

ORDER BELOW EXH.05

This is an application filed by plaintiffs for restraining defendant from creating any new cart road or feet road from the suit property.

2. **The brief facts of the plaintiffs' case are as under:-**

The field Gut No.129 area 2 H 61 R situated at village Mauje Wahegaon, Tq. Paithan, Dist. Aurangabad having four boundaries to the East-Wahegaon-Wava tar road, to the West-some area of field Gut No.128 and Gut No.130, to the North-field Gut No.128 and to the South-field Gut No.132 (here-in-after referred to as the "suit land") is ancestral property of plaintiffs and they are in possession of it. Defendant is having no concern with the suit land. Defendant is having field Gut No.133/3, 99, 100, 101, 103. The defendant is having road from field Gut No.157 and 145 Wahegaon-Wava cart road for approaching his field Gut No.133/3. So also, defendant is having the road from field Gut No.15 and 157 Wahegaon-Wadala pandi cart road for approaching his field Gut No.99, 100, 101 and 103. Defendant and other adjoining land owners were using the said road since long without any obstruction. Moreover, real brother of defendant is having field Gut No.132/1 adjacent to the land of plaintiff bearing Gut No.129. Defendant can also proceed through that land to his field. The wife of defendant is having field Gut No.103 and in the said sale-deed there is mention of road towards Western side. The said cart road is Wahegaon-Wadala and it is also available for defendant to approach his field. Thus, defendant is having above road for approaching his field, however, defendant is trying to create new cart road illegally from the suit land, which is belonging to plaintiffs. There is no

stream or cart road from the suit land nor in revenue record there is mention of cart road or feet road from the field Gut No.129. On all these grounds, plaintiffs prayed to restrain defendant from creating any cart road or feet road from the suit land. Hence prayed to allow the application.

3. Defendant has filed his written statement-cum-reply to this application (Exh.11). He has denied all adverse allegations levelled against him. It is his specific contention that he and other farmers on 24.01.2020 applied to the Tahasildar for clearing old approach road which is going from the suit land. It is also contended by defendant that from the suit land, there is stream and by said stream adjoining farmers used to go their field, when there is less water or when water becomes dry. However, plaintiffs have closed the said stream and clear it up to the level of his land. Due to it, the flow of water was stopped. Even the Circle Officer has submitted report on 10.09.2020 to Tahasildar, Paithan, in which, it is clearly mentioned that plaintiffs have brought the space of stream and road under their cultivation. Even Nayab-Tahasildar on 10.05.2021 has carried spot inspection in suit land bearing Gut No.129 and prepared panchanama. In said panchanama, it is mentioned that plaintiffs have closed the road and use the space of stream for their cultivation. It is also mentioned in said panchnama that the stream and road which is shown in the map is also not in existence and, therefore, defendant and other farmers were not having any road to go their field. Even Tahasildar, Paithan on 10.08.2021 has considered report of Circle Officer, the panchnama prepared by Nayab-Tahasildar and spot inspection report has passed order to clear the stream and road passing through it i.e. from field Gut No.129. However, plaintiff inspite of that order was not obeying it and trying to obstruct the clearance of stream and road which is going from suit

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land. On all these grounds, he prayed to reject the application.

4. Following points arises for determination. Findings against each of them are recorded for reasons mentioned there under:-

Sr. No.	POINTS	FINDINGS
1	Whether plaintiffs prove that they are having prima-facie case in their favour ?	No
2.	Whether they further prove that balance of convenience lies in their favour ?	No
3	Whether plaintiffs will suffer irreparable loss? If, the injunction is refused?	No
4	What Order?	The application is rejected.

REASONS

5. Heard learned counsel for plaintiffs at length. Most of the arguments advanced by him, is as per contentions raised by plaintiffs in plaint and application (Exh.05). Therefore, to avoid repetition, I did not reproduce it here again. Plaintiffs have also placed their reliance on documents such as 7/12 extract, map, spot inspection report, report of Circle Officer, order of Tahsildar, order of Sub-Divisional Officer, photographs and other documents filed on record. Learned counsel for plaintiff has invited my attention to all documents filed on record.

