

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.779 OF 2018
WITH CIVIL APPLICATION NO.11751/2018

Chandrapal s/o Parbatrao Patil, (Died),
L.Rs. -

- 1] Vimalbai w/o Chandrapal Patil,
age 69 yrs., occu.household,
- 2] Shailaja w/o Shahikant Patil,
age 49 yrs., occu.household,
- 3] Abhay s/o Chandrapal Patil,
age 47 yrs., occu.Advocate and agri.,
- 4] Manisha w/o Dileep Patil,
age 44 yrs., occu.household,
- 5] Shilpa w/o Narayan Kadam,
age 39 yrs., occu.service,

All r/o Udgir Tq.Udgir Dist.Latur.

..Appellants..
(L.Rs. of org.plaintiff)

VERSUS

The Chief Officer,
The Municipal Council, Udgir.
Tq.Udgir Dist.Latur.

..Respondent..
(Org.defendant)

.....
Shri Gopal D. Kale, Advocate for appellants.
Shri M.K. Bhosale, Advocate h/f Shri P.V. Barde, Advocate for
respondent.

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CORAM: V.L. ACHLIYA, J.

DATE: 14.06.2019

PER COURT :

1] Being aggrieved by the concurrent decisions rendered by the Courts below, the appellants (the legal heirs of original plaintiff) have preferred this second appeal.

2] Heard learned counsel for the appellants and the respondent. Perused the record and proceedings of the case.

3] The appellants have preferred this appeal with contention that the Courts below have erred in considering applicability of Sections 179 and 189 of the Maharashtra Municipalities Act in its proper perspective. According to the appellants, in the facts and circumstances of the case, the defendant - Municipal Council ought to have issued notice of minimum 15 days as provided under Section 189 of the Maharashtra Municipalities Act for removal of alleged encroachment. It is the contention of the appellants that the defendant - Municipal Council can only take action u/s 189 of the Maharashtra Municipalities Act. It is further contention of the appellants that the defendant - Municipal Council is estopped in law from taking action on account of long standing existence of suit structure and assessment of structure for the purpose of Municipal taxes.

4] On the other hand, learned counsel for the respondent - Municipal Council supported the judgment and decree passed by

the trial Court and confirmed in appeal. By referring the overall facts of the case and reasons and findings recorded by the Courts below, the learned counsel submits that the appeal raises no substantial question of law. It is submitted that the appeal filed is devoid of merit and filed with an intention to avoid the removal of structure erected over the service road.

5] I have carefully considered the submissions advanced in the light of rival pleadings, the oral and documentary evidence adduced in the case and findings on facts recorded by the Courts below.

6] The subject matter of the suit is the construction in the nature of shop premises raised by the plaintiff over 25 Ft. width service road passing in front of plot in possession of the plaintiff as a member of the cooperative society. The plaintiff has filed the suit against the defendant - Municipal Council seeking prohibitory injunction to restrain the defendant - Municipal Council to take action pursuant to notice dated 28.12.2012 issued to plaintiff. By way of injunction claimed in the suit, the plaintiff has urged to restrain the defendant - Municipal Council from damaging and demolishing the suit property described in paragraph no.1 in the plaint. The description of the property given in paragraph no.1 of the plaint reads as under:-

“The suit property adm. East - 80 ft., West - 50 ft., South - 100 ft., North - 90 ft., M.C. House No.3-2-996 (Old) 3-3-38 (New) which is bounded as, Towards East - Nanded Bidar road, Towards West - House of V.R. Tiwary, Towards South - Road, Towards North - House of Kishanrao Patil.”

