

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

20 WRIT PETITION NO.9101 OF 2021

DINESHKUMAR MALHARRAO KAPADNISH
VERSUS
SHIVAJI NATHU PATIL

...

Advocate for Petitioner : Bali Harish S.
Adv. Mr. Ujwal Patil for respondent

...

CORAM : MANGESH S. PATIL,J.
DATE : 30/08/2021

PER COURT :

Heard.

2] Issue notice. The learned advocate Mr.Ujwal Patil waives service for the sole respondent.

3] With the consent of the both the sides, the matter is heard finally at the stage of admission.

4] The petitioner is the original plaintiff impugning the judgment and order passed by the learned District Judge, Amalner whereby the learned Judge allowed the appeal preferred by the respondent under Section 104 of the Code of Civil Procedure and quashed and set aside the order of temporary injunction passed by the learned Civil Judge on petitioner's Application (Exh.5).

5] The sum and substance of the averments of the petitioner and the contentions of the respondent are to the effect that the former is

the owner of the property bearing Gram Panchayat Nos.343 and 344 whereas the respondent is the owner in possession of the property bearing Gram Panchayat No.346. Both these properties are stated to be obliquely situated and there is no common wall. The entry to the petitioner's suit property is from west whereas the entry to the property of the respondent is from south. According to the petitioner, there is a door and a stair case to his property opening towards west. The respondent is carrying out construction which is likely to obstruct his entry to the house as also light and air being received by him.

6] The respondent has not disputed ownership and possession of the petitioner but has contended that he has been carrying out construction according to the building permission granted by the Gram Panchayat. He specifically undertook in paragraph no.14 of the written statement not to create any construction in front of the stair case and the door of the petitioner's property opening towards west.

7] The learned Civil Judge restrained respondent by way of temporary injunction from carrying out any construction adjacent to the stair case and the door of the petitioner's property situated on the western side. By the impugned judgment and order the learned District Judge quashed and set aside the order of temporary injunction and rejected the Application (Exh.6).

8] The learned advocate for the petitioner vehemently submits that when the Suit was filed no building permission was obtained by the respondent and still he had started carrying out construction. The petitioner was entertaining a reasonable apprehension that since the respondent was digging the pits adjacent to the stair case and the

door, in all probability he was to obstruct petitioner's way, thereby causing obstruction to the light and air being received by him. He would further submit that there is also a window on the western wall and the proposed construction of the respondent is likely to obstruct his right to receive light and air through that window. The learned advocate would also submit that though it is not the case of the petitioner that the respondent has made any encroachment over his property, the construction being carried out is likely to obstruct his use of the property.

9] The learned advocate Mr.Patil for the respondent submits that admittedly, building permission was obtained by the respondent on 24/2/2021 and he has been carrying out construction over his own property strictly in accordance with the building permission. He would further submit that the respondent in his written statement itself has specifically committed that he will not carry out any construction in front of the petitioner's stair case and the door. It is in the light of such state of affairs, there was no *prima facie* case or balance of convenience in favour of the petitioner and the learned Civil Judge had erred in granting temporary injunction. By the impugned judgment and order the learned District Judge has corrected the error.

10] I have carefully considered the rival submissions and the papers including photos produced on record by both the sides. It is to be borne in mind that relief of temporary injunction is a discretionary relief and the party claiming it has to establish a *prima facie* case and balance of convenience in his favour and has to further prove that he would suffer some irreparable loss if the temporary injunction is not

granted.

11] When, admittedly, the petitioner himself has carried out the construction over his property by demolishing the old construction it was expected of him to have produced on the record the building permission under which he did so. He however, has not produced it on the record.

12] Again there is absolutely no whisper about any obstruction to the petitioner's light and air being received through any window fitted in the western wall, in the entire written statement. It is for the first time that the advocate is coming with such a plea in this proceeding.

13] So far as the stair case and the door in question is concerned, the respondent in paragraph no.14 of his written statement (Exh.15) has specifically mentioned that he would not carry out any construction in front of these stair case and the door.

14] Admittedly, though belatedly, the respondent no.1 has succeeded in obtaining some building permission on 24/2/2021. There was absolutely no material before the lower Court or even before this Court to demonstrate that the building permission granted to the respondent is either illegal or has tendency of creating any obstruction to the petitioner's use of his property.

15] It is in the light of such state of affairs, neither there was any *prima facie* case nor was the balance of convenience in favour of the petitioner and still the learned Civil Judge had granted the temporary

injunction overlooking the fact that building permission was received by the respondent to carry out construction over his property and there were no allegations about any encroachment or illegality in such permission. The conclusions drawn were clearly arbitrary and capricious.

16] The learned District Judge in his impugned judgment and order has taken into consideration all these aspects and has rightly allowed the Miscellaneous Appeal. There is no error or illegality.

17] The Writ Petition is dismissed in limine. The observations made hereinabove are confined to the decision of the present Petition.

(MANGESH S. PATIL,J.)

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