

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO.15 OF 2020

Noor Ratan Patel & ors. ... APPELLANTS

VERSUS

Qaisaruddin s/o Daud Siddiqui & ors. ... RESPONDENTS

.....
Shri A.D. Kasliwal, Advocate for appellants
shri S.V. Natu, Advocate for respondents No.1 and 2
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CORAM : R. G. AVACHAT, J.

DATE : 20th OCTOBER, 2021

ORDER :

The challenge in this appeal is to the order dated 18/1/2020, passed by District Judge-7, Aurangabad on application Exh.11 in Regular Civil Appeal No.98/2018. Vide impugned order, the appellants, original defendants in Regular Civil Suit No.117/2020 have been restrained from carrying out construction on the suit property.

2. Heard. Learned counsel for the appellants, original defendants would submit that, the respondents/ original plaintiffs' suit for possession of the land described in

paragraph No.1 of the plaint has been dismissed by the trial Court on merits. The appellants/ defendants are alleged to have made encroachment on the land belonging to the respondents/ plaintiffs. The Cadastral Surveyor had measured the land. Since he did not find any encroachment, he was not examined in the suit. Instead of asking for Nimtana measurement, the respondents/ plaintiffs examined private surveyor, who had measured the land. The Trial Court rightly disbelieved the evidence of the Surveyor to dismiss the suit. As such, the plaintiff respondent failed to make out a case of the suit land to have belonged to him. In such circumstances, the appellate Court ought not to have granted application Exh.11 to restrain the appellants/ defendants from making any construction on his own land. The learned counsel, therefore, urged for setting aside the impugned order.

3. Learned counsel for the respondents/ plaintiffs would, on the other hand, submit that, both the parties to this appeal have purchased the land in Survey No.32/1. The respondents/ plaintiffs' sale deed is first in point of time. He would further submit that, the application for measurement of the land has again been moved. If the appellants/ defendants are permitted to make construction on the suit land, it would

necessarily cause irreparable loss. The learned counsel relied on the Apex Court judgment in case of **Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass** reported in [(2004) 8 SCC 488].

4. Considered the rival submissions. Perused the impugned order. Gone through the documents relied on. The respondents/ plaintiffs filed the suit for possession of the land alleged to have been encroached by the appellants/ defendants. They have been unsuccessful in the suit. The Government Surveyor, who measured the land, did not find any encroachment. He was, therefore, not examined as a witness in the suit. The land was then measured by private surveyor. He was examined as a witness. The Trial Court did not believe his evidence. The suit, therefore, came to be dismissed. The suit dates back to the year 2010. The same is pending in first appeal. As of today, there is prima facie nothing to suggest that the land on which the appellants/ defendants had initiated construction belonged to the respondents/ plaintiffs. In such circumstances, the first appellate Court ought not to have curtailed the appellants/ defendants' proprietary right to use their own land as they wish.

5. There can be no dispute over the observations of the Apex Court in case of Baldev Dass (supra), it has been observed by the Apex Court that,

“Likelihood of nature of property being changed, including by alienation or transfer thereof – Such change of the status quo, when permissible – Power of Court to grant damages to compensate non-issue of injunction when case of the party opposing the injunction is baseless, on motion of party, and suo motu – Held, unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit a change of the said status quo, which may lead to loss or damage being caused to the party who may ultimately succeed, and may further lead to multiplicity of proceedings – In any event, it is always open to the other party to claim damages if the case of the party pleading a maintenance of the status quo is ultimately found to be baseless or, in an appropriate case, the Court may itself award damages for the loss suffered, if any, in this regard – On facts, no such case of irreparable loss made out – The contention that the legal proceedings are likely to take a long time, therefore the suit property should be permitted to be put to good use, is not good enough.”

6. Each case has to be decided on its own facts and circumstances. In the case in hand, the respondents/ plaintiffs have yet not been able to make out a prima facie case to suggest that the land on which the appellants/ defendants had initiated construction belonged to the

respondents/ plaintiffs. Needless to mention, whatever construction that would be made by the appellants/ defendants, would be subject to outcome of the suit. They will have to raze the same if it is found to be an encroachment on the suit land.

7. For all these reasons, interference with the impugned order is called for. In the result, the appeal succeeds. The same is allowed. The order dated 18/1/2020, passed on application Exh.11 in Regular Civil Appeal No.98/2018 is hereby set aside.

(R. G. AVACHAT)
JUDGE

fmp/-