6. The learned counsel for defendant has also advanced argument at length. His argument is also as per contentions raised by defendant in his written statement-cum-reply. Therefore, to avoid repetition, I did not reproduce it here again. The learned counsel for defendant has also filed

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various documents, photographs, etc. on record. Most of documents filed by both parties are same. He has invited my attention to those documents.

AS TO POINT NO. 1 TO 3:-

7. It is the contention of plaintiffs that defendant is creating cart road from the suit land and trying to stop the flow of water from the stream. It is also his contention that though the road is not in existence from the suit land, the Tahsildar has granted the road under Section 5 of The Maharashtra Land Revenue Code, 1966 which is illegal. Therefore, it is necessary to scrutinize all documents to arrive at a conclusion whether the stream and road is passing through the suit land or not.

8. On perusing the panchanama dated 10.5.2021, it is seen that the stream was going through suit land and some of adjoining land owners including defendant were using it for going to their field. It is also seen that plaintiffs have closed it and brought the said land under their cultivation. Moreover, Toch Map filed by plaintiff and other revenue record, itself goes to show that in between field gat No.129 and 132, there is existence of stream. In village map also, the existence of stream is seen.

9. The learned counsel for plaintiffs has argued that defendant has made application for new road and new road cannot be granted under Section 5 of The Maharashtra Land Revenue Code, 1966 and it can be granted under Section 143 of The Maharashtra Land Revenue Code, 1966. Therefore, the order of Tehsildar is illegal.

10. The application dated 24.1.2020 moved by the defendant shows that it is for clearing pre-existing approach road and natural stream. It is

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also contended in said application that plaintiffs have closed the stream and stopped the natural flow of water. The said application also bears the signature of other adjacent farmers. Even the order of Tehsildar did not show that any new road was granted by him. Rather it shows that though in Toch map, there is mention of road and stream in suit land, it is closed by plaintiffs. It is also seen that he has not granted any new road, rather he has directed to clear the stream and the road going from the stream. Under these circumstances, merely in panchanama dated 10.5.2021, there is reference of Section 143 of The Maharashtra Land Revenue Code, 1966 it cannot be said that the Tehsildar has granted new road. Therefore, I find no substance in the argument of learned counsel for plaintiff.

11. It is seen that plaintiffs have moved revision application before the S.D.O., Paithan challenging the order of Tehsildar. The learned counsel for plaintiffs has argued that the S.D.O. has also mentioned in his order that defendant can approach for new road under section 143 of The Maharashtra Land Revenue Code, 1966. Therefore, it is necessary to scrutinize the order of S.D.O. dated 24.5.2022. I would like to reproduce para No.10 of the said order which runs as under:-

“उप अधीक्षक, भूमि अभिलेख कार्यालय, पैठण यांच्या गाव नकाशामधील नोंदी/खुणांनुसार, गट 157,15,155,16,154,17,153,18,151,149,148,147, 83,85,86,87,82,81, 104, 96,103, 102, 99, 130 132,129 या गटांलगत मधून सदर ओढा हा निश्चित जलमार्गाचा नैसर्गिक प्रवाह आहे. सदर प्रवाह कायद्याच्या रितसर प्राधिकरणा व्यतिरिक्त अडविण्याचा कोणासही अधिकार नाही. ज्याप्रमाणे गैरअर्जदार यांनी नमूद केल आहे की, पावसाळ्यात जेव्हा ओढयाला पाणी असते, त्या वेळेस आम्हाला व आजुबाजुच्या शेतकरी वर्गात ओढयाच्या काठावरून जावे लागते व जेव्हा ओढयाचे पाणी ओसरून ओढा कोरडा होतो, त्यावेळेस आम्ही व आजुबाजुचे शेतकरी हे शेतातील खते, बी-

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बियाणे व शेतमालाची ने-आण करण्यासाठी गाडी बैलच्या सहाय्याने ओढ्याचा वापर करतो. याप्रमाणेच सदर ओढ्याचा वापर गैरअर्जदार यांना करता येईल. याशिवाय गैरअर्जदारांना नवीन रस्त्याची आवश्यकता असल्यास त्यांना, महाराष्ट्र जमीन महसूल अधिनियम 1966 चे कलम 143 नुसार तहसिलदार पैठण यांच्याकडे नियमानुसार अर्ज दाखल करता येईल”.

