



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 14488 OF 2023

Gagansingh s/o Indarsingh Asarjanwale

Died through his LR's

1. Sau. Balwantkaur w/o Gagansingh Asarjanwale
 2. Surendrasingh s/o Gagansingh Asarjanwale
 3. Narendrasingh s/o Gagansingh Asarjanwale ..**Petitioners**
- VERSUS**

1. Bhagindrasingh s/o Gurucharansingh Ghadisaj
2. Gurucharansingh s/o Uttamsingh Ghadisaj
3. The Commissioner,
Waghala Municipal Corporation,
Nanded.

..Respondents

...

Advocate for Petitioner : Mr. S.S. Bora h/f Mr. V.S. Badakh

Advocate for Respondents : Mr. S.V. Kurundkar h/f
Mr. S.S. Kurundkar

...

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 6th DECEMBER 2023.

PRONOUNCED ON : 22nd DECEMBER 2023.

JUDGMENT :

. Rule.

2. Rule is made returnable forthwith. Heard finally with the consent of the parties.

3. The petitioners are challenging concurrent finding of facts recorded by both the Courts below for rejecting their prayer for temporary injunction. The petitioners are the original plaintiffs and they are prosecuting Special Civil Suit No.55/2023 for declaration and injunction before the Civil Judge, Senior Division, Nanded. Their application for temporary injunction at Exhibit-5 was rejected by the trial Court on 02.05.2023. Being aggrieved, they preferred MCA No.43/2023. It was dismissed by judgment and order dated 01.11.2023 by the learned District Judge – 2, Nanded. Hence they are before this Court.

4. The cause of action for filing suit for the petitioners is the encroachment allegedly made by the respondent no.1 who is owner of CTS No.16329 located on the Western Side of the house property belonging to the

petitioners bearing CTS No.16330. An encroachment is stated to be of about $2 \times 131 = 262$ sq.mtrs. from the Western Side. The respondent no.1 is constructing his house by committing the encroachment. The respondent no.1 has purchased CTS No.16329 from the respondent no.2 by sale deed dated 05.06.2013.

5. It is the case of the respondents that there is no encroachment and no cause of action for the petitioners. A defective suit is filed in the name of dead person. The petitioner no.1/ Sau. Balwantkaur w/o Gagansingh Asarjanwale was signatory to the sale deed dated 05.06.2013 and conversant with the boundaries. By securing due permission from the Planning Authority, construction is being carried out.

6. The learned Counsel for the petitioners submits that both the Courts below committed error of jurisdiction and passed perverse order, rejecting application for temporary injunction. The petitioners are owners of CTS No.16330 measuring 197.5 sq.mtrs. The respondent no.1 is infact

owner of CTS No.16329 measuring 148.1 sq.mtrs. only. It was wrongly got enhanced to 181.22 sq.mtrs. and got recorded it in the property extract. In the sale deed dated 05.06.2013, the vendor respondent no.2 mentioned total area of 209.1 sq.mtrs. of City Survey No.16329.

7. The learned Counsel vehemently submits that taking disadvantage of excess area mentioned in the sale deed and erroneous order passed by the Deputy Collector on 24.08.2023, the respondent no.1 has encroached petitioners' passage and carrying out the construction. He would further submit that the order of correction of area passed by the Deputy Collector on 24.08.2023 is against principles of natural justice and obtained by misrepresentation. It was order against the dead person. It is further submitted that the respondent no.1 has construction permission of 148.1 sq.mtrs. only. It is also submitted that the findings recorded by both the Courts below relying upon the consent of the petitioner no.1 and construction permission are unsustainable.

8. Learned Counsel for the respondents repelled the submission of the petitioners by submitting that both the Courts below have recorded concurrent findings of facts against the petitioners. The suit is defective in nature. The petitioners are not legal heirs. There is no material on record to show that the petitioners are in possession of so called encroached area.

9. The respondent no.1 is the owner as per sale deed dated 05.06.2013. A construction permission is secured by him from the respondent no.3. The area of CTS No.16293 was wrongly mentioned in the record of right to be 148.10 sq.mtrs. By the order passed by Additional Collector, Nanded on 24.08.2023, it is corrected to 181.22 sq.mtrs. No appeal is preferred against the same order. The petitioner no.1 is estopped from alleging encroachment as she is one of the signatories on the sale deed. It is further submitted that slab level construction has been made but due to order of status-quo, it is halted. The respondent is

suffering irreparable loss. He would therefore pray to dismiss the petition.

10. I have considered rival submissions of the parties advanced across bar. Both the Courts below have recorded following concurrent findings :

- (i) The petitioner no.1 is signatory as a consenting party on sale deed dated 05.06.2013. She is estopped from alleging encroachment.
- (ii) There is construction permission in favour of respondent no.1.
- (iii) There is no material to show that the petitioners are in possession of encroached area.

11. The Lower Appellate Court has additionally dealt with issue of area shown in the respective sale deeds of the petitioners and respondent no.1 executed by their respective vendors. It is held that the area mentioned in the sale deeds corroborate case of the respondents. The reliance is also placed on orders passed by the additional Collector, directing to increase area from 148.1 sq.mtrs. to 181.16 sq.mtrs.

12. Both the Courts below have recorded findings on the basis of the sale deed dated 05.06.2013, construction permission, property extract and the orders passed by the Revenue Authority. I do not notice any perversity or patent illegality to cause interference in the impugned orders.

13. The conclusion drawn by both the Courts below are plausible. The present matter involved intricate question of facts. Unless there is full-fledged trial, it cannot be concluded whether there is an encroachment or not. The Courts below while conducting enquiry under Order 39 of the Civil Procedure Code cannot conduct mini trial. At that stage of the matter only, prima facie balance of convenience and irreparable loss are the parameters. I find that in the wake of parameters, the discretion has been properly exercise by both the Courts below.

14. The submissions of learned Counsel for the

petitioners that order passed by the Deputy Collector is secured by misrepresentation and behind back of the petitioners cannot be accepted at this stage. There is no appeal preferred against the order. The petitioners will have to prove their case by leading substantive evidence before the trial Court. Similarly the submission that the respondent no.1 is making construction exceeding the limit cannot be accepted at this juncture.

15. It appears that the respondent no.1 has made construction upto slab level and thereafter it is stopped. If he wants to continue with the construction that would be at his risk. Obviously the construction made by the respondent no.1 shall be subject to outcome of the suit.

16. I do not propose to interfere in the impugned judgment and order.

17. The writ petition is dismissed. The construction made by the respondent no.1 shall be subject to the

outcome of Special Civil Suit No.55/2023 and the respondent no.1 shall not claim equity. Rule is discharged.

[SHAILESH P. BRAHME, J.]

Najeeb.