7] In brief, the plaintiff has approached with a case that in the year 1960-61, the housing society of which plaintiff is member, purchased the land being part of land Survey No.306 of Udgir located just adjacent to Nanded-Bidar road towards eastern side of the said road. The land was duly converted for non-agricultural use by getting the lay-out plan approved from the competent authority. Plots from the sanctioned lay-out were allotted to respective members. One of such plot was allotted to plaintiff in said society. According to plaintiff, before allotment of plots to the members, it was decided by the members of the society that if service road shown in the lay-out plan is left open, it would cause inconvenience and trouble to some of the members of the society. It was, therefore, decided that the area of the service road be merged into the plots and area of service road passing in front of such plots be allotted to members. It is the case of plaintiff that service road was unnecessarily shown in the sanctioned lay-out. It is further

contention of the plaintiff that in terms of the allotment of the plot including part of service road, the plaintiff was put in physical possession of the suit property. He has made construction over the suit property after securing due permission from the Municipal Council. It is the case of the plaintiff that the notice issued u/s 189 of the Maharashtra Municipalities Act is illegal. It is further case of the plaintiff that the entire action on the part of the defendant is illegal and contrary to law.

8] The defendant - Municipal Council appeared in the matter and resisted the suit claim. The defendant has raised objection as to maintainability of the suit for want of statutory notice u/s 304 of the Maharashtra Municipalities Act as well as on the ground of limitation. The defendant has also raised the issue of maintainability of suit on the ground of *res-judicata*. It is contended that prior to filing of suit, the plaintiff has filed suit bearing Regular Civil Suit No.607/2012 on 30.12.2012. The defendant appeared in the suit and resisted the suit by filing written statement and say on 31.12.2012. On same day, the plaintiff did not press the application seeking interim injunction. On next date, the plaintiff withdrew the suit. On same cause of action, that too without seeking leave to file separate suit, filed another suit.

9] So far as merit of the case is concerned, the defendant

has denied that the plaintiff is the owner of the plot as referred in the plaint. It is contended that the plot in question is owned by Shivaji Cooperative Housing Society, Udgir, a registered cooperative society under the provisions of the Maharashtra Cooperative Societies Act. The said society purchased the land and approved the lay-out plan from the planning authority. Except two plots, all the plots owned by the said society are shown to be 50 ft. x 60 ft. in dimension. Only plot Nos.1 and 2 are shown as admeasuring 50 ft. x 70 ft. and 52 ft. x 70 ft. x 75 ft. respectively. It is further contended that in the lay-out plan, there is a service road shown facing towards Bider-Nanded road, which is a State Highway. The plaintiff has made construction over the service road causing inconvenience to the public at large. It was found that though the plot area allotted to plaintiff admeasures 50 ft. x 70 ft., he has made construction beyond the plot area and more particularly over the service road to be used by public at large. It is the contention of the defendant that though the plaintiff is having plot area 50 ft. x 70 ft., he has made the construction beyond the plot boundary and merged the portion of service road by raising construction over the same. Since the act of the plaintiff to encroach over the service road and raise construction thereon being illegal and contrary to law, the defendant - Municipal Council initiated action and issued

the notice. It is the contention of defendant that similar action was taken against other allottees of the plots by the society who have made encroachments over the service road. In the background of overall facts, the defendant has urged to dismiss the suit.

10] In support of case of the plaintiff, the plaintiff had examined himself as PW1 and examined few other witnesses to establish that the members of the housing society had secured loan by mortgaging the plots allotted to them. On behalf of the defendant, the defendant has examined its Chief Officer as DW1 and further examined Town Planner and Secretary of the Housing Society. On appreciation of evidence, the trial Court has dismissed the suit by holding that the plaintiff has failed to prove that the construction made on the suit property is legal and authorized. It is further held that the plaintiff has failed to prove that the notice issued by the defendant to him is illegal. On due appreciation of the rival pleadings and the evidence adduced in the case, the trial Court has reached to the conclusion that the plaintiff has encroached over the service road passing beyond the plot area of the plaintiff and raised construction and accordingly dismissed the suit.

