

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

WRIT PETITION NO.3793 OF 2019

VIJAY NARAYAN KHAPTE
VERSUS
VIKRAM DILIP LUTE AND OTHERS

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Advocate for the Petitioner : Shri Kulkarni Sanket S.
Advocate for Respondents 1 and 2 : Shri Amol S. Gandhi
Advocate for Respondent 3 : Shri Bedre Vinayak Sudhakar

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CORAM: SMT. BHARATI H. DANGRE, J.

DATE :- 15th February, 2022

Per Court:

1. Heard the learned counsel for the petitioner and the learned counsel for the respondents.
2. The petitioner is defendant No.1 in RCS No.299/2018 filed by the original plaintiffs (respondent Nos.1 and 2 herein) seeking perpetual injunction by invoking Section 38 of the Specific Relief Act.

The claim in the suit is based on the pleadings of the plaintiffs that they are owners of the suit property and are in possession thereof and defendant No.1 is carrying out construction on their land. The relief of perpetual injunction is, therefore, sought for and the appointment of the commissioner for carrying out measurement of the suit property by the Deputy Superintendent of Land Records, is also sought for.

3. On summons being issued, the present petitioner recorded his appearance in the suit and filed his written statement with a specific pleading that the plaintiffs are owners only of a portion and therefore, they cannot claim injunction for more than that area. On an application filed for injunction vide exhibit 5, same came to be rejected on 07.12.2018, prima facie, recording that the plaintiffs lack title over the piece of land, which was claimed as the suit property as their vendor was not the owner of the entire portion of the land. Thus, in short, the Trial Court did not deem it fit to grant the relief of injunction, since the plaintiffs lacked title.

4. During the pendency of the suit, the plaintiffs filed the application exhibit 54 for amendment, now alleging that the construction, which the defendant is undertaking is not as per the plan approved by the Municipal Council, Rahata and certain paragraphs were sought to be introduced through the said amendment. Impleadment of the Chief Officer of the Municipal Council was sought for along with impleadment of Smt.Sonabai Khapte, mother of the petitioner/ defendant No.1, since mutation has been effected in her name.

5. Perusal of exhibit-54 would reveal that the plaintiffs sought insertion of paragraph 4A in the plaint along with paragraphs E, U and OO (ई, उ and ऊ). The plaintiffs sought to challenge the building permission granted in favour of the defendant No.1 and perusal of the pleadings

sought to be introduced in paragraph 4A would reveal that the permission granted by the Municipal Council is subjected to severe criticism by pointing out lacunas to the effect that the said permission did not take into consideration the relevant factors as per the building bye-laws. It is further pleaded that defendant No.1 has acted in violation of the terms and conditions of the building permission and the manner in which this violation is alleged, can be seen from the pleadings sought to be introduced.

6. In a nutshell, in paragraph 4A, the plaintiffs are pleading that the building permission in favour of defendant No.1 is not as per the law and apart from this, in violation of the building permission, the construction is being carried out and therefore, it is unauthorized. Based on these pleadings sought to be introduced in paragraph 4A, other paragraphs are sought to be added in the form of the relief and the main relief being sought to the effect that the construction of defendant No.1 be declared as unauthorized and his permission for construction may be recalled. Interim relief is also sought to be introduced in terms of prayer clause E that the construction, which is clamped as unauthorized construction, shall be immediately stopped. Further prayer is that the construction undertaken is without building permission and it travels beyond the approved map and since it is unauthorized and illegal and therefore, for carrying out the measurement of the same, the

Commissioner shall be appointed to prepare the report and place the same before the Court.

7. Pertinent to note that, at an earlier instance, an application filed by the plaintiffs seeking injunction (exhibit-5) was rejected and therefore, there is no restraint order against defendant No.1 in carrying out the construction.

8. True it is that whatever construction has to be undertaken, it must be in conformity with the building bye-laws formulated by the Municipal Council i.e. planning authority and any construction de-hors the permission, is liable to be removed, but this action can be initiated by the Municipal Council. Though it is permissible for a neighbour like the plaintiffs to bring this to the notice of the planning authority, however, if the permission granted itself is sought to be challenged, the bar under Section 149 of the Maharashtra Regional and Town Planning Act, 1966, shall come into operation since the order passed or direction issued by any planning authority or development authority under the Act, shall not be questioned in any suit or any other legal proceedings. The learned Judge has failed to take into consideration the said provision and recording that the amendment is nothing but a subsequent development, has granted the same.

I do not think that this course is available to the learned Judge, in the wake of the bar imposed under Section 149 of the MRTP

Act. The learned Judge has not gone through the contents of the amendment application and has perfunctorily recorded that by the said application, only subsequent events are sought to be brought on record and therefore, it is granted.

9. By the order of this Court dated 20.03.2019, there was restraint order imposed on the Trial Court not to proceed with the suit. Since I am not satisfied with the reasoning in the impugned order, for the reasons recorded above, the impugned order deserves to be set aside.

10. In the result, by setting aside the impugned order, this Writ Petition is allowed. The proceedings in RCS No.299/2018 are permitted to progress further, but without the amendment.

11. This order is passed with the clarification to the effect that if the plaintiffs allege encroachment by defendant No.1 over the suit property, the above observations made qua their amendment sought to be introduced against the sanction granted by the Municipal Council, shall not come in their way.