

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

WRIT PETITION NO.2490 OF 2019

Sudhir Ramchandra Thopte

.. Petitioner

V/s.

Kishore Ramchandra Thopte and Anr.

.. Respondents

Mr.Nikhil Wadikar I/b Mr.Nandu Pawar for the petitioner

**CORAM: K.K. TATED, J
DATED : MARCH 6, 2019**

P.C. :

1 Heard.

2 By this petition under Article 227 of the Constitution of India, the Petitioner challenges the order dated 26.11.2018 passed by Civil Judge, Junior Division Mahabaleshwar below Exhibit-32 in Regular Civil Suit No. 28 of 2018 dismissing the Petitioner plaintiff's Application for appointment of court commissioner as per the provisions of Order XXVI Rule 9 of the Code of Civil Procedure, 1908.

3 In the present proceedings, Petitioner original plaintiff filed Regular Civil Suit No. 28 of 2018 in the court of Civil Judge, Junior Division at Mahabaleshwar for mandatory injunction. In

that Suit, they filed an Application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. Following are the prayers:

“8. *Plaintiff prays that:*

There is scope of Justice on the part of plaintiff, this court commission will help the plaintiff to get justice and as a part of evidence. As per order below ext. 5 and sanctioned approval plan by defendant no.2 necessary orders be passed towards Court commission and court commissioner be appointed.”

4 That Application was dismissed by the Trial Court holding that if unauthorised construction is carried out by Respondent no.1, in that case, Respondent no.2 Corporation can measure the same and place on record to that effect. Instead of doing that, plaintiff wanted to appoint court commissioner to collect the evidence under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. Hence, Trial Court rejected Petitioner’s Application for appointment of court commissioner.

5 The learned counsel for the Petitioner submits that Petitioner filed Regular Civil Suit No. 28 of 2018 for mandatory injunction for removal of unauthorised construction carried out by Respondent no.1. He submits that to place on record the exact area of unauthorised construction carried out by Respondent no.1, they filed an Application under Order XXVI Rule 9 of the

Code of Civil Procedure, 1908 for appointment of court commissioner for local investigation. He submits that the Trial Court rejected their Application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 only on the ground that it is the duty cast upon the Corporation to take action against unauthorised construction. He submits that the view taken by the Trial Court is not correct. He submits that third party can also filed a Suit for removal of unauthorised construction. In support of this contention, he relies on the Division Bench judgment of this court in the matter of ***Fatima w/i. Caetano Joao vs. Village Panchayat of Mercedes and another***¹. He relies on paragraph 22 and 33 of the judgment which reads thus:

“22. We, while taking the above view, are conscious of the approach adopted in the judgments referred to hereinabove, operating in the field holding that breach of bye-law does not furnish cause of action to the adjoining owner. However, in our opinion, the views expressed in the aforesaid cases are misplaced.

We are clearly of the view that a neighbour could seek remedy from the Court of law when he can satisfactorily establish infraction of the law or the Municipal Law invading his right, unless by express implication he is debarred from doing so. In our view, development of liberal view is thus discernible as the time marches on. We feel that building regulations do provide right in favour adjacent owner. A duty to conform to the

1 (2001) 1 Mh. L.J. 836

Municipal Rules is the duty not only of the corporation or the Municipality, but also of fellow citizens."

"33. Independently of the discussion, is it possible to hold that the Civil Court would have jurisdiction. Under Section 9, jurisdiction of the Civil Court to entertain all civil disputes, can be taken away by excluding its civil jurisdiction. Goa Panchayat Raj Act, 1993 has no provision excluding the jurisdiction of the Civil Court. Earlier it has been discussed that there is also no implied ouster. Under Section 38 of the Specific Relief Act, a perpetual injunction can be granted to prevent the breach of an obligation existing in favour of a party whether expressly or by implication. "Obligation" has been defined to mean every duty enforceable by law. What therefore, is the duty which is enforceable against a neighbour who violates the provisions of the Goa Panchayat Raj Act, 1993. Will putting up a construction without taking a licence or by taking a licence and constructing contrary to the licence, give to the neighbour a right. Does the person constructing owe a duty to the neighbour not to construct without a licence or contrary to the licence ? Can this be said to be a right enforceable in a Civil Court ? Easements, in so far as light and air, are concerned in areas falling within the jurisdiction of local bodies are subject to the Acts, Rules and Regulations of such bodies. This is pursuant to the powers conferred on local bodies by various statutes to

regulate construction activities within their jurisdiction. Therefore, does this duty cast by the statute on the neighbour, create an obligation which would be enforceable in a Civil Court. If it can be spelt out from the act itself, then the Civil Court would have jurisdiction. In respect of construction contrary to licence, extraordinary jurisdiction of this Court can be invoked to direct the local body to enforce the provisions of the acts, rules and regulations. If, therefore, the extraordinary jurisdiction available, a civil suit would be maintainable to direct by way of mandatory injunction, the local authority to discharge its duties under the Act. Where therefore, a local body is a party, there is no difficulty whatsoever.”

6 On the basis of these submissions and the authorities, the learned counsel for the Petitioner submits that the impugned order is required to be set aside directing Trial Court to appoint Court commissioner as per the provisions of Order XXVI Rule 9 of the Code of Civil Procedure, 1908 for local investigation. He submits that if present Writ Petition is not allowed, irreparable loss will be caused to the Petitioner original plaintiff.

7 Heard.

8 It is to be noted that bare reading of the plaint as it is filed by the plaintiff shows that prima facie, same is not maintainable in law. There is no prayers in the plaint. Paragraph 16 of the

said plaint reads thus:

“16. The Suit if filed in regard to heritage property wherein a large society of people seeking development as their right from the municipal council and which is denied by the municipal council on various grounds and as there are guidelines to develop which are prescribed by the government for keeping the heritage monuments deformed this council under undue influence and misusing its power prescribed by law have given elicited permission to develop the suit property. If the injunction is granted the benefit of the Society will be protected and confirmed hence this court need to enforce explicit power so that truth shall prevail as the suit is vast and evidence needs to be collected which is going to take time till then necessary temporary injunction orders be passed by the Honourable Court.”

9 Apart from that, bare reading of the Application filed by the Petitioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 shows that same is for collecting the evidence against the Respondent. It is to be noted that Municipal Corporation is already on record as defendant. If court called upon them, Corporation can place on record all the measurement of the suit structure. These facts were considered by the court in paragraph 8 and 9 of the impugned order. Apart from that, Application filed by the Petitioner original plaintiff for collecting the evidence against the Respondent is not permissible in law.

10 The authority cited by the Petitioner is not applicable in the facts of the present case. Authority in the matter ***Fatima w/i. Caetano Joao vs. Village Panchayat of Mercedes and another*** states that even third party and or neighbour can file a suit for removal of unauthorised construction. That is not the issue in the present proceeding in hand. In the present proceedings, the issue involved is whether court commissioner can be appointed for local investigation for collecting evidence in support of plaintiff's submission.

11 Considering these facts and after perusing the reasoned order given by the Trial Court, I do not find any substance in the present Writ Petition.

12 Hence, Writ Petition stands rejected.

13 No order as to costs.

(K.K. TATED, J.)