11] In my view, the judgment and order passed by the trial Court is well reasoned and there is absolutely no perversity in any of the reasons and findings recorded by the trial Court. By

examining Sudhir Patil DW 3, the Secretary of the society, the defendant has duly proved copy of the sanctioned lay out plan (Exhibit 87). The witness examined by the defendant namely Sudhir Bhaurao Patil, the Secretary of Shivaji Cooperative Housing Society has deposed before the Court that eight plots of the lay out sanctioned by the society are towards eastern side of land of the society and admitted that there is a service road in between boundaries of said plots and thereafter Nanded-Bidar State Highway passes. He further deposed that the width of service road is 25 ft. He admitted that the construction was made by merging the area of service road by the plot holders. The plaintiff has also not denied the existence of service road shown in the sanctioned lay out. It is the case of the plaintiff that when this lay out was constructed, the area was outside Udgir town. Since the service road was not under use and unnecessary, the society decided to merge the area of service road into the plots and thereafter the plot area merged in the service road into respective plots and the size of the plot became 90 ft. x 50 ft. The trial Court has thoroughly analyzed the evidence and recorded the findings to issue nos.1 to 3, 6 and 7 as under:-

“13] It is the evidence of Deelip Ganpatrao Deshmukh, the Chief Officer of the defendant (DW1), Gyanraj Pandharinath Kakde, Town Planner of Latur

district (DW 2) and Sudhir Bhaurao Patil, Secretary of the Society (DW 3) that as per sanctioned lay-out plan (Exh.87) there are total eight plots in the eastern lane of the land of the society. On the eastern side of these eight plots i.e. between these plots and Nanded-Bidar State highway there is north-south suit service road of 25 feet in width. Area of the extreme northern and southern side plots in the said lane is 70 feet x 60 feet and area of each middle six plots, including the suit plot, is east-west 60 feet and north-south 50 feet. The certified copy of the sanctioned lay-out plan (Exh.87) also corroborates this position. It is further evidence of the Chief Officer (DW 1) that the plot holders have made construction of their respective buildings by committing encroachment over the suit service road. Hence, the defendant has initiated action to remove the encroachment made on the suit service road.

14] **The plaintiff does not deny existence of the suit service road shown in the sanctioned lay-out plan (Exh.87). It is only his say that at the time of laying plots the land was outside Udgir town. At the relevant time there was neither S.T. Bus stand nor development in the said area. The society came to know that the suit service road is unnecessary, unwanted, troublesome and causing nuisance. Hence, the society decided to not to keep the suit service road. The society, therefore, by including the area of the suit service road allotted plots admeasuring 90 feet x 50 feet to its**

members, including the plaintiff.

15] The plaintiff has neither filed the allotment letter issued to him by society nor filed any record to show that the society has allotted him more area than 60 feet x 50 feet shown in the sanctioned lay-out plan (Exh.87). He has also neither filed any record of the society nor examined any office bearer of the society to fortify his say. During cross-examination he has fairly made it clear that he has no such record. On the contrary, the existing Secretary of the society (DW 3) has made it clear that the society has not made any change in the sanctioned lay-out plan (Exh.87). The town planner (DW 2) has also made it clear that without sanction of his office no change or alteration can be made in the sanctioned plan. He has further made it clear that his office record does not show any change or alteration made in the sanctioned lay-out plan.

16] It indicates that the sanctioned lay-out plan (Exh.87) is the final approved plan and as per the said plan area of the suit plot is only 60 feet x 50 feet. The plaintiff has, however, come with a specific case that he has occupied the area of 80' x 50' x 100' x 90', which is inclusive of the area of suit service road and made construction of the suit building thereon. It further indicates that he has arbitrarily and unauthorizedly occupied excess area than his approved plot. Ultimately it indicates that he has made construction of the suit building by committing encroachment over the area of suit service road sanctioned in the sanctioned lay-out

plan.”

12] Thus, if we consider the reasons and findings recorded by the trial Court, there is absolutely no perversity in the reasons and findings recorded by the trial Court to hold that the plaintiff has failed to prove that construction over the suit plot was legal and authorized.

