

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11642 OF 2017

M/s.Pasaydan Developers

Through its Partner

V/s.

Jaisingh Mukunda Murkute

... Petitioner

... Respondent

Ms.Gauri Godse for the Petitioner.

None for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th JANUARY, 2018.

ORAL JUDGMENT :-

1] Heard learned counsel for the Petitioner, finally at the stage of admission itself.

2] This Writ Petition is preferred against the concurrent finding of the fact arrived at by the Trial Court and the Appellate Court holding that the Petitioner has failed to make out a *prima-facie* case or to prove the balance of convenience or irreparable loss in order to get the relief of interim injunction.

3] The order challenged in this Writ Petition is the one dated 29th April, 2017 passed by District Judge-18, Pune, thereby dismissing Miscellaneous Civil Appeal No.119 of 2017 filed by the Petitioner challenging the order dated 29th March, 2017, passed by the Court of 7th Joint Civil Judge Junior Division, Pune, below Exhibit 5 in Regular Civil Suit No.412 of 2017. The said application at Exhibit 5 was filed by the Petitioner for getting relief of interim injunction restraining the Respondent from causing obstruction in the construction work undertaken by the Petitioner on the suit plot.

4] According to the Petitioner, the suit plot is bearing No.9B admeasuring 4.5-R. i.e. 450 sq.mtrs. from and out of Survey No.5 Hissa No.5/2, having access from main road running in North-South direction through Survey No.5, Hissa No.5/1 and Survey No.5/2 on extreme East running East-West as easement, situated at Village Belewadi, Taluka Haveli, District Pune. The Petitioner claims to have acquired development rights with respect to the suit plot from Horizon Developers Private Limited Company by virtue of a development agreement dated 10th May, 2005. Thereafter, the sale-deed dated 11th July, 2011 came to be executed in favour of the Petitioner by the

owners of the land and the Horizon Developers Private Limited Company being consenting party thereto. On the basis of this title acquired over the suit plot, the Petitioner has got the plans for the construction sanctioned from the Municipal Corporation and also obtained the commencement Certificate dated 23rd December, 2015. However, when he started the construction activity, the Respondent obstructed to the same, hence the Petitioner filed a suit simpliciter for injunction restraining the Respondent from causing such obstruction in the construction work at the site.

5] Along with suit, the Petitioner also filed an application for interim injunction at Exhibit 5 which came to be strongly resisted by the Respondent contending *inter-alia* that the alleged sale-deed on the basis of which the Petitioner was claiming the title and ownership right is sham and bogus. It was contended that the Petitioner has obtained the sanction and the permission for construction showing that the suit plot is having existing road of 7.50 mtrs. width. Infact there is no such road existing at the site of the width of 7.50 mtrs.. The alleged sale-deed of the Petitioner also refers to the existence of the access road of 3.00 mtrs. width only. In such situation, it was submitted that the

Petitioner has no right to carryout the construction on the access road and therefore, no right to get the relief of interim injunction, which the Petitioner has sought in the suit.

6] The learned trial Court, after considering the evidence on record was pleased to hold that the Petitioner has failed to make out a *prima-facie* case considering that the existence of such 7.50 mtrs. width road is not at all pleaded or shown in either the development agreement or sale-deed. The Appellate Court also on this very ground dismissed the Miscellaneous Civil Appeal No.119 of 2017 preferred by the Petitioner.

7] While challenging this impugned order of the trial Court and the Appellate Court, the submission of learned counsel for the Petitioner is that the Respondent/Defendant has not challenged the sale-deed of the Petitioner. In the sale-deed dated 19th June, 1997 wherein the Petitioner is a purchaser and one Lata Kerkar is a seller, there is clear mention that the suit plot is having access from the main road in North-South direction, through Survey No.5, a East-West easement. Moreover, in the sale-deed dated 12th April, 2012 also there is mention of access from main road in North-South direction through

Survey No.5 and Survey No.5/2. Even in the measurement plan dated 22nd December, 2008, the existence of access road is shown. Before the Appellate Court, therefore, a case was made out that there is right of easement of necessity, regarding existence of a access road in North-South direction and on the basis of the same it was submitted that when the sale-deed clearly mentions the existence of access road, it was not proper on the part of the Trial Court and also the Appellate Court to accept the case of the Respondent that width of the access road is not 7.50 mtrs. and on that basis to reject the Petitioner's application for interim injunction.

8] According to learned counsel for the Petitioner, when the Municipal Corporation has sanctioned the plans for construction, as submitted by the Petitioner, the Respondent cannot raise objection to the construction and hence, the impugned order passed by the trial Court and confirmed by the Appellate Court needs to be quashed and set-aside.

9] However, at the outset, it has to be stated that the application for interim injunction filed by the Petitioner raising certain factual aspects is dismissed by the Trial Court and after accepting the

said factual finding to be proper, the Appellate Court has also dismissed the Miscellaneous Civil Appeal No. 119 of 2017 preferred by the Petitioner. Therefore, when there is concurrent finding of fact arrived at by the Trial Court and the Appellate Court, needless to state that in writ jurisdiction this Court should restrain itself from disturbing the said concurrent finding, unless and until it is shown by the Petitioner that the said finding of fact is perverse, in the sense that it is against the material on record.

10] However, in the present case, the Petitioner has miserably failed to show that the view taken by the Courts below is neither justified from material on record nor it is a possible view of the matter. Neither in the sale-deed nor in the plaint, the Petitioner has come before the Court with a specific case that this access road is of the width of 7.50 mtrs. and it is being used as a easement of necessity. No such case is made out before the Trial Court. Only in the Appellate Court, the said case was tried to be put up, however, as observed by the Appellate Court, it was not pleaded and in such situation, the Petitioner cannot be said to be having any *prima-facie* case.

11] Moreover, the Appellate Court and the Trial Court has also considered that in the plan sanctioned by the Municipal Corporation road adjacent to the East-West running in North-South direction is also not shown to be of the width of 7.50 mtrs., whereas the Respondent has produced on record a measurement plan dated 18th November, 2010 which shows that no such access road of admeasuring 7.50 mtrs. is there.

12] In view thereof, both the Trial Court and the Appellate Court has rightly concluded that, *prima-facie*, the Petitioner has no case to restrain the Respondent from causing obstruction to the construction. It is apparent that by cleverly drafting the suit simpliciter for injunction, the Petitioner is asserting the rights which the Petitioner has yet to establish and therefore, the Trial Court and the Appellate Court has rightly rejected his application. The Writ Petition hence being devoid of merits stands dismissed.

13] At this stage, learned counsel for the Petitioner requests that this Court should clarify that these observations made here-in-above or in the order of the Trial Court and the Appellate Court do not

come in the way of final decision of the suit. Needless to state that, whatever observations are made in the order on the application for interim injunction or orders passed in the proceedings against said order, are always of an interim nature and they cannot come in the way of the final decision of the suit.

[DR.SHALINI PHANSALKAR-JOSHI, J.]