

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.3472 OF 2019

Dnyanesh Rajesh Chaudhari,
age: 38 years, Occ: Business,
through GPA -
Mr.Rajesh Kisanrao Chaudhari,
age: 53 years, Occ: Business,
R/o 10/986, I.G.T. Sharda Nagar,
Behind Govt. Technical High School,
Bhusawal, Tal. Bhusawal,
District Jalgaon.

Petitioner

Versus

01 Jitendra Jairam Agicha,
age: 43 years, Occ: Business,
R/o Satyam Tyles, Kanhala Road,
Khedhi Road, Bhusawal,
Tal. Bhusawal,
District Jalgaon.

02 Prashant Sarjarao Deshmukh,
age: 43 years, Occ: Business,
R/o Mahalakshmi Refrigerations,
Kanhala Road, Khedi Road,
Bhusawal, Tal. Bhusawal,
District Jalgaon.

03 Bhanudas Prabhakar Talele,
age: 40 years, Occ: Business,
R/o Behind Hotel Divesh Garden,
Kanhala Road, Khedi Road,
Bhusawal, Tal. Bhusawal,
District Jalgaon.

04 Sachin Maru Mardane,
age: 42 years, Occ: Business,
R/o Behind Hotel Divesh Garden,
Kanhala Road, Khedi Road,
Bhusawal, Tal. Bhusawal,
District Jalgaon.

Respondents

Mr. S.P.Brahme, advocate for the petitioner.
Mr. P.B.Gamot, advocate for Respondents No.1 to 4.

CORAM : RAVINDRA V. GHUGE, J.

DATE : 26th August, 2019

ORAL JUDGMENT:

1 Rule. Rule made returnable forthwith and heard finally by the consent of the learned Counsel for the respective parties.

2 The petitioner, original defendant, in RCS No.101 of 2018, is aggrieved by the order of the appellate Court, dated 07.12.2018, by which M.C.A. No.15 of 2018 filed by the plaintiffs is allowed. The order dated 11.09.2018, passed by the trial Court below Exhibit-6, refusing temporary injunction to the plaintiffs, is quashed and set aside and Exhibit-6 is allowed. A further direction is given to the petitioner to stop the construction of a commercial complex on plot no.25 in G.No.100.

3 I have considered the strenuous submissions of the learned advocates for the respective sides and have gone through the petition paper book with their assistance.

4 The learned advocate for the Respondents, original plaintiffs, prays that the petition be dismissed with heavy costs and no interference be caused at an interlocutory stage.

5 The plaintiffs claim to be residents of Bhusawal who are aggrieved by the activity of construction commenced by the defendant – petitioner on plot no.25 in S.No.100. A commercial complex is being constructed and the grievance is that the said construction is an encroachment on a public road and is abutting the National Highway. Because of the construction activity of the defendant, the road has shrunk and a nuisance is being caused to the public at large. It is also contended that the suit has been filed in a representative capacity.

6 A revised lay out in S.No.100 at Bhusawal, District Jalgaon, is placed before the Court. The said lay out sketch map is prepared by the Town Planning and Valuation Department, Jalgaon, State of Maharashtra and the District Collector, Jalgaon. The said sketch map is authenticated as being a correct description of the revised lay out. Plot no.25 appears on the north side at the junction of the Kanhale-Bhusawal and Khedi roads.

7 The petitioner-defendant has purchased the said plot no.25 on 03.07.2001, admeasuring 550 square meters, from the earlier title holder Shri Savkare. The revised residential lay out was prepared by the Municipal Council Bhusawal in 2001. This document has a presumptive value and would, therefore, indicate the existence of plot no.25 atleast from 2001.

8 The plaintiffs have preferred RCS No.101 of 2018 on 01.08.2018. The ground taken by the plaintiffs is that they are residents of Bhusawal and owners of plots no. 3, 4, 14 and 15 in S.No.128. They are shop keepers who have their own shops in S.No.128.

9 I find that if the plaintiffs are of the view that the construction of the petitioner has become a nuisance to them as the road has allegedly shrunk by the fictitious plot no.25, these plaintiffs have to seek permission under Section 91 of the Code of Civil Procedure from the trial Court for filing such a suit. It is only if they have any right, which would independently exist notwithstanding Section 91(1), that the said Section would not deem to limit the rights of the plaintiffs. However, the plaintiffs

have no share in plot no.25. They have no plot in S.No.100 and they have no direct nexus with the construction activity of the petitioner so as to bring their case under Section 91(2) of the Code of Civil Procedure. On this count alone, *prima facie*, the suit cannot progress/proceed until the Court grants a permission. Admittedly, no such permission has been taken.

10 If the petitioners had any grievance about plot no.25 in S.No.100, they should have approached the Municipal Council, Bhusawal, if the plot was within the limits of Municipal Council. If not, they have to approach the District Collector of Jalgaon, if the plot is situated beyond the municipal limits of Bhusawal. On the one hand, no such grievance is raised before the Municipal Council Bhusawal or the District Collector, Jalgaon, as the case may be. On the other hand, the Municipal Council, Bhusawal, is not arrayed as a defendant. The question would be as to whether the trial Court would be assisted in taking a decision that plot no.25 originally existed in S.No.100 or whether it was in existence when Shri Savkare purchased the plot and then sold it to the petitioner, in the absence of the Municipal Council in the suit. The Municipal Council should have been arrayed as a defendant so as to assist the Court. If the petitioner – defendant is embarking upon the

construction of a commercial complex without the permission of the Municipal Council, it would be within the domain of the Municipal Council to deal with these irregularities/illegalities.

11 None of the above aspects have been gone into by the appellate Court which has exercised its limited jurisdiction in setting aside the order of the trial Court and directing the petitioner-defendant to stop the construction of commercial complex. A burden has been put on the petitioner-defendant that he should establish the existence of plot no.25, he should prove that he had legally purchased the plot from Shri Savkare and that he should establish that he is not indulging in illegal construction, when all these allegations are made by the plaintiffs. The principle is that the one who pleads has to prove.

12 The learned advocate for the petitioner-defendant submits that the petitioner is willing to file an affidavit before the trial Court now indicating that, if the suit is held to be maintainable and is eventually decreed against him, he would remove that portion of the construction if it is declared to be an illegal construction by the trial Court or by any Court dealing with the said civil litigation.

13 In view of the above, this petition is partly allowed. The impugned order dated 07.12.2018, being rendered perverse and erroneous, is quashed and set aside and M.C.A. No.15 of 2018 stands dismissed. Though the order dated 11.09.2018, passed by the trial Court, below Exhibit-6 in the suit, is being restored, the petitioner would file his personal affidavit undertaking as per the statement recorded above, before the trial Court, within a period of four weeks from today.

14 Rule is made absolute to the above extent. No costs.

RAVINDRA V. GHUGE
JUDGE

adb/