

SAS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13093 OF 2017

Abdul Wahab s/o. Hajjubhai Chande & Anr. ..Petitioners.

V/s.

Md. Hussain s/o. Haidarsab Chanda & Anr. ..Respondents.

Mr.S.S.Kanetkar for the petitioner.

Mr.Ashok B.Tajane for respondent Nos.1 & 2.

CORAM: NITIN W.SAMBRE, J.

DATE : JUNE 26, 2018

PC:-

Heard Mr.S.S.Kantekar, the learned counsel appearing for the petitioners and Mr.Ashok Tajane, the learned counsel appearing for respondent Nos.1 and 2.

2. The order of grant of injunction passed by the learned trial Court in Regular Civil Suit No.1301/2015 on March 19, 2016 is confirmed by the learned District Judge, Solapur in Civil Misc. Appeal No.63/2016 on June 17, 2017, whereby the present petitioners are restrained from carrying out constructions in City Survey No.5488/A, which is claimed to be owned by the petitioners-

defendants, till the final disposal of the suit.

3. Mr.Kanetkar, the learned counsel for the petitioners would make following submissions :-

- a) Admittedly, the petitioners/defendants are the owners of City Survey No.5488/A;
- b) There is a revised plan sanctioned by the local Planning Authority i.e. the Municipal Corporation, Solapur and they have already furnished an undertaking that they shall strictly carry out construction in accordance with the revised sanctioned plan;
- c) The affidavits of two witnesses is taken into account by both the Courts below so as to infer easementary rights in favour of the respondents-plaintiffs in absence of any specific documentary evidence on record;
- d) The construction has already reached at an advanced stage, there is no requirement of restraining the petitioners from carrying out further construction, as construction if any contrary to the revised sanctioned plan will be removed by the petitioners on their own.

3. *Per contra*, Mr.Tajane would urge that the easementary rights claimed by the plaintiffs is required to be established by two modes :-

- a) By specific pleadings and by affidavits of witnesses;
- b) By demonstrating appropriate and supporting documentary evidence.

4. According to him, an amendment to the plaint is already permitted which is not questioned by the petitioners wherein the respondents, pursuant to the measurements noticed encroachment by the petitioners on their Survey number and have accordingly amended the plaint. He sought dismissal of the petition.

5. Considered rival submissions.

6. There are concurrent findings recorded by both the Courts below granting injunction against the petitioners having considered the fact that there is easmentary right in favour of the respondents-plaintiffs.

7. This Court is not intending to dwell upon the controversy at this stage *qua* findings recorded over the easementary rights.

8. What has impressed this Court is the subsequent measurements carried out during the pendency of the suit and the report of the Revenue Authority therein. It is shown in the measurement map that the petitioners have encroached upon the property of the respondents-plaintiffs.

9. Though Mr.Kantekar was right in pointing out that he has filed an appeal questioning the said measurements, however, in my opinion, if the appeal of the petitioners is allowed, that will give a fresh cause to the petitioners for questioning the order of injunction either before the same Court or before this Court, as the case may be,.

10. However, in view of the concurrent findings of fact recorded, the measurement report demonstrating encroachment on the property of the respondents-plaintiffs, in my opinion, no interference is warranted. The petition as such is dismissed.

11. The findings are restricted only to the extent of deciding the contentions raised by the petitioners before this Court.

(NITIN W.SAMBRE, J.)