific case that Respondent has made encroachment on the property owned by the Petitioner and on the said encroached portion, she is carrying out construction. It is urged that, it is also a matter of record that the Respondent has not obtained any permission for carrying out construction. However, both the Courts below have said that, even if no such permission is obtained, it will be for the Planning Authority to take necessary action and the Planning Authority is competent to do so; but, there is no necessity of granting interim injunction, as sought by the Petitioner. According to learned counsel for the Petitioner, this finding arrived at by the Trial Court and confirmed by the Appellate Court, is totally erroneous and not sustainable in the light of the legal position.

5. Learned counsel for the Petitioner has also relied upon various

authorities to submit that, when a Suit is for removal of encroachment, unless the Court Commissioner is appointed and his report is brought on record, the exact position or situation at the site cannot come before the Court and, till then, if the nature of the suit property is allowed to be changed, that will cause irreparable loss and hardship to the Petitioner-Plaintiff. Here in the case, learned counsel for the Petitioner submits that, the Petitioner has applied for appointment of such Court Commissioner to determine and assess the encroachment and the Trial Court has now allowed the said application. Therefore, till the report of the Court Commissioner is received, the Trial Court should have restrained the Respondent from carrying out construction on the encroached portion of the suit property.

6. The perusal of the impugned order goes to show that, both, the Trial Court and the Appellate Court have relied upon the provisions of Order 7 Rule 3 of the Civil Procedure Code (Bombay Amendment), which require that, where the subject matter of the Suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. Moreover, when the case of encroachment is put up, its sketch showing, as approximately as possible, the location and extent of the encroachment shall also be filed along with the plaint.

7. In the instant case, admittedly, the Petitioner has neither shown the area of the alleged encroachment in the plaint, nor filed along with the plaint any sketch showing approximately possible location and extent of the alleged encroachment. In the absence of such details and the sketch, merely on the vague averment made by the Petitioner that Respondent is carrying out construction by making encroachment on his property, the case of the Petitioner can hardly be accepted. If at all the Petitioner wanted to make out a case that Respondent has made encroachment on his property, then, he should have got his property measured before hand and produced the sketch or given the requisite details as to how much portion is alleged to be encroached, on which the construction is sought to be made. Petitioner has not done that. In such situation, it cannot be said that the Petitioner is having any prima facie case to restrain the Respondent from carrying out construction over the property which, according to the Respondent, belongs to her and which is yet not proved to be an encroached portion.

8. It was also necessary for the Petitioner to apply for appointment of the Court Commissioner before pressing for this application for interim injunction or to get his land measured before filing of the Suit. Now, after his application is rejected by the Trial Court, when he has filed the application for appointment of a Court Commissioner and that

application is allowed, that does not mean that, prima facie, the Petitioner has proved that the construction carried out by the Respondent is on the area owned by him and encroached by the Respondent. Therefore, when, at this stage, there is nothing on record to show that the Respondent has carried out construction by making encroachment on the land of the Petitioner, then, if the relief of interim injunction is granted restraining the Respondent from proceeding with the said construction, it goes without saying that, the Respondent will suffer irreparable loss and hardship and not the Petitioner. Both the Courts below have properly considered these aspects and rightly rejected the Petitioner's application for interim injunction.

9. The main grievance of the learned counsel for the Petitioner is on the fact that, the Respondent has not produced on record a single document to show that she has obtained requisite permission of the Planning Authority, namely, the Gram Panchayat, to carry out such construction. The observations made by the Trial Court in paragraph No.12 of its order are pointed out in this respect to show that, the Respondent has not brought on record any document to show that she has obtained permission for carrying out the construction either from the Gram Panchayat or from the Town Planning Authority. It is urged that, the Trial Court has, despite that, refused the relief of interim injunction to the Petitioner on the ground that, if Respondent is carrying

out such construction without permission, it will be only at the risk of the Respondent and Gram Panchayat and the concerned Town Planning Authority can take effective steps against the construction of the Respondent, in case the construction is carried out without requisite permission. According to learned counsel for the Petitioner, these observations and findings made by the Trial Court and confirmed by the Appellate Court, cannot be upheld in law.

10. To substantiate this submission, learned counsel for the Petitioner has relied upon the Judgment of Madhya Pradesh High Court in the case of *Cantonment Board, Sagar Vs. Sudhanshu, 1998 DGLS(M.P.) 428*. However, the facts of the said case reveal that, in that Suit, the Cantonment Board, which was the competent Town Planning Authority, was the Plaintiff, who has filed Suit for injunction restraining the Defendant from carrying out illegal construction. The Trial Court rejected the same and Appellate Court confirmed the said order holding that, the Cantonment Board is competent to take necessary action as it is having statutory powers. In that background, it was held that, both the Courts below have misdirected themselves in observing that, as the Cantonment Board, which was the Plaintiff, is entitled under its statutory powers, no injunction in favour of such an Authority can be granted. However, if one considers the facts of the present case, it is not the Planning Authority like the Gram Panchayat, which is coming before

the Court contending that the construction undertaken by the Respondent is illegal, unauthorized or without permission; but, it is the Petitioner who is alleging the same and in such situation, this case law cannot be of any help to the Petitioner.

11. Learned counsel for the Petitioner has then placed reliance on the Judgment of the Supreme Court in the case of *Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, (2004) 8 SCC 488*. However, again facts of the said case clearly reveal that the Plaintiff therein was proved to be the owner of the premises, on which Respondent was carrying out illegal construction. Here in the case, the Petitioner has yet to prove that the portion on which the Respondent is carrying out construction is encroached one or it does not belong to the Respondent. In such situation, this Judgment also cannot be of any assistance to the Petitioner.

12. Learned counsel for the Petitioner has also relied upon the Judgment of the Calcutta High Court in the case of *Krishna Kali Mallik Vs. Babulal Shaw and Ors., AIR 1965 Calcutta 148*. In that case, again the facts show that, the Plaintiff was the neighbour of Defendant and he noticed that Defendant was constructing his building in violation of Municipal Statutory Rules. In that background, it was held that the Plaintiff has a right to sue Defendant and ask for an injunction. Here in

the case, there is nothing on record to show that the construction, which Respondent has undertaken, is in violation of Gram Panchayat's Statutory Rules or it is totally an illegal and unauthorized construction.

13. In such situation, merely because the Respondent has not produced on record the alleged permission and, that too, when Gram Panchayat itself is not challenging the same, it cannot be said that the construction undertaken by the Respondent is in violation of the Statutory Rules.

14. What Petitioner has to, prima facie, prove in this case was that the construction is undertaken on the encroached portion and for that purpose, he has to prove that there was encroachment made by the Respondent. Apparently, the Petitioner has failed to prove the same as he has neither given the description of the suit property in detail, nor attached the sketch of the encroached portion, or, got his land measured prior to filing of the Suit.

15. Hence, at this stage, no interference is warranted in the impugned order passed by the Trial Court and confirmed by the Appellate Court. The Writ Petition, therefore, being without merits, stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]