13] Similarly, the contention raised by the plaintiff that the notice issued to the plaintiff was illegal was thoroughly dealt by the trial Court. The trial Court considered said contention and observed in its judgment in paragraph nos.37, 38, 39 and 41 as under:-

“37] Learned Advocate for the plaintiff has further vehemently submitted that in order to remove any part of construction as per the provisions of Section 53 of the Maharashtra Town Planning Act and Section 189 of the Municipal Act notice of one month and 15 days respectively is mandatory. Section 179 of the Municipal Act is in respect of removal of only temporary structures. Hence, the suit notice (Exh.37) of only 48 hours under Section 179 of the Municipal Act is bad in law. On the basis of such illegal notice the defendant can not cause any damage to the suit building.

38] Learned advocate for the defendant has submitted that in Writ Petition Nos.5263 to 5273 of 1988 our Hon'ble High Court has taken a serious view and has made very serious observations that encroachments on

Government, Semi-Government lands as well as unauthorized construction on private lands are increasing. If this tendency on the part of citizens is not curbed effectually, people will have no respect for law and law abiding citizens will feel frustrated. It is necessary for the Government and for local authorities to device such methods as are necessary to ensure that there is a systematic and regular reckoning of the encroachment in every ward, and in the Municipality as a whole and to take necessary steps to stop/prevent attempted encroachments and to remove illegal encroachments already made. Relying on the observations the Government of Maharashtra, Urban Development Department, issued circular dated 17th September, 1992 directing the Municipal Councils to implement directions of the Hon'ble High Court. Accordingly the defendant has initiated action to remove the encroachments made on public roads within the limits of Municipal Council. As per section 179 of the Municipal Act, the Chief Officer has every power to remove encroachment on public street without notice. However, as a part of natural justice and just for the purpose of information the defendant has issued the suit notice (Exh.37).

39] The suit service road has come in existence as per the sanctioned lay-out plan (Exh.87). Section 88 sub-section (1), clause (g) of the Municipal Act speaks that all public streets, situate within the limits of municipal area, shall vest in and be under the control of the council. In

view of section 49, sub-section (2), clauses (f) and (l) of the Municipal Act it shall be the duty of the Municipal Council to undertake and to make reasonable provision for constructing, altering and maintaining public streets and removing obstructions and protections in public streets. Section 77 of the Act provides that the Chief Officer shall perform duties and functions as may be conferred or imposed upon him or allotted to him by or under this Act.

41] On plain reading of this provision it is seen that this is a special provision to remove encroachments on the public streets. It is not restricted only to temporary structures but it extends to every sort of encroachment on public street. Sub-section (3) specifically empowers the Chief Officer to remove any sort of encroachment on the public street without notice. The suit notice (Exh.37) discloses that the Chief Officer by invoking this provision intimated the plaintiff to remove encroachment on the suit service road. His action being not either under section 53 of the Maharashtra Town Planning Act or Section 189 of the Municipality Act it can not be said the mere formal notice of intimation is bad in law."

14] The decision rendered by the trial Court was confirmed in appeal by the appellate Court. The appellate Court found no perversity in the judgment and order passed by the trial Court. Thus, on due consideration of overall facts of the case, evidence

adduced in the case, reasons and findings recorded by the Courts below, I am of the view that no case is made out to entertain this appeal. The evidence on record clearly establishes that the housing society, of which the appellant – plaintiff was member, allotted plot to plaintiff admeasuring 50 ft. x 70 ft. in duly sanctioned lay-out. It is also established through testimony of the witnesses examined and the copy of sanctioned lay out map produced on record (Exh.87) that there was a service road having width 25 ft. in existence between plots owned by the society and Nanded-Bidar road. The service road having width of 25 ft. passing in front of plot of the plaintiff was encroached by the plaintiff and other allottees of said society raised construction over encroached area of service road and illegally merged into their plots. In order to remove the encroachments, the Municipal Council issued the impugned notice. Thus, I am of the view that no case is made out to entertain the appeal, which raises no substantial questions of law. I am, therefore, not inclined to entertain the appeal. The appeal is dismissed. There shall be no order as to costs. In view of dismissal of appeal, Civil Application No.11751/2018 also stands dismissed.

(V.L. ACHLIYA, J.)