

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 7482 OF 2022

Tansukh Himmatlal Parekh,
 Aged about 80 years,
 Occupation-Business,
 R/o. 4th Floor, Navrang Apartment,
 Near Head Post Office, Akola,
 Taluka and District-Akola.

.. Petitioner
 (Ori. Defendant No.3)

.. Versus ..

1. Uday Padmakar Naik,
 Aged about 64 years,
 Legal Practitioner,
 R/o. Jatharpeth, Akola,
 Taluka and District-Akola.

(Ori. Plaintiff)

2. Akola Municipal Corporation,
 Akola, through its Commissioner,
 Akola, Tq. And District-Akola.

(Ori. Deft. No.1)

3. The Zonal Officer,
 East Zone, Akola Municipal Corporation,
 Akola, Taluka and District-Akola.

(Ori. Deft. No.2)

.. Respondents

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Shri A.C. Dharmadhikari, Advocate for Petitioner,
 Shri A.R. Deshpande, Advocate for Respondent No.1,
 Shri S.S. Sohoni, Advocate for Respondent Nos.2 and 3.

.....

CORAM : ANIL S. KILOR, J.
DATED : 12.07.2023.

ORAL JUDGMENT

ADMIT. Heard the matter finally by the consent of the learned counsel for the parties.

2. The order below Exh.26 dated 3rd September, 2022 passed by the 3rd Joint Civil Judge, Junior Division, Akola rejecting the application filed by the petitioner under Order VII, Rule 11 of the Code of Civil Procedure for rejection of plaint, is under challenge in the present writ petition.

3. The learned trial Court, while rejecting the application, recorded the findings in para 5 and 7 of the order impugned, which read thus :

(5) At the outset, while deciding application under Order VII Rule 11 of the Code of Civil Procedure, it is necessary to verify averments in the plaint. On perusal of averments in the plaint, it prima facie appears that though the suit property is having monitory valuation. But, the relief sought in the plaint cannot be susceptible to monitory evaluation.

(7) No doubt, there is one relief against defendant No.3 about demolition of structure by defendant No.3. However, the plaintiff since inception seeking relief of removal of unauthorized construction. Entire property may be having much value in Crores of Rupees. But, it is first requirement that defendants are duty bound to determine unauthorized construction and then it has to be demolished. At this juncture, there is no separation or valuation of unauthorized construction on record. Therefore, the Court is of the opinion that entire plaint and relief in the plaint shows that the relief in question is not susceptible to monetary evaluation.

4. From bare reading of para 5, it is evident that, while dealing with the provision particularly Section 6 (iv) (j) of the Maharashtra Court Fees Act, 1959, the court has observed that the relief sought in the plaint cannot be susceptible to monetary evaluation. Whereas, Section 6 (iv) (j) of the said Act refers to the susceptibility of 'subject matter in dispute' and not the 'relief sought'.

5. Thus, it appears that the learned trial Court has not properly considered the provisions of Section 6 (iv)(j) of the said Act in its right perspective.

6. Moreover, the findings recorded in para 7 are contrary to para 6 of the suit, which reads thus :

(6) The plaintiff repeatedly approached the defendant no.1 and 2 for taking suitable action to prevent the illegal unauthorized construction of deft. no.3 over the suit property. The defendant no.1 and 2 had again issued a notice to defendant no.3 on 06/02/2019 (sixth day of February two thousand nineteen). In the said notice the defendant no.1 and 2 has pointed out that, the defendant no.3 was permitted to make construction on 955.99 sq. mts. but however he had made construction of 2774.43 sq. mts. i.e. construction of additional 1818.45 sq. mts. and has not left the front and side margins as per the approved map. In the said notice it is also mentioned that, the defendant no.3 has unauthorizedly and illegally constructed fifth floor also.

7. From the above referred para 6, it is evident that the plaintiff himself has pleaded that, permitted construction is 955.99 sq.mts. however, defendant no.3 had made construction of 2774.43 sq.mts i.e. additional construction to the extent of 1818.45 sq.mts.

8. Thus, I have no hesitation to observe that the learned trial court has not considered the pleading as well as the law in right perspective. Hence, I am of the considered opinion that the present matter needs to be remanded back to the trial court for deciding the same afresh. Hence, the following order :

ORDER

- (i) The writ petition is partly allowed.
- (ii) The order below Exh.26 dated 3rd September, 2022 passed

by the 3rd Joint Civil Judge, Junior Division, Akola is hereby quashed and set aside.

(iii) The application Exh.26 under Order VII, Rule 11 of the Code of Civil Procedure filed by the petitioner is remanded back to the trial court for deciding the same afresh after hearing both the parties.

[ANIL S. KILOR, J.]

Gulande