

MHAU100005832020



RCS 14/2020
Khatunbee and Anrs. Vs.
Baba Kha and Ors.

ORDER BELOW EXH. 5

Perused application and say.

2. Application is under Order 39 Rule 1 and 2 of the C.P.C. for temporary injunction for restraining defendants from creating road over southern side of land Gat No.149 admeasuring 177 R. out of 4 Hector 30 R. situated at village Devlana, Tal. Khultabad, Dist. Aurangabad. (More particularly described in claim clause and para No.1 of plaint and hereinafter referred as 'suit property')

3. Plaintiffs' case in brief is that plaintiff No.1 purchased 85 R. land from one Mehtabee Sardar Khan vide registered sale deed No.65/1992 dated 16-01-1992 and plaintiff No.2 purchased 93 R. land from Sunita Shivaji Gaike vide registered sale deed No.671 dated 04-06-2001.

4. Plaintiffs averred that land purchased by plaintiff No.1 was previously purchased by Sardarkha Ismailkha Pathan from its original owner Kachru Ravji Kale through registered sale deed No.4608 dated 14-09-1989. According to plaintiff in the said sale deed, it was wrongly mentioned that from southern side there is road. Therefore, on 12-07-1988 Kachru Ravji Kale executed correction deed in favour of Sardarkha Pathan by which boundaries were shown as ; towards East- land of Sardarkha, towards West- Cart Road, towards South- land of defendant and others and towards North- land of Shivaji Shankar. Later on Sardarkha Pahan gave said land by partition to Mehatbbe Sardarkha who sold said land to plaintiff No.1.

5. Plaintiffs further averred that, suit property is their self acquired property and defendants have no concern with it. Towards southern side of suit property there is land of defendants in Gut No.154 and 153. Plaintiffs alleged that on 22-05-2020 defendants came in suit property and destroying southern bandh tried to create road. Plaintiffs lodged complaint to Khultabad police station against defendants. Thereafter defendants filed proceeding before Tahasildar Khultabad seeking road and same is pending. Tahasildar, Khultabad has not passed any order till the date. Plaintiff further submitted that on 04-06-2020 defendants again came to suit property and tried to create road. Hence, plaintiff filed present suit and with this application claiming temporary injunction against defendants.

6. Defendants have filed their written statement and say at Exh. 16. Defendants contended that plaintiffs have mentioned false boundaries of suit property. According to defendants towards southern side of suit property there is road (Wahiwat) on bandh of land Gut No.159, 156, 154, 155 and 149. Plaintiffs and defendants as relative are using said road since long. Plaintiffs have filed present suit due to family dispute between them. Plaintiffs tried to close the said road by ploughing it and putting stone on it. In that regard defendants filed proceeding No.2020/Jama-1/Kavi/268 before Tahasildar, Khultabad seeking relief to free the road. Defendants contended that plaintiffs have filed present suit for preventing Tahasildar to free the said road. It is further contended by defendants that, on 17-07-2020 Tahasildar, Khultabad passed order in their favour allowing their claim. As per said order plaintiffs are directed to free the road by removing obstruction and perpetually restrained from creating any obstruction in the road. Defendants submitted that Tahasildar, Khultabad has already passed order against plaintiffs and restrained them perpetually from creating any obstruction in the road holding existence of said road. Therefore, plaintiffs suit and present application is not maintainable. Lastly, defendants requested to reject the application.

7. Heard oral argument of both sides. Following are the points for determination. Findings thereon are for the reasons stated hereinafter.

Sr. No.	POINTS	FINDINGS
1]	Whether prima facie case is made out?	No
2]	Whether balance of convenience lies in favour of plaintiffs ?	No
3]	Whether plaintiffs shall suffer irreparable loss in the event relief is refused ?	No
4]	What order?	As per final order.

REASONS

AS TO POINT NOS. 1 TO 4 :

8. Plaintiffs filed with List Exh.4 photo copies of 7/12 extract of land Gut No.149, sale deed No.65 dated 10-01-1992, sale deed No.671 dated 04-06-2001, Toach Map, Petition before Tahasildar, Correction deed dated 12-07-1988 and photo copy of N.C. dated 22-05-2020. Plaintiffs also filed with List 20 photo copies of N.C. dated 19-07-2020, sale deed No.380 dated 06-04-2000, sale deed No.1228 dated 16-04-2003, Correction deed dated 12-07-1988 and mutation entry dated 14-11-1988.

9. Defendants filed with list Exh.18 photo copies of order passed by Tahasildar dated 17-07-2020, petition before Tahasildar dt. 05-06-2020, Panchanama dated 18-06-2020, Najari Nakasha, sale deed dated 14-09-1981, F.I.R. dated 21-05-2020 filed against plaintiffs, copy of N.C. dated 27-05-2020, Village map, Mutation entry No.38 and two photo copies of road photo.

