



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

WRIT PETITION NO.3345 OF 2023

Gajanan S/o Daulatrao Raut,
Aged about 76 years, Occu: Business,
R/o Raut House No.437, Ward No.26,
Mahal, Nagpur. **PETITIONER**

..V E R S U S..

1. Shiv S/o Liladhar Bende,
Aged about 49 years, Occu: Business.
2. Poonam W/o Shiv Bende,
Aged about 39 years, Occu: Household.

Both R/o House No.432-A, Udhoji Road,
Near Sangh Building, Mahal, Nagpur-440032.

3. The Assistant Commissioner,
Zone No.6, Public Works Department,
Municipal Corporation of Nagpur,
Maharashtra, Raje Raghuji Nagar Bhawan
Parisar, Mahal, Nagpur – 440032.
4. The Incharge,
Urban Design Department,
Municipal Corporation of Nagpur,
Maharashtra, Nagpur Municipal
Corporation, Mahanagarpalika Marg,
Near Vidhan Bhawan, Collector's Colony,
Civil Lines, Nagpur – 440001. **RESPONDENTS**

Mr. M. R. Joharapurkar, Advocate for Petitioner.
Mr. S. R. Dambhare, Advocate for Respondent Nos.1 and 2.
None for Respondent Nos.3 and 4.

CORAM: **ANIL L. PANSARE, J.**
DATE: **11th JULY, 2024.**

ORAL JUDGMENT:

1. Rule. Rule made returnable forth. Heard finally with consent of learned counsel appearing for the parties.

2. The petitioner in the year 2017 has filed the suit against respondent Nos.1 and 2 for declaration and permanent injunction. The declaration sought read thus:

1) To declare that the plaintiff has right of easement to enjoy to way, air, light staircase from the lane towards southern side of suit property the said right is enjoyed the plaintiff and his predecessor in the tile for more than 30 years and as such defendant has no right to close the said land encroaching any time of construction in the said lane.

The prayer has been made on the ground that the respondent Nos.1 and 2 have commenced construction, completion of which will affect the easementary right of the petitioner.

3. The respondent Nos.1 and 2 in the year 2022 filed the suit against Nagpur Municipal Corporation (for short 'NMC') for

declaration and permanent injunction. The notice issued by the NMC calling upon the respondent to demolish the structure admeasuring 72.45 square meter is sought to be illegal and bad in law. In addition, the respondents sought a declaration that a deemed permission to the said construction stands granted in terms of the provisions of Maharashtra Regional and Town Planning Act, 1966 (for short 'MRTP Act'). One of the grounds for seeking relief against the NMC was that one Gajanan Raut (present petitioner) has made a false complaint to the NMC, which resulted into issuance of notice dated 24.09.2022.

4. The petitioner approached the trial Court under Order I Rule 10 of the Code of Civil Procedure, 1908 for impleadment as party defendants. The trial Court by taking aid of the judgment of Hon'ble Apex Court in the case of *Kasturi v. Iyyamperumal (2005) 6 SCC 733* found that the petitioner's presence as party defendant is not necessary. According to the trial Court, the respondent had sought no relief against the petitioner in the said suit and further that the petitioner failed to make out a case that no effective decree can be passed without his presence.

5. The counsel for petitioner has invited my attention to

the judgment passed by the Co-ordinate Bench of this Court in the case of ***Chandrakant Dharma Bhonu v. Pandurang Ramchandra Dandekar and another 2004(2) Mh.L.J. 782*** wherein in identical set of facts, the Court proceeded to record findings as under:

11. The conspectus of facts clearly shows that the petitioner is directly and substantially affected by the unauthorized construction which is alleged to have been carried out by the first respondent. Indeed, the process of enforcing the statutory powers and duties of the Municipal Corporation has been initiated on complaints filed by the Petitioner and pursuant to successive petitions filed before this Court under Article 226 of the Constitution. In the Chamber Summons which was filed before the City Civil Court, the Petitioner has specifically made a grievance of the fact that between me structure of the Petitioner and the First Respondent there was a vacant land in the past which had been used by the Petitioner and by his forefathers. The Petitioner was, in the circumstances, directly aggrieved by the conduct of the First Respondent in having allegedly increased the area of the ground floor and by constructing an unauthorized first floor thereon. The grievance of the Petitioner was that the inaction of the Corporation was due to the clout wielded by the First Respondent. The Corporation was constrained to act only upon successive petitions instituted by the Petitioner in this Court. Having regard to these facts and circumstances, I am of the view that the learned Trial Judge was dearly not justified in rejecting the Chamber Summons and in coming to me conclusion that the Petitioner was neither a necessary nor proper parry. Undoubtedly, the Plaintiff is dominus litus and mar is a principle which has been laid down by Vimadaial, J. in Jivanlal Damodardas Wani v.

