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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

1 SECOND APPEAL NO.208 OF 2018
WITH CA/3743/2018 IN SA/208/2018

Ratan s/o Ramrao Jadhav,
Age : 40 years, Occu.: Service,
R/o.: Ward NO.7, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar

.
APPELLANT
(Ori.Def.No.1)

VERSUS

1] Rajesh Khanderao Vyavhare,
Age : 44 years, Occu.: Pathology,
R/o.: Ward No.7, Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar
(Ori.Plaintiff)

2] Shrirampur Nagar Parishad,
Shrirampur, through its Chief Officer,
Tq. Shrirampur, Dist. Ahmednagar (Ori. Def.No.2)
..RESPONDENTS

...
Advocate for Appellant : Shri Kasliwal Anil H.
Advocate for Respondent no.1 : Shri R. R. Karpe

CORAM: V.L. ACHLIYA, J.

DATE: 29.07.2019

PER COURT :

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1] Being aggrieved by concurrent decisions rendered by the Courts below, the appellant – original defendant no.1 has preferred this second appeal.

2] Heard learned counsel for the appellant and the respondent no.1 – Caveator. Perused the impugned judgments and decrees passed by the Courts below.

3] The respondent no.1 – plaintiff had filed suit for permanent and mandatory injunction against appellant – defendant no.1 and respondent no.2 – Municipal Council, Shrirampur. It is alleged that appellant – defendant no.1 has encroached upon the plaintiff's plot to the extent of 13 ft. x 4 ft. and 26 ft. x 3 ft. admeasuring 10.26 Sq.Meters and illegally erected permanent structure without seeking prior permission from respondent no.2 – Municipal Council. He lodged complaint with respondent no.2 – Municipal Council for taking action against the appellant – defendant no.1. However, the Municipal Council has not taken any action against the defendant no.1.

4] The appellant – defendant no.1 resisted the suit claim with contention that he has neither made any encroachment nor raised unauthorized construction over

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the plot area of the plaintiff. In short, the defendant no.1 has approached with a case that he is the owner and in possession of land admeasuring 22.44 Sq.Meters. There was old house property situated over said plot. He has only carried out repairs to existing structure. While the repairs were carried out, the plaintiff has not raised any objection.

5] The defendant no.2 – Municipal Council has denied the case of the plaintiff and submitted that the defendant no.1 has raised the construction without submitting the plan for approval and the notice has been issued to the defendant no.1 in respect of unauthorized construction made over the suit plot.

6] After due consideration of rival pleadings and evidence adduced in the case, the trial Court has decreed the suit. In terms of the decree passed, the defendant no.1 is directed to remove the disputed construction. As against the decision of trial Court, the appellant – defendant no.1 preferred appeal before District Court, Ahmednagar. By judgment and decree dated 21.3.2011 passed in Regular Civil Appeal No.81/2012 (old No.1096/2011), the appellate Court confirmed the judgment

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and decree passed in Regular Civil Suit No.45/2008 and dismissed the appeal. Being aggrieved by the concurrent decisions rendered by the Courts below, the appellant has preferred this appeal.

7] Learned counsel for the appellant assailed the judgments and decrees passed by the Courts below with contention that the Courts below have not properly considered the evidence in its proper perspective and misread the evidence adduced in the case. It is submitted that the Courts below have failed to take into consideration that the suit filed by the plaintiff is liable to be dismissed for want of statutory notice u/s 304 of the Maharashtra Municipalities Act, 1965, to defendant no.2 - Municipal Council. It is further submitted that the suit filed by the plaintiff is also not maintainable for the reason that the powers to take action against unauthorized construction solely vests with the Municipal Council. The Chief Officer of Municipal Council is required to decide to demolish or not to demolish any structure which is claimed as unauthorized construction after giving opportunity of hearing to such person. It is submitted that the Courts

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of Law cannot impede the exercise of discretion of Chief Officer of Municipal Council by issuing order in the nature of injunction. In support of the submission advanced, the learned counsel has referred and relied upon decisions of the Apex Court in the cases of *Vora Automotives Pvt.Ltd. v. Gopalrao Namdeorao Pohre* [(AIR (BOM) 1993 0 151] and *Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & others* (2007 ALL SCR 207).

8] It is further submitted that the construction raised by the plaintiff – defendant no.1 is within the plot area of the defendant no.1. He has not made any encroachment. The defendant no.1 has submitted an application for permission to construct, however, the application was not decided within the statutory period nor any communication was made to defendant no.1. In that view, the permission deemed to have been granted in favour of defendant no.1 to make construction, which is alleged as unauthorized construction.

9] On the contrary, the learned counsel representing the defendant no.1 – respondent no.1 supported the judgments and decrees passed by the Courts below. It is submitted that the appeal filed by the

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appellant is devoid of merit. It is submitted that there are concurrent findings of facts recorded on appreciation of evidence on record by the Courts below. By referring the decisions rendered by the Courts below, the learned counsel submits that the relief granted by the trial Court confines to unauthorized construction made by the defendant no.1 beyond his plot area and more particularly indicated in the report of Court Commissioner. It is submitted that the plaintiff is well within his powers to file suit and claim the reliefs in respect of unauthorized structure erected by the defendant no.1 affecting his interest. It is submitted that the plaintiff has made construction without keeping the side margin and further made encroachment beyond his plot area. He has encroached over land owned by plaintiff and made construction, that too without seeking prior permission from the Municipal Council. It is pointed out that as per report of Court Commissioner, it is proved that altogether new construction has been made by the defendant no.1. It is further pointed out that the defendant no.1 has taken inconsistent stand. At one hand, the defendant no.1 has claimed that he has only

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carried out repairs to old existing house and no construction has been made. On the other hand, the defendant no.1 has claimed that he has submitted an application for permission to make construction. However, the defendant no.2 has not decided the same within the statutory period and, therefore, permission to make construction deemed to have been granted to plaintiff. Learned counsel has pointed out that the defendant no.1 has produced no evidence to show that the requisite application alongwith the plan as required under the law submitted with defendant no.2 and same has not been considered and decided within the statutory period prescribed under the law. It is further submitted that the defendant no.1 cannot raise the issue of maintainability of suit for want of statutory notice as such plea can be raised and agitated only by the defendant no.2.

