

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

WRIT PETITION NO.4611 OF 2022

- 1] Dr. Mohan Tejpal Tholar,
Age: 71 years, Occu: Medical Practitioner
- 2] Dr. Padmini A. Fariyas
Age : 72 years, Occ: Medical Practitioner
(Petitioner No.1 is the attorney holder of the
Petitioner No.2)
- 3] Dr. Priyanka Mohan Tholar
Age : 36 years, Occu: Medical Practitioner

All R/o. Tholar Hospital, Opp. Tarakpur
S.T. Stand, Ahmednagar, Taluka
and Dist. Ahmednagar.

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PETITIONERS
(Orig. Deft. Nos.1,5 and 6)

VERSUS

- 1] Bhaskar Bhagwan Koli
Age : 37 years, Occu: Service
R/o. Flat No.304, Court Yard C
Building, Opp. Tarakpur S.T. Stand
Ahmednagar, Tal & Dist. Ahmednagar.
- 2] Chetan Pradip Bhandari
Age : 33 years, Occu: Business,
R/o. Flat No.202, Court Yard C
Building, Opp. Tarakpur S.T. Stand
Ahmednagar, Tal & Dist. Ahmednagar.
- 3] Hemant Ramesh Gawali
Age : 43 years, Occu: Advocate
R/o. Flat No.204, Court Yard C
Building, Opp. Tarakpur S.T. Stand
Ahmednagar, Tal & Dist. Ahmednagar.
- 4] Sachin Bhausahab Patil,
Age : 47 years, Occu: Advocate,
R/o. Flat No.302, Court Yard C
Building, Opp. Tarakpur S.T. Stand
Ahmednagar, Tal & Dist. Ahmednagar.
- 5] Sau. Anjali Anil Sarode
Age : 50 years, Occu: Advocate
R/o. Flat No.405, Court Yard C
Building, Opp. Tarakpur S.T. Stand
Ahmednagar, Tal & Dist. Ahmednagar.

- 6] Pranit Deepak Medhe
Age: 29 years, Occu: Business,
R/o. Flat No.14, Court Yard E
Building, Opp. Tarakpur S.T. Stand
Ahmednagar, Tal & Dist. Ahmednagar.

... Orig. Plaintiffs

- 7] Mrs. Shirley Santosh Tholar
Age : 64 years, Occu: Household
- 8] Mr. Tanveer Santosh Tholar
Age : 43 years, Occu: Service
- 9] Mr. Raoul Santosh Tholar
Age: 34 years, Occu: Business,
All R/o. Ibrahim Colony, Opp.
Evangeline Boothe Hospital, A'Nagar
Tal & Dist. Ahmednagar.
- 10] M/s. Marc Developers
Partnership Firm through its Partner
Makarand Madhav Kulkarni
Age: 58 years, Occu: Business,
R/o. Office No.101, Marc House,
Opp. Datta Mandir, Savedi, Ahmednagar

... RESPONDENTS
(No.7 to 10 Orig. Defts)

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Advocate for Petitioners : Mr. S.P. Brahme
Advocate for Respondent Nos.1 to 6 : Mr. A.M. Gholap

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CORAM : MANGESH S. PATIL, J.
Reserved on : 15.06.2022
Pronounced on : 29.06.2022

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. Learned advocate Mr. Gholap waives service for the respondent Nos.1 to 6. At the request of both the sides, the matter is heard finally at the stage of admission.

2. The petitioners are the original defendant Nos.1,5 and 6 in a suit filed by the respondent Nos.1 to 6 claiming perpetual injunction restraining the petitioners from obstructing their use of couple of 9 meter

wide roads originating from the western boundary of 6738.09 sq.mt. portion of the north-east corner from survey No.3 which totally admeasures 13800 sq.mt. and also for mandatory injunction directing them to remove a wall constructed across the 9 meter wide road along the western boundary of survey No.3 erected by them adjacent to their Krupa Tholar Hospital. They had also annexed a rough sketch to the plaint. By moving Application (Exhibit-5) the respondent Nos.1 to 6 prayed for a temporary injunction as also temporary mandatory injunction in terms of the main relief. The trial court rejected the Application (Exhibit-5). The respondent Nos.1 to 6 challenged that order by preferring a Miscellaneous Civil Appeal in the District Court. By the judgment and order under challenge, the appeal has been allowed and the Application for interim relief (Exhibit-5) has been allowed.

