

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 7947/2018

(NISARGA ASTHA BAHUDDSHIYA SHIKSHAN PRASARAK MANDAL, AKOLA **VERSUS** M/S
 OBEROI CONSTRUCTION & OTHERS

 Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri A.R. Deshpande, counsel for petitioner.
 Shri S.S. Sarda, counsel for R-1.
 Shri V.A. Thakare, A.G.P. for R-2.
 Shri S.V. Sohoni, counsel for R-3.

CORAM : A.S. CHANDURKAR, J.

DATE : JUNE 26, 2019.

Heard finally with consent of counsel for the parties.

The petitioner is the original plaintiff who is aggrieved by the order passed by the Appellate Court allowing the miscellaneous appeal filed by the respondent no.3 herein and setting aside the order of the trial Court.

It is the case of the plaintiff that on 11.11.2006, it was allotted an open space from Field Survey No.4/1 by the defendant no.3-Municipal Corporation, through its Commissioner. By the said agreement, the plaintiff was permitted to develop the property on the lease for a period of thirty years. After depositing the requisite amount, the plaintiff started work thereon. The defendant no.1 sought to obstruct the possession of the plaintiff and that gave a cause of action to file the suit in question. In the suit, the plaintiff sought temporary injunction seeking to restrain the defendants from disturbing its possession and evicting it without following due process of law.

In the said suit, the defendant no.1 which was a Construction Company sought to rely upon an agreement and work order dated 09.03.2017 issued in its favour by the Public Works

Department. According to said defendant, it had the right to develop a walking track on the said land and hence the plaintiff had no right to obstruct such work being done. The Collector who was the defendant no.2 took the stand that the defendant no.2 had no concern with the dispute and the suit property was not Government land. The Municipal Corporation took the stand that the Commissioner was not authorized to enter into the said lease agreement and the provisions of Section 79 of the Maharashtra Municipal Corporations Act, 1949 had not been complied with in that regard. The agreement was void *ab-initio*. Insofar as the Public Works Department is concerned, it referred to the work order dated 09.03.2017 issued to the defendant no.1.

The trial Court after considering the material on record *prima-facie* found that the agreement dated 11.11.2006 was in operation. It further observed that under provisions of Section 81B of the Act of 1949, the Municipal Corporation was empowered to evict the plaintiff. Considering the settled possession of the plaintiff, the trial Court allowed the application for temporary injunction. It restrained the defendants from disturbing the possession of the plaintiff except by following the due process of law. The Municipal Corporation being aggrieved filed an appeal and the Appellate Court after observing that the Municipal Commissioner had no authority to enter into such an agreement, set aside the order passed by the trial Court. Hence, the present writ petition.

Shri A.R. Deshpande, learned counsel for the petitioner submits that in the light of the lease-deed dated 11.11.2006, the plaintiff was in settled possession which fact was also noted by the Appellate Court. As possession of the plaintiff was not in dispute, the plaintiff was not liable to be dispossessed without following the

due process of law. According to him, the Appellate Court was not justified in going into the exercise of determining the validity of the lease-deed at this stage. The said aspect was required to be considered in the suit and there was no reason to interfere with the order passed by the trial Court in the light of the liberty granted to the defendants to follow the legal provisions if it wanted to dispossess the plaintiff. In support of his submissions, he placed reliance on the decisions in *Samir Sobhan Sanyal Versus Tracks Trade Private Ltd. & Others* [(1996(4) SCC 144] and *Rame Gowda (Dead) by LRS. Versus M.Varadappa Naidu (Dead) by LRS. & Another* [(2004(1) SCC 769)]. It was thus submitted that the order passed by the trial Court deserves to be restored.

Shri S.V. Sohoni, learned counsel for the respondent no.3 and Shri S.S. Sarda, learned counsel for the respondent no.1 as well as Shri V.A. Thakare, learned Assistant Government Pleader for the respondent nos.2 and 4 supported the impugned order. It was submitted that in view of provisions of Section 79 of the Act of 1949, the agreement dated 11.11.2006 had no legal force. It was an agreement that was void in nature and the petitioner could not claim any right on that basis. Reference was also made to the provisions of Section 74(2) of the Act of 1949. According to the Municipal Corporation, the open space vested in the Municipal Corporation and therefore after the resolution of the General Body, such work could have been granted. On behalf of the respondent no.1, reference is made to the work order dated 09.03.2017 and it was submitted that the defendant no.1 was entitled to undertake work in that regard. The learned Assistant Government Pleader has relied upon the judgment of the Division Bench in **Writ Petition No.2975 of 2000** [*Justice Shriniwas Gaurishankar Mutalik Versus*

Aurangabad Municipal Corporation & Others] in support of the impugned order.

Heard the learned counsel and perused the documents on record. The plaintiff seeks to rely upon the agreement dated 11.11.2006 and it is the case of the plaintiff that pursuant to that agreement the work of development is in progress. On the other hand, the defendant no.1 seeks to rely upon the agreement dated 09.03.2017 and the work order issued thereto by the Public Works Department. According to the Municipal Corporation, the agreement in question relied upon by the plaintiff was not in accordance with the provisions of Section 79 of the Act of 1949 and hence it was void *ab-initio*. These aspects require consideration by the trial Court in the light of the evidence that would be led by the parties. The trial Court has observed that since the plaintiff was in possession on the basis of the agreement dated 11.11.2006, it could be dispossessed only after following the due process of law. The injunction as granted permits the defendants to follow due process of law if they seek to take possession from the plaintiff. The Appellate Court however has disregarded this aspect and has thereafter observed that the plaintiff had failed to make out a *prima-facie* case. In the light of the fact that the plaintiff could not have been dispossessed without following the due process of law and in the light of the fact that the provisions of Section 81B of the Act of 1949 permit the Municipal Corporation to take steps in that regard, the Appellate Court was not justified in setting aside the order passed by the trial Court. The decisions relied upon by the learned counsel for the petitioner support his contention that the due process of law has to be followed.

In that view of the matter, the order passed by the Appellate Court on 26.10.2018 in Miscellaneous Civil Application No.40 of 2018 is set aside. The order passed by the trial Court below Exhibit 5 is restored. It is made clear that the defendants are at liberty to take such steps as are permissible in law with regard to their legal rights. The trial Court while deciding the suit shall not be influenced by any of the observations made in this order.

All contentions of the respective parties are kept open.

The Writ Petition is allowed in aforesaid terms. No costs.

JUDGE

APTE