

CNR:MHAK110013652024**R.C.S. No.76/2024****Sarfaraj Kha ...v/s... Afzal Kha**

.....ORDER BELOW EXH-5.....
(Pronounced On 9th April, 2025)

In a suit for perpetual injunction the plaintiff is asking relief postulated under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 whereby he prayed to restrain the defendant or any person on his behalf to approach or take tractor, bullock cart or any other heavy vehicles from the suit way.

2. It is the case of the plaintiff that defendant is brother of plaintiff. It is asserted that plaintiff no.1 owns and possess F.S. No.46/B, plaintiff no.2 owns and possess F.S. No.46/C whereas the defendant owns and possess F.S. No.46/A situated within Mauja Zari Bazar, Tq. Telhara, Dist. Akola. Initially, F.S No.46 was ancestral property and it was partitioned prior to 30 years and as such the parties have been allotted to their share above field property. The plaintiff has annexed plaint map with the plaint and depicted the field of plaintiff by letter GHMNOP whereas field of defendant has been shown by letter PQORZYP. The controversy in suit pertains to the suit way which is shown by letter HNO and hereinafter for brevity referred to as “**the suit-way**”

3. It is the case of plaintiff that the defendant is having a way available through Bagada Nala/stream which is at East side of their field and he has been using the said stream/Nala to approach his field for more than 30 years. It is further pleaded by the plaintiff that the defendant has filed proceeding under Section 5(2) of the Mamlatdar Court Act before the Tahasildar and the Tahasildar without following due process has granted way to the defendant from the field of plaintiffs which is shown by letter HNO in plaint map. It is the case of plaintiff that the Bagada Nala is the accessible way for the defendant despite the Tahasildar has granted cultivation way from the field of the plaintiff which has never been in existence. The plaintiff claimed that the defendant has been taking his tractor, bullock cart,

harvester from the field of plaintiff as a result the crops of plaintiffs getting damaged and as such, he has been suffering irreparable loss. It is hence claimed that the order of Tahasildar was perverse against which the revision was preferred which was dismissed by Sub-Divisional Office, Akot. Hence, this is the suit for perpetual injunction.

4. The defendant appeared. He has filed his written statement-cum-reply at **Exh-15** and has not disputed the possession of respective parties over the field shown by the plaintiff. On the contrary, the defendant asserted the fact that initially F.S. No.46 was the ancestral property which was partitioned and as a result it has been sub-divided in F.S. No.46/A, 46/B and 46/C. Furthermore, it is asserted that before partition the plaintiff and defendant used to approach their field by Zari Bazar-Umarshevadi Road. Before partition the plaintiffs and defendants used to approach by Zari Bazar-Umarshevadi Road and since the portion received to the defendant is at southern side, the defendant has to approach through the field of plaintiff.

5. It is further asserted by the defendant that the defendant has to approach only through the field of plaintiff since it is an ancestral property and by going through Umarshevadi Divanzari Road the plaintiff has to access at southern side by going through the field of plaintiff. It is further the case of the defendant that without going through the field of plaintiff the defendant cannot cultivate his field and the defendant has no any alternative way to approach his field. It is claimed by the defendant that there is a stream/Nala at East and West side and it is impossible for the defendant to approach through the said Nala. As a result, the defendant has filed the proceeding before the Tahasildar and after the spot inspection has been effected the Tahasildar has passed injunction order against the plaintiff. Hence, the defendant prayed to reject the application.

6. The learned counsel for the plaintiff Shri. Tayade has argued that the Tahasildar and S.D.O., Akot has not considered the case in appropriate manner and the suit way has been granted to the defendant. He argued that the suit-way was never in existence to the defendant. It is further argued by

him that Bagada Nala is an alternative way available to the defendant to approach his field despite this fact the Tahasildar has granted a way to the defendant. He argued that he has filed sale deed on record of adjacent owner which shows that Bagada Nala is the way by which the defendant can access to his field. Per contra, learned counsel for the defendant has argued that the defendant has no alternative way and it is impossible for any person to approach through stream/Nala. He has extensively argued that easement by way of necessity permits him to use the field of plaintiffs since the properties in question used to be ancestral property. Hence, he prayed to reject the application.

7. The following points have been taken for determination. I have recorded my findings along with reason.

Sr. No.	Points	Findings
1.	Whether the plaintiff has made out prima-facie case?	...Partly Yes...
2.	Whether the balance of convenience tilts in favour of the plaintiff?	...Partly Yes...
3.	Whether irreparable loss will be caused to the plaintiff, if injunction is refused?	...Yes...
4.	What Order?	As per final order

:: REASONS ::

As to point nos.1 and 2 :-

8. Before adverting to the discussion to the case propounded by respective parties, the nature of suit needs to be considered here first. In this case, the plaintiff has asserted that the Tahasildar has passed an order under Section 5(2) of the Mamlatdar Court Act against which the revision was preferred which was dismissed. The plaintiff has not challenged the order passed by Tahasildar directly and has instituted a simpliciter suit for perpetual injunction which presupposes that he has challenged the order

passed by the Tahasildar indirectly. But when the facts are considered, it is ascertained that by implication he has questioned or assailed the validity of the order passed by the Tahasildar. It is pertinent to note that prima-facie the question revolves around only to the fact to find out whether there exists the suit-way to the defendant to approach through the field of plaintiff and if what is the nature of that way.