3. The learned advocate Mr. Brahme for the petitioners vehemently submitted that a well reasoned order passed by the trial court refusing to grant any interim relief has been unnecessarily and illegally quashed and set aside by the appellate court by substituting its own views. He would submit that the petitioners and their co-owners had only entrusted 6738.09 sq.mt. portion to the respondent No.10 who is a builder and a developer. Pursuant to such development agreement he carried out construction of buildings 'C' and 'E' over that property by getting the layout sanctioned on 21.03.2016. The respondent Nos.1 to 6 (plaintiffs) are some of the purchasers of the flats and shops from these two buildings. He would

submit that by resorting to fraud and forgery and indulging into misrepresentation the respondent No.10 developer had got the layout sanctioned. Except the portion measuring 6738.09 sq. mt. of the north-east corner, no right was transferred in respect of the remaining portion of the land Survey No.3. Petitioners' bungalow and hospital situate to the west of the property that was delivered for development and all these 9 meter wide roads shown in the sanctioned layout had continued to be their property and the roads were also internal roads, exclusively owned and possessed by the petitioners. No right was ever transferred to the respondent No.10 in respect of those internal roads. He pointed out that after realizing the fraud the petitioners have already filed civil and criminal proceedings against the respondent No.10. In view of such complexity of the issue, the trial court had rightly refused to exercise the discretion in favour of the respondent Nos.1 to 6 (plaintiffs). The discretion exercised by the trial court has been unnecessarily interfered with and substituted by the lower appellate court. The lower appellate court could not have indulged into any scrutiny afresh. It could have interfered with the order of the trial court only if the latter would have been perverse, arbitrary and capricious. These limitations in exercise of jurisdiction to cause interference in the orders passed by the trial court on temporary injunction applications were overlooked by the appellate court.

4. Mr. Brahme would further submit that the order under challenge granting temporary injunction in mandatory form is as good as

granting the main relief which should have been avoided by the appellate court. In support of his submissions he would place reliance on the decisions in the matter of **Wandar Ltd. & Ors. Vs. Antox India Pvt. Ltd.**; 1990 Supp (1) SCC 727, **Mohd. Mehtab Khan and Ors. Vs. Khushnuma Ibrahim and Ors.**; (2013) 9 SCC 221 and **Metro Marins and Ors. Vs. Bonus Watch Co. Pvt. Ltd. and Ors.**; AIR 2005 SC 1444.

5. The learned advocate Mr. Gholap for the respondent Nos.1 to 6 (plaintiffs) submits that though there are inherent limitations on the powers of the courts to grant temporary injunction in mandatory form, the facts and circumstances obtaining in the matter are peculiar. There is no dispute about the location of the 9 meter wide roads through which the respondent Nos.1 to 6 (plaintiffs) are claiming to have a right to use. He would further submit that the petitioners had entered into a development agreement with the respondent No.10. The layout was got sanctioned from the Municipal Corporation. The petitioners were even the signatories of the layout plan. It clearly shows existence of the roads in dispute. Once having committed about existence of such road, the petitioners cannot be allowed to resile from such a layout. He would submit that it is a matter of use of the ways by the respondent Nos.1 to 6 (plaintiffs) and even the public at large. Even if the petitioners are now coming with a case of fraud, forgery and misrepresentation, these are the facts which are still to be established. He would submit that there was enough material before the trial court to demonstrate a good *prima facie* case in favour of the respondent Nos.1 to 6

(plaintiffs), balance of convenience was in their favour and allowing the petitioners to obstruct them from using the roads would certainly put them to irreparable loss. Ignoring all the aforementioned facts and circumstances and the principles which govern the law relating to temporary mandatory injunction, the trial court had refused to exercise the discretion in their favour which has been rightly reversed by the lower appellate court. Learned advocate Mr. Gholap would place reliance upon the decision in the matter of **Deovraj Vs. State of Maharashtra and Ors.; (2004)4 Supreme Court Cases 697**.

6. I have carefully considered the rival submissions and perused the papers including the orders passed by the lower courts. It is trite that as laid down in the various decisions cited by both the sides (supra), parameters for granting interim relief in mandatory form have been well settled. In the matter of **Dorab Cawasji Warden Vs. Coomi Sorab Warden; (1990) 1 SCR 332** which is relied upon in the matter of **Metro Marins** (supra) it has been held in para 6 as under :

“The Relief of interlocutory mandatory” injunctions are granted generally to preserve or restore the status-quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause grate injustice or irreparable harm”.

