



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

<u>WRIT PETITION NO.6856/2023</u>	
<u>PETITIONERS</u> <u>(Original Plaintiffs)</u>	1. Dharmendra Mulchand Choudhari Aged about 55 years, occupation Business, resident of Near Zalke Saw Mill, Bachelor Road, Dhantoli Chowk, Wardha. 2. Babita Dharmendra Choudhari Aged about 51 years, occupation Housewife, resident of Near Zalke Saw Mill, Bachelor Road, Dhantoli Chowk, Wardha. 3. Bharat Kanhaiyalal Wadhwani Aged about 41 years, occupation Business, resident of Tilak Chowk, Wardha. 4. Sujata Chhaganlal Batra Aged about 51 years, occupation Housewife, resident of Malgujaripura, Wardha. 5. Tindumal Kanhaiyalal Wadhwani Aged about 49 years, occupation Business, resident of Tilak Chowk, Wardha.
<u>...VERSUS...</u>	
<u>RESPONDENT</u> <u>(Original Defendant)</u>	Yogesh Ashok Kirtane Aged about 42 years, occupation Business, resident of Mhada Colony, Wardha.
Mr. S.V. Bhutada, Advocate for petitioners Mr. Abhijeet Deshpande, Advocate for respondent	

CORAM : BHARAT P. DESHPANDE, J.
DATE : 14/03/2024

ORAL JUDGMENT

1. Heard. Rule. Rule made returnable forthwith. Heard learned counsel for the parties with consent for final disposal.

2. The challenge in the present petition is to the order passed by the first Appellate Court, thereby reversing the order of the Trial Court, granting temporary injunction in favour of the petitioners-plaintiffs.

3. Mr. S.V. Bhutada, learned counsel for the petitioners would submit that the suit is filed against the respondent-defendant under various reliefs including declaration, removal of encroachment perpetual and mandatory injunction. Along with plaint an application is filed under Order 39 Rule 1 and 2 of the Civil Procedure Code for grant of injunction restraining the defendant/respondent from carrying out further construction in the disputed portion.

4. The learned Trial Court after considering the documents placed on record allowed the application for injunction, thereby restraining the respondent from carrying out construction only within the disputed area i.e. 126 sq. ft. out of Survey No.138.

5. The defendant – respondent challenged such order by filing Misc. Civil Appeal. While deciding the said appeal, the learned

first Appellate Court observed that the Trial Court failed to consider the relevant documents produced by the defendant and accordingly, allowed the said appeal, thereby rejecting the injunction application.

6. Learned counsel for the petitioners would submit that the plot of the petitioners-plaintiffs is having area of 156 sq. meters as shown in the survey report, which is in their possession. He would submit that the defendant is carrying out construction for commercial establishment, thereby encroaching 126 sq. ft. area of the plot of plaintiffs. Reliance is placed on the plan prepared by Civil Engineer showing encroached portion. Similarly, copies of documents including sale-deed having survey records are also placed on record.

7. Learned counsel for the petitioners would submit that a well reasoned order passed by the Trial Court has been set aside by the first Appellate Court even though *prima facie* case was made out and balance of convenience is showing in favour of the plaintiffs.

8. Learned counsel for the petitioners would submit that in the event the plaintiffs succeed in the suit, the defendant will have to remove such encroachment and therefore, in the interest of justice,

parties be directed to maintain *status quo* as on date, till disposal of the suit as the pleadings are complete.

9. Mr. Abhijit Deshpande, learned counsel for the respondent would submit that first of all the predecessor-in-title of the plaintiffs was the owner of only 1500 sq. ft. area and therefore, the plaintiffs cannot claim more area as mentioned in his sale-deed. The plan prepared by the Engineer and relied upon by the plaintiffs is not tallying with the plans of the survey department and the defendant is carrying out construction work as per sanctioned plan and the licence issued by the authority. He would submit that only because the plaintiffs are now claiming encroachment, the construction, which is underway, cannot be stopped as it would amount to irreparable loss.

10. Rival contentions call for determination.

11. The suit is for declaration as well as removal of encroachment. Thus, the plaint itself shows that the defendant encroached on the 126 sq. ft. area of the plaintiffs' plot. Secondly, the sale-deed of the predecessor-in-title of the plaintiffs clearly shows the area as well as the dimensions of the plot, which, if calculated would show the area as 1500 sq. ft. Specifically, the boundary on the

northern side as well as width is shown as 20 sq. ft. The plan prepared by the Engineer of the plaintiffs shows more area towards northern side i.e. beyond 20 sq. ft., which is itself disputed by the defendant.

12. The sale-deed, by which the plaintiffs purchased the suit plot subsequent to correction of survey boundaries, is produced on record at page no.50 of the paper-book. The plot of the plaintiffs bearing Survey No.138 in the said plan shows rectangular shape. The northern and southern boundaries are apparently in the straight line but whereas the plan prepared by the Engineer of the plaintiffs is not matching with the plan of the survey department at page no.50.

13. The contention of the learned counsel for the respondent is that the predecessor-in-title of the plaintiffs was the owner of only 1500 sq.ft. of plot and thus he was not entitled to transfer more area than one which was in possession and ownership.

14. The entire case of the plaintiffs is based on the title and since the documents placed on record clearly go to show that the predecessor-in-title of the plaintiffs was in possession of only 1500 sq. ft. of land, he could not have transferred more area to the

plaintiffs only on the basis of subsequent correction in the survey records.

15. The first Appellate Court has observed that the documents placed by the defendant were not properly analyzed and therefore, there was need to interfere with the order of the Trial Court. Thus, the findings in paragraph nos.13 and 14 of the first Appellate Court's order are justified on the basis of documentary evidence placed by the parties on record.

16. The discretion, which the first Appellate Court exercised, cannot be faulted with under the supervisory jurisdiction of this Court as the documents have been properly considered for the purpose of deciding three important aspects for grant or refusal of temporary injunction.

17. The observation of the first Appellate Court that the plaintiffs have failed to prove *prima facie* case as well as establish that balance of convenience is in their favour, no interference is required in the impugned order. Accordingly, the writ petition stands dismissed. Rule stands discharged. No order as to costs.

18. At this stage, learned counsel for the petitioners submits that the injunction operating in favour of the petitioners be extended for a period of ten days so that the petitioners would be able to take

necessary recourse. Learned counsel for the respondent objected to such relief.

19. Considering that the injunction is operating till date, the same is extended for a period of ten days from today.

(BHARAT P. DESHPANDE, J.)