9. In order to substantiate case, the plaintiff has filed 7/12 extracts on record of field properties, photographs, the order passed by Tahasildar and S.D.O., affidavit of one adjacent owner and sale deed whereas the defendant has not filed any document on record. The admitted fact on record is that the properties involved in the dispute where the ancestral properties and by way of argument the defendant has propounded the case by way of easement of necessity and hence as such the defendant has to have approached through the field of plaintiff. But when the pleadings of the defendant are considered, it reflects that the defendant has not put forth the case that it was easement by necessity. The pleadings are not clear on the point that the necessity has been given a right of easement to the defendant. On the contrary, what the defendant has propounded is that he has not having any alternative way and it is impossible for him to access through stream/Nala. In such circumstances, I am of the considered opinion that the order passed Tahasildar and observations made by him in order has to be put into service to find out the existence of suit-way and if yes what is the nature of that way.

10. According to plaintiff, the defendant has been taking his tractor, bullock car and other heavy vehicles from the field of the plaintiff. When at this juncture the order passed by the Tahasildar is scrutinized and assessed it reflects that only a foot way was available through the field of plaintiff. Furthermore, the plaintiffs herein have also not disputed before the Talhasildar that there is foot way through the field of plaintiff. Moreover, the Talhasildar in his order has made observation cultivation way which certainly means foot way has been obstructed by the plaintiffs. Certainly, existence of foot way cannot be tantamounted as a right to take the bullock cart or tractor from the field of plaintiff. When the order of Tahasildar is

considered, it shows that he has not given observation as to whether the way accessible to take the bullock cart or tractor was available through the field of plaintiff. On the contrary, what he has observed is that the cultivation way is available to the defendant.

11. Furthermore, according to the defendant he is not having any alternative way. But when at this juncture the sale deed filed by the plaintiff of the adjacent owner is considered it shows that there is a way from Bagada Nala. This sale-deed further shows that Bagada Nala is accessible. The defendant by way of argument has put forth the case of easement by way of necessity. However, the defendant has not pleaded such case and, therefore, it cannot be said that he came before the Court with the case of easement by necessity. Whenever easement is claimed the pleadings to that extent are required in the eyes of law of hold or infer a fact that the defendant has a right of easement.

12. It is pertinent to note here that the sale deed filed on record, affidavit of the adjacent owner shows that alternate way is available from the Bagada Nala. When the case of the plaintiff put forth before the Tahasildar is considered he has not disputed the fact that the foot way was available to the defendant. The absence of observations of the Tahasildar as regards the existence of broader way by which the tractor and bullock cart can be taken are totally silent. Certainly, existence of foot way to the defendant does not give or conform any right on the defendant to take his bullock cart, tractor or heavy vehicles. When the pleadings of plaintiffs are considered, it can certainly be inferred by the defendant by taking the advantage of order of Tahasildar trying to create a new way from the field of plaintiff. Since, the foot way is available to the defendant which is admitted to the plaintiff the same needs to be protected. However, existence of such foot way does not give any right to the defendant to take his bullock cart or tractor or other heavy vehicles from the suit-way. Therefore, I answered these points partly in affirmative.

As to point no.3 :-

13. The plaintiff has filed photographs on record which shows that the broader way from stream/Nala is available to the defendant. If the defendant is permitted to take his bullock cart, tractor and heavy vehicles then certainly it would cause irreparable loss to the plaintiff. When the defendant has an alternative way to take his bullock cart or tractor through the Bagada Nala if the act of defendant is permitted further it will certainly cause irreparable loss to the plaintiffs. In such circumstances, I am of the considered opinion that the application of the plaintiff deserves to be partly allowed by following order.

As to point no.4: -

14. In view of above observations, the application of the plaintiff to the extent of prayer confined to restrain the defendant from taking bullock cart, tractor and heavy vehicles needs to be allowed.

15. So far as the question of cost is concerned the same needs to be put in cause.

16. Consequently, the following order.

:: ORDER ::

- i. The application is hereby partly allowed.
- ii. The defendant or any person on his behalf is temporarily hereby restrained from taking the bullock cart, tractor or other heavy vehicles through suit way till the final decision of the suit.
- iii. Cost in cause.

Date: 09.04.2025
Telhara.

(Rahul A. Rannaware)
Jt. Civil Judge (Jr. Dn.) Telhara

:: Certificate of Stenographer ::

"I affirm that the contents of this P.D.F. file are same word to word as per original Order."

Date	:	09.04.2025	
Checked & Signed by Presiding Officer on	:	09.04.2025	(Nikhil S. Shirsat) Stenographer-III Jt. C.J.J.D. & J.M.F.C., Telhara
Uploaded on	:	11.04.2025	