10] I have carefully considered the submissions in the light of rival pleadings and the evidence adduced in the case. In my view, no case has been made out to entertain the second appeal. The appeal raises no substantial question of law to be heard and decided in

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this appeal. There is no perversity in the reasons and findings recorded by the Courts below. Both the Courts below have decided the case after thoroughly analyzing the evidence adduced in the case. The contention of the appellant that the suit is bad in law for want of statutory notice u/s 304 of the Maharashtra Municipalities Act, 1965, cannot be accepted for the reason that such plea cannot be raised at the instance of the appellant. The issue of maintainability of suit can be raised and agitated only by the defendant no.2 - Municipal Council. It appears that no such plea was raised and agitated by the defendant no.2. So also the suit as filed calls for no notice u/s 304 of the Maharashtra Municipalities Act, 1965.

11] So far as submission advanced that the suit is not maintainable in respect of unauthorized construction at the instance of a third person, I am of the view that such contention cannot be accepted for the sole reason that there is no prohibition under the law to prevent the aggrieved person to approach the Courts of law to protect his own right on account of any construction made without permission of Municipal Council. In the instant

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suit, the plaintiff has approached with a specific case that the unauthorized construction raised by the defendant no.1 has been made over the portion of plot owned by plaintiff and thereby affected his right. In that view, the suit filed by the plaintiff seeking removal of unauthorized construction made over the plot area of the plaintiff as well as construction made by defendant no.1 on his own plot affecting the right of the plaintiff, suit of the plaintiff is maintainable in law. The decisions relied in the cases of *Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & others* (supra) and *Vora Automotives Pvt.Ltd. v. Gopalrao Namdeorao Pohre* (supra) have no bearing upon the facts of the present case.

12] Perusal of the judgments and decrees passed by the Courts below reflects that the decree passed in the suit does not extend to the entire construction made over entire plot area admeasuring 20.44 Sq.Meters owned and possessed by him. The injunction granted is restricted to area specified in the judgment and order passed by the trial Court. The order reads as under:-

"1] The suit is decreed with costs.

2] The defendant No.1 is directed to remove

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disputed construction of his house extending towards West beyond Western boundary of 22 ft. East-West, of his area-

3] The defendant No.1 is directed to remove the construction carried out by him extending beyond Northern boundary of of 10 ft. South-North of his area.

4] If the defendant No.1 fails to remove the construction as above within two months from today, the defendant No.2 is hereby directed to remove the same.

5] In the meanwhile the defendant No.1 is permanently restrained from carrying out any further construction at his portion of land.

6] The decree be drawn up accordingly."

Thus, the contention of the plaintiff that no direction could have been issued to defendant no.2 cannot be accepted in the facts and circumstances of the case as the relief granted confines to portion of area affecting the right of the plaintiff. The defendant no.2 has stated in the written statement that the notice has been given to defendant no.1. The defendant no.2 is required to take action as contemplated under the provisions of Maharashtra Municipalities Act. The notice issue4d is a step in a direction to take further action depending upon

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the reply to be filed to notice issued by defendant no.2.

13] Perusal of the judgments and decrees passed reveal that though the plaintiff claims to be owner of 20.44 Sq.Meters, the defendant no.1 is found to have made construction over the area admeasuring 30 Sq.Meters, he is found to have made encroachment over 10.37 Sq.Meters of land belonging to plaintiff. In order to ascertain the exact area of encroachment and unauthorized construction made by the defendant no.1 over the plot area of the plaintiff, the trial Court had appointed Court Commissioner. The Court Commissioner after visiting the site and measuring the land in presence of plaintiff and defendant no.1 submitted report to the effect that the defendant no.1 has carried out construction beyond the plot area owned by him. The trial Court has recorded in paragraph no.52 as under:-

"52] Thus it is established that, the defendant No.1 has encroached upon the plaintiff's area admeasuring 6.7 ft. East-West and 3 Ft. South-North. Since the defendant No.1 did not own area more than 22 ft. East-West and 10 ft. North-South. The construction extending more than said area is an encroachment on plaintiff's land."

14] Thus, the relief granted by the trial Court does not refer to the unauthorized construction made over the entire plot area of defendant no.1, but restricts to the unauthorized construction made by defendant no.1 over the portion of plot area of the plaintiff. In that view, the contention of learned counsel for the appellant that the decisions rendered by Courts below are contrary to the law laid down in the case of *Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad & others* cannot be accepted. The reasons and findings recorded by the Courts below clearly make out a case of unauthorized construction made by the defendant no.1 without seeking prior permission from the defendant no.2 – Municipal Council. The unauthorized construction made by defendant no.1 not only restricts to the plot area owned by him, but extends beyond plot area of the plaintiff, as well as set back area.

15] Thus, the appeal filed by the appellant is devoid of merit. The appeal raises no substantial question of law to be decided in appeal. There are concurrent decisions rendered by Courts below against appellant – defendant no.1. I am of the view that no

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case is made out to entertain the appeal. Accordingly, the appeal is dismissed with no order as to costs. In view of dismissal of appeal, Civil Application No.3743/2018 also stands dismissed.

(V.L. ACHLIYA, J.)