

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3197 OF 2017

Rajaram Anna Sutar & Ors.	 Petitioners
V/s.	
Ramesh Bajirao Bichkar	 Respondent

Mr. Akshay P. Shinde for the Petitioners.

Mr. Chetan Patil, i/by Mr. Ramnath S. Patil, for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 19TH APRIL, 2018.

P.C. :

1. Heard Mr. Shinde, learned counsel for the Petitioners, and Mr. Patil, learned counsel for the Respondent.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 4th February 2017, passed by the District Judge-1, Ichalkaranji, thereby allowing Miscellaneous Civil Appeal No.52 of 2015, which was preferred by the present Respondent against the order dated 21st November 2015 passed by the 3rd Joint Civil Judge, Junior Division, Ichalkaranji, below the application at "Exhibit-5" filed in Regular Civil Suit No.285 of 2015.

3. The Regular Civil Suit No.285 of 2015 was filed by the present

Respondent simplicitor for injunction, claiming that he is owner of the land bearing Gat No.311, admeasuring 0.5 R, situate at Village Sajani, Tal. Hatkanangale, Dist. Kolhapur, and Plot No.4, having the area of 198 sq.mtrs. He has purchased the said land by virtue of registered 'Sale-Deed' dated 26th November 2010. Thereafter, he has obtained the permission from Gram Panchayat for construction of the compound wall and, accordingly, while he was carrying out construction of the compound wall, the Petitioners herein had obstructed the said construction and, therefore, the Petitioners be restrained from doing so.

4. Along with the Suit, the Respondent has filed the application for interim injunction at "Exhibit-5", which came to be resisted by the present Petitioners contending *inter alia* that, Respondent is carrying construction by making encroachment on the public road. Petitioners had, therefore, made an application to the Tahasildar, under Section 5 of the Mamlatdars' Courts Act, 1906, for taking measurement of the suit land and it was clearly stated in the Inspection Report prepared by the Mamlatdar that, on account of the construction of the compound wall, the access from the road leading to the Petitioners' houses is blocked. It was further submitted that the Respondent has not produced the 'Plan' sanctioned by the Gram Panchayat and, therefore, his application for interim injunction, in which he is seeking final relief itself, should not be allowed.

5. The Trial Court, therefore, after considering the submissions advanced at bar by learned counsel for both the parties and after giving its thoughtful consideration thereto, found that it was for the Respondent to show that the construction of the compound wall was not by way of making encroachment on the public road or other property and it was within the four boundaries and within the limits of the land owned and purchased by him. It was held by the Trial Court that, the Respondent has not done so. Respondent has also not produced on record the copy of the 'Plan' sanctioned by the Gram Panchayat, to show that the Gram Panchayat has ascertained that the construction was within the limits of the land owned by the Respondent. Hence, the Trial Court held that, the Respondent has failed to make out the prima facie case. Moreover, if the construction of the compound wall is allowed at the interim stage, it would cause more hardship and inconvenience to the Petitioners herein and hence, the Trial Court has, by passing a well reasoned order, rejected the application for interim injunction filed by the Respondent.

6. However, when the Respondent challenged this order before the Appellate Court, the Appellate Court has reversed the order of the Trial Court. Mainly it appears to be on the count that the Petitioners herein have failed to remain present before the Appellate Court to support their

contentions. Secondly, the Appellate Court also held that, there was nothing on record to show that, due to intending construction of the compound wall, the access of the Petitioners would be obstructed. It was further held by the Appellate Court that, in the event of the encroachment on the public road, the Gram Panchayat can take necessary action against the construction, if it is found illegal. Then, the Appellate Court went on to state that, to be on the safer side, the Respondent can be called upon to give the 'undertaking' in writing, stating that the Respondent, at his own costs, would get removed the compound wall or any part of it, if found illegal, or an encroachment over the nearby properties or public road. Being aggrieved by the interference of the Appellate Court in the impugned order passed by the Trial Court, the Petitioners have approached this Court.