12. Thus, on perusing above contents, it is seen that there is existence of stream in the suit land and adjacent land owners were using it whenever the water flow is less or stream becomes dry. It is also seen that plaintiffs have closed the flow of water of stream. On perusal of the said order, it is seen that it has been ordered to clear the obstruction from the stream going from the suit land. It is also seen that restricted use of defendant and other farmers is not prevented, whenever there is less water in the stream and stream becomes dry. Thus, from the said order, it is seen that if the defendant and other land owners wants permanent road, from the said road, they have to approach under Section 143 of The Maharashtra Land Revenue Code, 1966. On perusal of application of defendant and other land holders it shows that they did not demand any new road, rather it is their contention that stream is closed by plaintiff and they are using the road going from the stream whenever there is less water or water becomes dry. Therefore, it cannot be said that defendant has filed application for new road. Moreover, order of S.D.O. itself has permitted the restricted use of the stream for approaching the defendant and other land holders to their land whenever there is less water and water of stream becomes dry. Whatever observations of S.D.O. about Section 143 of The Maharashtra Land Revenue Code, 1966, are in respect of permanent road. However, on perusing the application of defendant and order of Tehsildar, it is not seen that there is demand of permanent road and creation of new road. It is in respect of only clearing the stream and road passing through it, which is used by defendant and others

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whenever there is less water and water become dry.

13. The learned counsel for plaintiffs has argued that alternative way is available to defendant and other adjoining land holders to their field. As discussed above, defendant and other land holders did not claim any new road, rather they moved application for removing the obstruction in stream created by plaintiffs and its restricted use, whenever there is less water in stream and stream becomes dry. Moreover, there is no any demand of defendant of new road under Section 143 of The Maharashtra Land Revenue Code, 1966. Therefore, I find no substance in the argument of plaintiffs.

14. Moreover, it is the contention of plaintiffs that there is no stream and the road from the stream as alleged by defendant and as mentioned in the order of Tahasildar. Then question arose as to how there was compromised between plaintiffs and defendant before the Circle Officer on 21.08.2024 when he has visited the spot. Perusal of the report of Circle Officer shows that this plaintiff has agreed to give road to the defendant on the condition to not to remove the obstruction in stream. This conduct of the plaintiff itself shows that there is stream and road from the suit land. Thus, over all above discussion shows that there is stream from the suit land and defendant and other adjacent land holders were using the said stream whenever there is less water or whenever the waters becomes dry. Moreover, it is also seen that this plaintiff himself has closed the said stream and brought the said area under his cultivation. Therefore, it cannot be said that the Tahasildar by his order has given the new road to defendant. Rather it is seen that the Tahsildar has ordered to remove the obstruction created by the plaintiff himself in the stream and thereby caused obstruction to the

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natural flow of water.

15. The learned counsel for plaintiffs has placed his reliance on the Judgment of Hon'ble Bombay High Court in a case of Mohammad Khan Vs. Shrishankar Maroti Dhage and another, 2017(3) ALL MR 380 in respect of the jurisdiction of Civil Court. I have gone through it and considered the ratio laid down therein while deciding this application.

16. The learned counsel for plaintiffs has placed his reliance on the Judgment of Hon'ble Bombay High Court in a case of Vasudev Vs. Manoj in Civil Writ Petition No.1826/2018, it is in respect of the jurisdiction of Civil Court. I have gone through it and considered the ratio laid down therein. It is in respect of right of way and alternate way. However, in this case the order of Tahsildar and S.D.O. clearly shows that there is stream in the suit land and it was used by the defendant and other adjoining land owners since long. Moreover, plaintiff in this case, himself has agreed before the Circle Officer to give road to defendant on the condition that not to clear the whole stream. Therefore, facts of the present and cited case are different.

