

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.978 OF 2021

Nirmala Rajendra Gawali

...Petitioner

Versus

Hansraj Vitthal Gawali And Another

...Respondents

Ms. Pooja V. Langhe, Advocate for the petitioner.

Mr. Y.D. Kale, Advocate for respondents.

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 3rd OCTOBER, 2022

ORDER :

1. Petitioner filed Regular Civil Suit No. 143 of 2020 seeking permanent injunction against the respondents/defendants that the defendants shall not obstruct the construction of plaintiff from southern side. In the suit, application Exhibit-5 is filed seeking temporary injunction that defendants shall not cause obstruction in the construction of the plaintiff from the southern side. Application of the petitioner is rejected by the Trial Court and the rejection is confirmed by the Appellate Court. Hence, the present petition.

2. I have duly considered the submissions made by

learned advocate for the petitioner and learned advocate for respondents. Perused the writ petition, grounds raised therein, documents submitted along with the petition, impugned orders and the citations relied upon by the learned advocate for the petitioner. This Court is of the opinion that no case is made out by the petitioner to interfere in the order impugned in the present petition.

3. Record indicates that the plaintiff and wife of defendant No. 1 and mother of defendant No. 2 are owner and possessor of 998.25 sq.ft. portion in gut no. 318 (subject property). The petitioner has filed suit claiming a substantial relief of permanent injunction that the defendants should not interfere in the construction of the petitioner from southern side. Same relief is claimed by the petitioner in the application Exhibit-5. Thus, if the interim relief is granted by allowing application Exhibit-5, it would amount to grant of final relief in favour of the petitioner.

4. The Trial Court while rejecting the application filed by the petitioner has assigned proper reasons and has held that the petitioner has failed to make out a prima facie case in her favour.

There is no balance of convenience in favour of the petitioner and no irreparable loss would be caused to the petitioner if injunction is not granted.

5. It is further clear from the record that the photographs and affidavits placed on record show that only small portion of area is left between two houses i.e. between the house of defendant No. 1 and construction of the petitioner. The Appellate Court has therefore recorded a finding that small portion left in between two constructions will not count around 998.25 sq.ft. of the share of wife of defendant No. 1. A further finding is recorded that the plaintiff has failed to prima facie show that she has made construction only on 998.25 sq.feet land. In this view of the matter, the Appellate Court is justified in rejecting the appeal filed by the petitioner thereby confirming the order passed by the Trial Court.

6. The learned advocate for the petitioner has relied on Baban Anantrao Naik Vs. Sau. Pramila Uttamrao Yenare & Anr., 2011 (6) ALL MR 15, Shamrao Ganpat Chintamani Vs. Kakasaheb Laxman Gorde, 2008(2) ALL MR 118 and Rame Gowda (D) By LRs. Vs. Varadappa Naidu (D) By LRs, AIR (SC) 2004 0 4609.

7. In Baban Naik (supra), this Court has held '*at the time of determination of an application for temporary injunction, the factum of possession would only be the relevant factor. Whether the possession is lawful possession or not would not be the subject matter of enquiry.*' There cannot be any dispute about said proposition, however, this decision is not applicable to the facts of the present case.

8. In Shamrao Chintamani (supra), this Court has held '*prima facie case, balance of convenience and irreparable loss are the factors which require to be taken into consideration by the Court while considering the application for temporary injunction.*'

This is a settled legal position, however, in the facts of the present case, both the Courts have concurrently held that the petitioner has failed to make out a prima facie case and balance of convenience in her favour and no irreparable loss is likely to be caused to the petitioner.

9. In Rame Gowda (supra), the Apex Court has held that, '*if trespasser is in settled possession of property belonging to rightful owner, he shall have to take recourse of law, he*

cannot take the law in his own hands and evict the trespasser.'

Such are not the facts of the present case.

10. Both the Courts have recorded concurrent finding of fact, which are not liable to be interfered with in the extraordinary writ jurisdiction. There is no merit in the challenge raised by the petitioner in the present petition. The writ petition is therefore dismissed.

11. Needless to state that, these observations are prima facie and shall not influence the Trial Court while deciding the suit on merit.

[NITIN B. SURYAWANSHI, J.]