Bearing in mind these principles, if one applies them to the fact situation of the matter in hand, at the outset, it is necessary to note that except the dispute about the alleged fraud practised upon the petitioners by the respondent No.10 who is the defendant No.7 in the Suit (developer), there is not much of a dispute between the parties.

7. Admittedly, the petitioners are the owners of Survey No.3 which totally admeasures 13800 sq.mts. They entered into a development agreement with the respondent No.10 in respect of 6738.09 sq.mt. portion of the north-east corner by way of a registered agreement dated 07.05.2015 as a part of the Development Agreement, a layout was got sanctioned from the authorities in which the disputed roads, as demonstrated in the rough sketch annexed to the plaint, were shown. Three of the petitioners were the co-signatories whose signatures purported to be theirs with their names appear on that approved layout which also bears signatures of the Town Planer of the Municipal Corporation and that of the respondent No.10. Obviously, for this very reason, the petitioners have now filed a civil suit and have even initiated a criminal proceeding alleging fraud. The fact remains that *prima facie*, existence of the disputed roads which are part and parcel of the layout stands admitted. Whether those are only the internal roads and whether the layout was got sanctioned by practising fraud are the issues which can be answered only after the decision in the petitioners' suit.

8. It is a matter of record that this development agreement was entered into and the layout was got approved about 5 to 6 years before

petitioners filed the Suit and initiated a criminal proceeding. This clearly shows that even they had failed to take prompt steps. It is to be borne in mind that the petitioners are not layman. They are highly educated persons and some of whom are even medical practitioners. If these facts are borne in mind, it can certainly be said that the disputed roads are in existence which are 9 meter wide through which one can easily have access to the portion admeasuring 6738.09 sq.mt. which has been handed over for the development to the respondent No.10. The principle of estoppel by conduct and by record are the important hurdles which the petitioners will have to cross. All these are the decisive factors which were clearly ignored by the trial court while refusing to exercise the discretion that was vested in it.

9. There is no dispute about the fact that the petitioners' hospital situates in the remaining western side portion from the Survey No.3 and to the north of which their bungalow situates and even the roads in dispute can be used to have access to these properties. The trial court seems to have got swayed away by such a topography.

10. It is also a matter of record that the respondent Nos.1 to 6 (plaintiffs) can have access to their individual flats and shops by the alternate ways available in the form of a 9 meter wide road along the eastern boundary of survey No.3 which originates from the southern side wide public road. The dispute here is not in respect of any easement. The question is while handing over a portion of the property to the respondent No.10 for development, when *prima facie* the petitioners had committed

themselves by signing the sanctioned layout plan showing existence of these many access points and regarding which there has been no stipulation, certainly the buyers of the developed property like the respondent Nos.1 to 6 (plaintiffs) can certainly claim to have a right to use these disputed ways.

11. In this respect, it is also important to note that in the rough sketch annexed to the plaint it was specifically demonstrated that across both these 9 meter wide roads which are east-west in direction, the eastern end of which is the boundary of 6738.09 sq.mt. portion that has been given to the respondent No.10 for development, walls have been erected by the petitioners. Similarly a barrier has been erected across the western side 9 meter wide road. It has also been specifically averred that one of these two walls across the northern of the two east-west roads was demolished by the Municipal Corporation on 25.02.2020. It was obviously bound to be the case since those were shown as access points to the north-east 6738.09 feet portion given for development. All these facts and circumstances clearly demonstrate that the respondent Nos.1 to 6 (plaintiffs) have a strong *prima facie* case and balance of convenience is also in their favour. Applying the principles for grant of temporary injunction in mandatory form discussed in the aforementioned decisions, taking stock of the circumstances, this was indeed a fit case to grant such temporary mandatory injunction to bring about the *status quo ante*.

12. Needless to state that if and when the petitioners would succeed in proving that the layout was got sanctioned by practising fraud, certainly,

the scenario thereafter would be different and they would be entitled to treat and use these disputed roads as their internal roads. At this juncture, in view of the aforementioned facts and circumstances, depriving the respondent Nos.1 to 6 (plaintiffs) and anybody else from using these roads would tantamount to allowing a change in the layout plan which has been duly sanctioned by the Municipal Corporation.

13. All these facts and circumstances which were clinching and material were overlooked by the trial court. The order was perverse, arbitrary and capricious and has been rightly interfered with and reversed by the appellate court by the impugned judgment and order. I find no illegality in the order passed by the lower appellate court.

14. The Writ Petition is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)

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