

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 6133 OF 2022

Sou. Anita Deepak Sarate and Ors. ..Petitioners

V/s.

Vinay Construction and Ors. ..Respondents

Mr. Ashok Tajane a/w Y.G. Thorat for the Petitioners.

Mr. G.S. Godbole a/w R.S. Alange for the Respondents 1 to.3

CORAM : ROHIT B. DEO, J.

DATE : 15 JUNE 2022

P.C.

1. The Petitioners are the Plaintiffs in Regular Civil Suit 351 of 2018, which is brought for declaration and injunction. The injunction sought is that the Respondents-Defendants in the suit be restrained from disturbing the possession of the Plaintiffs *qua* space reserved for parking, and further to remove the construction made while installing the transformer-generator.

2. The Plaintiffs are the apartment owners in “Shilpa Apartments”, and claim that 470.93 sq. meters space which is reserved for the parking of the vehicles of the residents of Shilpa Apartments is encroached by the Defendants. Averments in the plaint would reveal that the Plaintiffs are relying on the building

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permit dated 22.10.2010 issued by the Solapur Municipal Corporation and the accompanying plan. According to the Plaintiffs, the Defendants have purchased the eastern portion of land assigned City Survey No. 117/42/1/9 and are constructing an apartment scheme which is named and styled as “Samruddhi Greens Apartment”. The sum and substance of the plaint averments is that while constructing Samruddhi Greens Apartment, the Defendants have committed encroachment on space reserved for parking for the residents of Shilpa Apartments.

3. The Defendants have filed their written statement in response to the suit summons, generally denying each and every adverse allegation in the suit plaint. The Defendants specifically denied that they have encroached on any portion of land belonging to Shilpa Apartments, much less on the space reserved for parking.

4. It would not be necessary to delve in the counter narratives on merits since the limited issue is whether the courts below are justified in recording a concurrent finding that the Plaintiffs have failed to prove that the Defendants are encroaching on the parking space reserved for residents of Shilpa Apartments. The question arises in the backdrop of the failure of the Plaintiffs to secure injunctive relief from the Trial Court, and then in Appeal.

5. During the pendency of the petition, this Court (Coram : Nitin W. Sambre, J) rendered order dated 24.03.2021 and it would be opposite to note the relevant portion of the said order.

“3. It is not clear from the documents on record as to the parking area provided for constructed area of 822.92 sq. mtrs, for which the development permission was granted on 22nd October, 2010. The property initially stood in the name of Chairman, Uma Sahakari Gruhnirman Sanstha Maryadit, Solapur. The completion certificate was issued under the signature of the City Engineer of Municipal Corporation on 12th August, 2011.

4. In this background, it will be appropriate, in my opinion to direct the City Engineer of Solapur Municipal Corporation to place on record in the form of report duly signed by him as to the plot area of the Society namely Shilpa Apartments, for which the Completion Certificate issued on 12th August, 2011. The said report shall also reflect the required parking area under building by-laws applied at relevant time i.e. at the time of granting sanction. It should also reflect the parking area available on the spot. Let this document be filed on affidavit.”

6. Pursuant to the order dated 24.02.2021, the City Engineer of Solapur Municipal Corporation has placed on record his report and while I need not make any positive observation on the contents thereof, lest any party suffers any prejudice in the pending litigation, suffice to note that the said report does not take the case of the Petitioners-Plaintiffs any further.

7. Even dehors the report submitted by the City Engineer of Solapur Municipal Corporation, the Courts below have recorded concurrent findings that the Plaintiffs have failed to make out *prima facie* case. The Appellate Court notes that while the Plaintiffs did not take any step to have the property measured, the Defendants did apply for measurement, and the measurement was done by the City Survey Officer on 02.04.2018 in presence of the Plaintiffs, the Defendants and the panchas. While the learned counsel for the Plaintiffs hastens to submit that the measurement is not acceptable to the Plaintiffs, at this stage, it would be relevant to note that the City Survey Officer confirmed the boundaries and prepared map of the property of the Defendants and the Commissioner of the Municipal Corporation after giving an opportunity to the Plaintiffs, and after inquiry, issued Building Construction Permit to the Defendants. I need not burden this order by microscopic analysis of the material on record which in any event, I am not expected to do in writ jurisdiction and suffice it to note the consideration of the issue by the Appellate Court, which reads thus:

“13. It appears that the plaintiffs have never made application to concerned authority for getting measured the disputed portion. On the contrary, on the application of the defendants, measurement of the disputed property at the hands of Officers of Town Planning, Solapur was held on 02.04.2018 in presence of plaintiffs and defendants and panchas. After measurement, concerned officers confirmed

boundaries and prepared map of said property of the defendants. Commissioner of Municipal Corporation, Solapur after giving opportunity to all persons including the plaintiffs and after inquiry, gave building construction permission to the defendants. The Municipal Corporation, Solapur through its City Engineer gave letter bearing No. 79 dated 27/4/2018 to the defendants mentioning that the defendants can carry out work of the compound wall as per the boundaries confirmed during the course of aforesaid measurement of their property held on 2/4/2018. It appears that the plaintiffs have not challenged the said measurement carried out and decision of the Commissioner of Municipal Corporation Solapur, till date. The Sheet No.1 and Sheet No.2 filed on record by the Plaintiffs showing parking area are dated 22/10/2010. Whereas the construction permission alongwith Map of the property owned and possessed by the defendants is dated 2/4/2018. This prima facie makes clear that the defendants purchased portion measuring 3306.46 sq. mtrs of Final Plot No.117 after its sub-division and made construct of their Samruddhi Greens building thereon. Measurement Map does not show encroachment by the defendants. Thus, the plaintiffs have not prima facie proved that the defendants are making construction on alleged open space admeasuring 470.93 sq. mtrs. adjoining to Shilpa apartments towards Eastern side left fro parking of vehicles of residents and shop holders of Shilpa Apartment. In the same way considering above facts, balance of convenience does not lie in favour of the plaintiffs.”

8. The contours of the restricted scope of writ jurisdiction is well entrenched. The Courts below have exercised discretion which is neither arbitrary nor otherwise illegal. I would be loath to re-appreciate the material on record as if I am an Appellate Court particularly since there is no grave error either of law or fact, which is demonstrated, much less an error, which would occasion grave prejudice or miscarriage of justice. While I do not find any reason to interfere in the concurrent view of the courts below, it is clarified that all questions are kept expressly open and that the Plaintiffs may if deemed fit seek appointment of Court Commissioner to measure the property, even at this stage, and if such an application is made, the same shall be considered on its own merits uninfluenced by any observation herein. Subject to what is observed supra, the petition is dismissed.

(ROHIT B. DEO, J.)