10. On going through record it appears that main dispute between the parties is in regard road towards southern side of suit property. Perusal

of sale deed No.65 dated 10-01-1992 by which plaintiff purchased 85 R. land of Gut No.149 depicts that as per boundaries mentioned, towards south there is land of Mukhtar Sandu and Usman Sandu. As per sale deed No.671 dated 04-06-2001 by which 93 R land purchased by plaintiff No.2, towards south there is land of Mehatab Bee Sardarkha. Thus, as per plaintiffs' case towards southern side of suit property there is no road.

11. Per contra, according to defendants, Sardarkha Ismailkha who is husband of plaintiffs' vendor Mehtab Bee has purchased said land from Kachru Kale vide sale deed No.4608 dated 14-09-1981. Copy of sale deed No.4608 is filed on record. In the said sale deed it is mentioned at page No.4 and 5 as “ पूर्व पश्चिम बांधाने गाडी रस्ता वापरण्यास अधिकारासह मालकी हक्काने ताब्यात दिली आहे ”. It means vendor Kacharu Kale has given purchaser right to use cart road situated East-West bandh of vendor. In this regard it is case of plaintiffs that Kachru Kale has executed correction deed on 12-07-1988 wherein it is stated that the road mentioned in sale deed No. 4608 dated 14-09-1981 which is shown towards southern side of suit property is given by Kachru Kale (vendor) to purchaser and purchaser may use it as sole user or may include it in his land for cultivation. At this stage it cannot be decided whether Kachru Kale was having sole ownership on alleged road or other adjacent land holders were also having any easementary right or interest therein. Said issue can be decided after adducing of evidence by both parties at trial.

12. It appears that defendants have land in Gut No.154 and 153 and plaintiffs also pleaded said fact in the plaint. Plaintiffs have filed copies of sale deeds No.380 dated 06-04-2000 and sale deed No.1228 dated 16-04-2003 through which defendant No.1 has purchased 40 R and 24 Gunthas land respectively. In the said sale deeds in description of boundaries there is no mention of any road from any side. It is argued on behalf of plaintiffs that in the sale deed No. 380 dated 06-04-2000 and sale

deed No.1228 dated 16-04-2003 there is no mention of any road. It suggests that there was no road in existence.

13. According to defendants, alleged road is on common bandh of land Gut No.159, 156, 154, 155 and 149. As the plaintiffs and defendants are relatives they all were using said road since long. However, due to personal disputes amongst plaintiffs and defendants, plaintiffs' tried to close the said road by ploughing and putting stone on it. Therefore, defendants filed proceeding before Tahasildar, Khultabad under Section 5(2) of the Mamlatdar Act, 1906 on 05-06-2020 seeking removal of plaintiffs' encroachment on road.

14. As per Section 5 of the Mamlatdar Act, 1906 removal of encroachment over the way is within the jurisdiction of Mamlatdar only, if existence of right of way established. It can be seen that Tahasildar, Khultabad passed order in the above proceeding No.2020/Jama-1/Kavi/268 on 18-06-2020. The said order is passed in favour of present defendants and present plaintiffs ordered to remove encroachment on the alleged road and perpetually restrained from creating any obstruction on it.

15. It is important to note that in the case in hand plaintiffs have filed present suit on 20-06-2020 i.e. after defendants filed proceeding before Tahasildar. Order passed in the said proceeding by Tahasildar on 18-06-2020. There will be no dispute that aggrieved plaintiffs can challenge order of Tahasildar before Civil Court as well as before appellate authority of Tahasildar. However, both remedy cannot be availed by plaintiff at the same time. During the course of argument learned advocate for plaintiffs submitted that plaintiffs have filed revision against order dated 18-06-2020 passed by Tahasildar before competent authority and revision proceeding is pending for decision.

16. It is worthy to note that if plaintiffs were willing to challenge the order of Tahasildar before Civil Court, they ought to have filed civil suit before Civil Judge Senior Division by adding Tahasildar as party. However, plaintiffs have filed revision before appellate authority of Tahasildar as well as they have also filed present suit claiming injunction. The order of Tahasildar by which plaintiffs ordered to remove encroachment on alleged road is already under challenge in revision before appropriate authority. In such circumstances plaintiffs ought to have wait for order in revision. When the revision against order of Tahasildar is already pending, passing of any inconsistent order by this court at this stage will create complications and multiplicity of proceedings.

17. Considering discussion as above plaintiffs failed in establishing prima-facie case and balance of convenience in their favour. Thus, the law of equity does not support plaintiffs and they will not suffer irreparable loss if temporary injunction is refused. On the other hand if blank injunction order is passed, it will create multiple litigation among the parties and interest of defendants will be affected. Hence, I answered point No. 1 to 3 in the negative and in answer to point No.4 I pass following order.

ORDER

Application is rejected.

Date : - 17-08-2020

(G.R.Tiwari)
Civil Judge (J.D.)
Khulatabad.

CERTIFICATE

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

Name of the Stenographer : Shri Akash S. Chavan
Court : C.J.J.D. & J.M.F.C. Khulatabad
Date : 17-08-2020
Order signed by the Presiding
officer on : 17-08-2020
Order uploaded on : 19-08-2020