17. The learned counsel for defendant placed his reliance on following Judgments -

(i) Jivanlal Kannaiyalal Paliwal Vs. Krishnarao D. Sathone, AIR 2004 BOMBAY 89

(ii) Patneedi Rudrayya Vs. Velugubantla Venkayya & Ors. AIR 1961 SUPREME COURT 1821

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(iii) Dilip Shankarrao Deshpande and others Vs. Executive Engineer and others AIR 1993 Bombay 140

(iv) Malaya Gounder (Dead by L.Rs.) and Ors. V. Nachiappa Gounder and Anr, AIR 2012 Madras 182

I have gone through above Judgments and found that those are in respect of right of easement by prescription. However, in this case, defendant did not come up with a case of right of easement by prescription. Rather defendant applied for clearing the obstruction created by plaintiff in the stream and revenue authority also found that the plaintiff has used the space of stream for his cultivation. Therefore, with due respect facts of the present case and cited case are different.

18. The learned counsel for defendant has also placed his reliance on the Judgment of Hon'ble Bombay High Court in a case of Chandrashekhar Vijay Dhosewan Vs. Sunil Bhaurao Bihari and Ors., AIR Online 2019 Bom. 655.

I have gone through above Judgment and found that in above case, during pendency of the suit, plaintiff and defendant No.12 have erected fencing wire with a view to obstruct the movement of the said defendants for approaching their respective fields. However, there are no such facts in present case.

19. In view of above discussion, I hold that plaintiffs failed to prove that prima facie case exists in their favour and also that balance of convenience lies in their favour. As regards irreparable loss is concerned,

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from the revenue record and orders of Tehsildar and S.D.O., it is crystal clear that plaintiffs themselves have created obstruction in the stream and brought the space of stream under their cultivation. It is also seen that defendant and other adjacent land holders were using the stream for approaching their field by cart way available from stream or whenever there is less water in stream and whenever stream becomes dry. Moreover, as per pleadings of plaintiff para No.7 and contents of this application, plaintiff has denied the existence of stream or cart road from the suit property, though it is in existence, as seen from the order of Tehsildar and S.D.O. Moreover, from the report of Circle Officer dated 21.08.2024, it is seen that this plaintiff has agreed to give cart way to defendant from the suit land, on the condition of not removing the obstruction created by him in the stream. Thus, it appears that plaintiffs did not come before Court with clean hands and suppressed the material fact. Under these circumstances, if the injunction is granted, it will amount to protect the illegal act of plaintiff of closing the stream and bringing the area of stream under his cultivation and in that circumstances, defendant and other adjacent cultivators would suffer irreparable loss than t plaintiffs. I have, therefore, recorded Negative findings of Point No. 1 to.3.

AS TO POINT NO.4:

20. Before concluding this order, it would be necessary to make it clear that by virtue of this order, the Tehsildar or revenue authorities are entitled to remove the obstruction created by plaintiff in the stream. Defendant and other adjacent land owners have restricted use of cart way in the stream whenever stream becomes dry or whenever it is possible to use it for cart way only as observed by S.D.O. in his order. By virtue of this order, no new way can be created from the stream, except as observed by the S.D.O. in his order.

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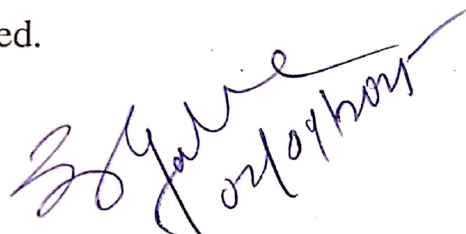
21. All observations made above are of prima facie nature and made only to decide the present application and it did not affect the merits of the case.

22. In view of negative findings of point Nos. 1 to 3, I proceed to pass following order :-

ORDER

1. Application (Exh.05) is rejected.
2. Costs in main cause.

Date : 02/09/2025



(G. V. Gandhe)

Civil Judge, Junior Division,

Paithan