

**ORDER BELOW EXH.05.**

(Passed on this 9<sup>th</sup> day of January, 2023)

The present application filed under order 39 Rule 1 and 2 read with Section 151 of C. P. C for grant of ad-interim temporary injunction.

2] The sum and substance of the application of the plaintiff is as under. Plaintiff is the owner of the suit property whereas defendants are adjacent land holders. The defendants holding the property at Gat no. 400. It is the contention of the defendant no. 1 to 4 that they having customary way from the plaintiffs property. Accordingly, the defendant no. 1 to 4 moved application before the defendant no. 5 i.e. Naib Tahsildar Borgaon Manju under Mamlatdar Courts Act.

3] It is the contention of the plaintiff that without considering the factual aspect the defendant no. 5 passed order and directed to circle inspector to open the alleged way from the suit property. The plaintiff have challenged the said order before S.D.O. Akola but, S.D.O. Akola also reject the appeal of the plaintiff.

4] The plaintiff in his plaint tried to demonstrate that defendant having other way but he is tried to create new way from the middle of Gat no. 402 which is divided in 5 parts and out of which one part is belonging to the plaintiffs.

5] It is the also contention of the plaintiffs that half share of

the suit property belonging to the plaintiff no. 2 but the defendant no. 1 to 4 not made him party before the revenue proceeding.

6] With this backdrop the plaintiff submits that if defendant no. 1 to 4 created way from the suit property then he will suffer heavy loss of crop and the loss of the plaintiff cannot be compensate in terms of money. Thus, defendant no. 1 to 5 be restrained from executing the order passed by revenue authority.

7] The defendants appeared in the suit and denied the contention raised by the plaintiffs para wise. It is the contention of the defendants that the defendants and their forefather since their immemorable time using the way which passes through the field of plaintiffs and which runs west to east. The plaintiffs are knowing very well that the said way is the customary way of defendants and therefore, till filing of the application before the Tahsildar plaintiff never objected to the defendants from passing to the suit field.

8] It is the contention of the defendants that the plaintiffs obstructed the customary way therefore, the approached to the authority. The concern authority after considering all the circumstances passed the order in question. The plaintiff has challenged the said order before Sub Divisional Officer. The Sub Divisional Officer also rejected the same.

9] It is the contention of the defendants that defendants not

having any other way except the way which passes through the field of the plaintiffs. Temporary injunction filed by the plaintiffs become infructuous thus, the application needs to be rejected.

10] The points for determination along with my findings are as under.

| Sr.No. | POINTS                                                                         | FINDINGS                 |
|--------|--------------------------------------------------------------------------------|--------------------------|
| 1]     | Do the plaintiff prove <i>prima facie</i> case ?                               | Negative                 |
| 2]     | Whether the balance of convenience lies in favour of the plaintiff ?           | Negative                 |
| 3]     | Whether the plaintiff will suffer irreparable loss, if injunction is refused ? | Negative                 |
| 4]     | What order ?                                                                   | Application is rejected. |

**: REASONS :**

**AS TO POINT NO. 1:-**

11] Before parting with the *prima facie* case it is desirable on my part to recapitulate the prayer of plaintiff. The plaintiff in interim application prayed for restriction order against defendant no. 1 to 5 from executing the order passed by defendant no. 5 in MCA No. 5/Borgaon Manju(Part 3)/21-2021-22 till the decision of the suit.

12] The defendants specifically on affidavit submit that on 03.11.2022 in presence of plaintiffs, defendants and government machinery the obstructing of plaintiff was removed and thereby make available the obstruction free way to the defendants. There is no

counter affidavit to denied the said fact nor much disputed by the plaintiff. Thus, the order passed in MCA Number is already executed. Therefore, the act which is already completed cannot be restrained by the injunction order. Therefore, the present application is now fruitless and infructuous in regard to the prayer of the plaintiff.

13] The advocate for the plaintiff here argued that the Mamalatdar Court not act in accordance with the law. Therefore, even if the order is executed liable to be set aside.

14] I have given thoughtful consideration to the said submission. Also gone through the case of *Sanjay Patil Vs. Latabai* *2021 (6) ALL M.R. 578* cited by advocate by the plaintiff.

15] In the case cited supra the respondent asked permission for self immolation. The Mamlatdar treated the said application as a plaint and without any proceeding issued the order. In that sets of fact the Hon'ble High Court observed that without following due process of law and giving opportunity, Mamlatdar passed the order. Therefore, even if that order assumed to have been executed liable to be set aside.

16] In the case at my hand it is not a case of plaintiff that the Mamlatdar passed the order without giving any opportunity to the plaintiff. Even the order passed by the concern officer is perused it appears that after giving the opportunity to the plaintiff order was

passed. Therefore, due to different facts the case cited supra is not applicable to the present case.

17] Now I am turning back to the prima facie case. It is the contention of the plaintiff that the Mamlatdar without considering the factual position passed order. It is also contention of the plaintiff that there is no any customary way from the middle of the gut no. 402.

18] On perusal of the order passed by Naib Tahsildar it appears that the Naib Tahsildar after considering the report of Circle Officer and Talathi, spot inspection and statements come to the conclusion that the present plaintiff obstructed the customary way and also the alternative way and therefore, passed the order for removal of obstruction under section 5 of Mamlatdar Court Act. Per contra, except of bare words of the plaintiffs there is no prime facie evidence on record which suggests that the order passed by the Mamlatdar Court Act is arbitrarily or without following due process of law. Therefore, I am of the view that plaintiff not established his prima facie case. Thus, I answer point no. 1 in negative.

**As to Issue No. 2 and 3:-**

19] As mentioned above the order is already executed. Therefore, the main prayer of the injunction order now itself frustrated. So far as irreparable loss is concern if the defendant is not permitted to used the concern way then he will not able to cultivate his land and as such it will cause irreparable loss. On the other hand,

plaintiff's only strip of land will be utilized. Thus, comparatively the hardship of plaintiffs is less as comparative defendants. Thus, I answer point no. 2 and 3 in negative and pass the following order.

**ORDER**

01] Application Exh.5 is rejected.

02] Costs in cause.

Dt.09.01.2023

( N. S. Puri )  
5th Jt. Civil Judge (S.D.),  
Akola.

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