7. At the outset itself, it has to be stated that, when the Trial Court has passed a well reasoned order and exercised its discretion, after having regard to the prima facie case, the balance of convenience and irreparable loss, it was not proper on the part of the Appellate Court to interfere in the said discretion and substitute its own opinion in the place of the opinion and the view expressed by the Trial Court. The Hon'ble Apex Court has, in the landmark decision of *Wander Limited Vs. Antox India P. Ltd., 1990 (Supp.) SCC 727*, categorically held in a discretionary relief of temporary injunction that, the Appellate Court

should restrain itself from interfering in the discretion exercised by the Trial Court, merely because this Court may arrive at a different view. For ready reference, paragraph No.14 of the said Judgment can be reproduced as follows :-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely, or, where the Court had ignored the settled principles of law regulating grant or refusal of inter-locutory injunction. An appeal against the exercise of discretion is said to be an appeal on principle and, therefore, the Appellate Court will not re-assess the material and seek to reach a conclusion different from the one reached by the Court below; if the one reached by the Court below is the one reached by that Court was reasonably possible on the material before it. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to the contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner, the fact that the Appellate Court would have taken a different view, may not justify interference with the Trial Court's exercise of discretion.”

8. Especially, in the facts of the present case, the Appellate Court has committed an error in interfering in the discretion exercised by the Trial Court. As can be seen from the order passed by the Trial Court, the Trial Court has exercised its discretion judiciously. The Trial Court has considered the fact that no 'Plan', sanctioned by the Gram Panchayat, was produced on record by the Respondent to show that the construction of the compound wall was within the four boundaries of his property. The Trial Court has also considered that, when Respondent is making construction and there is complaint made that the said construction is beyond his own property, then, it was for the Respondent, who was seeking such relief of injunction, to show that the said construction was within his limits. Respondent has not done that.

9. The Trial Court has also considered that, already the application was made by the Petitioners before the Tahasildar, under Section 5 of the Mamlatdars' Courts Act, 1906. In that inquiry, the 'Panchanama' was made by the Mamlatdar and in that, it was found that the road and access to the properties of the Petitioners was blocked because of the construction of the compound wall by the Respondent and only the foot-way remained at the site. The 'map' was also drawn by the Mamlatdar. It is pertinent to note that, the Tahasildar had also granted stay to the construction of the compound wall vide his order dated 18th May 2015, which is produced at page 65 of the Petition.

10. Therefore, having regard to all these facts, when the Trial Court has rightly refused the relief of interim injunction to the Respondent, when the said relief was as good as granting the final relief itself, the Appellate Court should have restrained itself from interfering in the said discretion exercised by the Trial Court.

11. It is to be noted that, the Appellate Court has also observed in its order that, there is no specific pleading in the Suit as to how much area of the plot is used for construction of the houses and how much area remained vacant out of the said plot and the said fact has not been made clear. Therefore, the Appellate Court itself was not sure as to whether the compound wall was really within the limits or the boundaries of the property of the Respondent. That is the reason why the Appellate Court has also directed the Respondent to give the 'undertaking' to remove the compound wall, if it is found to be constructed by making encroachment. In this view of the matter, the Appellate Court should have tied its hands from substituting its discretion in place of the discretion exercised by the Trial Court. On this very ground itself, the order passed by the Appellate Court needs to be quashed and set aside.

12. Otherwise also, now the Suit being of the year 2015 and it being a Suit simplicitor for injunction, it must be ready for hearing and there is

no question of the Respondent suffering any loss or hardship, if such relief of interim injunction, which he was claiming at the interim stage itself and which is to be considered at the time of final hearing of the Suit, is refused by the Trial Court. Therefore, the impugned order passed by the Appellate Court, setting aside the well reasoned order passed by the Trial Court, needs to be quashed and set aside.

13. Accordingly, the Writ Petition is allowed.

14. The impugned order passed by the Appellate Court is quashed and set aside. As a result, the order passed by the Trial Court below the application at “Exhibit-5” in Regular Civil Suit No.285 of 2015, stands restored.

15. Though it is not necessary, on the request of learned counsel for the Respondent, it is clarified that, whatever observations made here-in-above are only for the purpose of deciding this Writ Petition and the Trial Court is not to be influenced by them in any way.

[DR. SHALINI PHANSALKAR-JOSHI, J.]