Narayan Ukha Sali, 1972 Mh.L.J. 64 = AIR 1972 Bombay 148). However, having regard to the provisions of Order 1 Rule 10 of the Code of Civil Procedure 1908 it cannot be said that the application for impleadment that was moved on behalf of the Petitioner was misconceived. The Petitioner is directly and substantially concerned with and affected by the proceedings before the City Civil Court for more than one reason. The action of carrying out an allegedly unauthorized construction and the alleged encroachment by the First Respondent directly affects the rights of the Petitioner. Secondly, it is at the behest of the Petitioner and, in view of the proceedings which were instituted, before this Court, that the Municipal Corporation has almost grudgingly resorted to its statutory powers under the Mumbai Municipal Corporation Act 1888. In the circumstances, the order passed by the learned Trial Judge is unsustainable and is accordingly quashed and set aside. The Chamber Summons instituted by the Petitioner (Chamber Summons 714 of 2003) shall stand allowed. Rule is made accordingly absolute in terms of prayer Clauses (a) and (b). Amendment to be carried out within a period of one week from today.

As could be seen, the Court held that the action of carrying out the alleged unauthorized construction and the alleged encroachment by the respondent therein directly affects the rights of petitioner therein and secondly, the suit against the Corporation was instituted at the behest of the petitioner. In the present case as well, the petitioner has come up with the case, which is now amended to the extent that the construction that was commenced

has been now completed and the completed structure is affecting his easmentary right. In that sense, the petitioner's rights are at stake.

6. At this stage, it is worth mentioning here that according to counsel for petitioner, the NMC is not being represented before the trial Court. The counsel then submits that despite *status quo* order dated 21.06.2022 having been passed in the suit filed by respondent against the NMC, the NMC has not taken any steps to participate in the suit. Thus, according to him, the officials of the NMC are hand in glove with the respondents. Surprisingly, despite service, none is appearing for the NMC in the present petition as well. This is something, which the Commissioner of NMC should take note of who shall then first find out the reasons why the NMC is being not represented in the selective proceedings and further shall ensure that the NMC is duly represented in all the matters.

7. Coming back to the issue involved in the present case, since the controversy is covered by the judgment in the case of *Chandrakant* above, the order passed by the trial Court is contrary to the position of law as enunciated in the aforesaid judgment and

is thus liable to be quashed and set aside.

8. At this stage, the counsel for respondent by relying upon the judgment in the case of *Mohamed Hussain Gulam Ali Shariffi v. Municipal Corporation of Greater Bombay & Ors.* 2017(6) ALL MR 420 (S.C.) made an attempt to contend that the order passed by the trial Court is fully justified, however, the facts of the case before the Hon'ble Supreme Court were altogether different. The suit therein was filed against the Municipal Corporation. The petitioner therein claimed that they had purchased suit property from the respondent – plaintiff. In that context the Hon'ble Supreme Court held that for deciding legality of demolition notice, presence of the petitioner was not required. As against in the present case, the respondent themselves have come up with a case that the notice under Section 54 of the MRTTP Act has been issued by the NMC at the instance of the petitioner. That apart, the petitioner has already filed a suit against the respondents claiming demolition of the structure on the ground that his easmentary rights are affected. In the circumstances, his presence in the suit filed by the respondents against the Corporation would be proper if not necessary because his rights are at stake and will be affected by the out come of the suit.

9. The petitioner has thus made out a case. The order impugned being unsustainable, is liable to be quashed and set aside. Accordingly, the order passed by 2nd Joint Civil Judge, Junior Division, Nagpur below Exh.17 in Regular Civil Suit No.614/2022 dated 17.01.2023 is quashed and set aside. The application Exh.17 filed by the petitioner is allowed. The respondent shall add petitioner as party defendant No.3. The trial Court shall then proceed with the case in accordance with law.

10. The copy of order be served upon the Commissioner, Municipal Corporation Nagpur, for taking appropriate steps in the light of what has been stated in the body of the order. It will be highly appreciated if this Court is apprised of the steps so taken.

11. Rule is made absolute in the above terms. No order as to costs.

12. At this stage, the counsel for respondents made a request to stay the effect and operation of the order as respondents intend to challenge the order before the Hon'ble Supreme Court.

13. The effect and operation of the order shall stand stayed for four weeks from today.

(ANIL L. PANSARE, J.)

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