

Order below exh.5
(Passed on 19.09.2015)

1] By way of this application under Order 39 Rule 1 (c) of the Civil Procedure Code, plaintiff prayed for grant of temporary injunction restraining defendants from obstructing in peaceful use of way A-B shown in plaint map. To it defendants denied vide their reply at exh. 14.

2] Prior to deciding the fate of this application, necessary to mention that earlier present application was decided on 23-07-2013 and relief as sought was granted to plaintiff. To it, defendant filed appeal, wherein vide order dt. 07-04-2015 Hon'ble Appellate Court quashed the order dt.23-07-2013 and directed to permit defendants to file order dt. 18-07-2007 passed in Revenue Appeal No. 124/B.N.D.-54/2006-2007 by Additional Collector, Nagpur and hear both the parties and decide present application afresh on merit. Accordingly, on 03-09-2015 defendant filed the said document. Thereafter, both parties advanced argument.

3] From the rival contention of the parties, following points arise for my determination, accordingly I recorded my findings thereon for the reasons given below.

<u>Sr.No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the plaintiff has made out prima facie case in his favour ?	:- In the Affirmative
2.	Whether the balance of convenience tilt in favour of the plaintiff	:- In the Affirmative.
3	Whether the irreparable loss will be caused to the plaintiff, if injunction is not granted in his favour ?	:- In the Affirmative.
4	What order ?	:- As per final order.

REASONS**AS TO POINT NOS.1 TO 4 :-**

4] For the sake of brevity, I am clubbing all the points. Heard Ld. Adv. Shri Lolusure on behalf of the plaintiff and ld. Adv. Shri Dangore for defendants.

5] Shri Lolusure submitted that order is stayed by Additional Collector, but fact remains that way is in existence. He said that defence raised is not acceptable as Survey no.116/2 is purchased by plaintiff recently, so it cannot be said that way as shown by defendants is used by him since beginning. He also stressed that both the easements are for different properties and are different easements.

6] Whereas, Shri Dangore said that earlier exh. 5 order was passed relying upon order of Sub-Divisional Officer and now as same is stayed, plaintiff cannot claim any benefit. He draw my attention towards fact that it is plaintiff himself who challenged order of Sub-Divisional Officer and now he cannot encash on his act. He argued that as now plaintiff had led ample evidence as trial is begin, same can be read and same shows that plaintiff had alternate way as shown by defendants.

7] He also said that now nature of suit also changed as plaintiff himself says that defendants have closed the way. He says exh. 5 now became infructuous and now plaintiff should claim mandatory injunction. He said that photographs cannot be relied as no affidavit of photographer is filed and lastly prayed for rejection of application.

8] As per plaintiff Survey no. 117 is his ancestral property having its approach way through boundary of field of Survey no. 118 and 106 owned by defendant no. 1 and 2. That approach way is shown as A-B in

plaint map and that is used by plaintiff since time immemorial. Point A goes through Naygaon Pandhan running towards north side dhura of Survey no.118. Plaintiff specifically pleaded that the then owner of Survey no.106 were also have no objection of use of way by plaintiff. That way is broad enough to carry yolked bullock cart and plaintiff has no other way to cultivate his field and he had acquired prescriptive easementary right over that.

9] Plaintiff further pleaded that he had purchased Survey no. 116/2 for valuable consideration and since then defendants started causing obstruction in use of suit way as they wanted to purchase same but could not. In such attempt defendant firstly minimized suit way and lastly uprooted same by tractor. On asking by plaintiff, defendant no.1 told him that he can still use the way and hence he started continue using same though way A-B seized to appear.

10] Plaintiff further pleaded that on instigation of defendant no.1, adjoining owners of Survey no. 116/2 namely Pralhad Kade and his wife started obstruction in approaching Survey no.116/2. Due to which plaintiff filed proceeding before Naib Tahsildar, Jalalkheda for removal of obstruction, which was allowed. Thereafter, on appeal of Pralhad matter was remanded back for fresh inquiry. In appeal, Sub-Divisional Officer, Katol held that plaintiff to use way located over boundary of Survey no. 106 and 118. Plaintiff had challenged that order before Collector, Nagpur. As way asked by plaintiff for Survey no. 116/2 was under law of easement of necessity. In between this Pralhad Kade filed proceeding against defendant no.1 and 2 alleging that they have removed boundary marks between Survey no. 118 and 106. On enquiry, Naib Tahsildar directed parties to approach competent Court.

11] Plaintiff specifically pleaded that since long he is using suit way continuously and peacefully to approach Survey no. 117. However now defendants started creating obstruction in it and asked so much land in Survey no. 117. Efforts were made to convince them by respectable person of village, but in vain. Due to obstruction by defendants, plaintiff could not pay any attention to his field. Plaintiff had also lodged report with revenue and police authorities, but no result came, hence he approach this Court.

12] In their reply, defendants denied all the adverse allegations made against them, They denied of existence of any way as pleaded by plaintiff, so also alleged obstruction by them. As per them plaintiff wants to create new way once again. Though they admits about location of suit field, but denied of Naygaon Pandhan. They specifically pleaded that they were not party to litigation between plaintiff and Shri Kade, hence that order is not binding against them and as Kade had denied way to plaintiff, he wants to reopen way A-B.

13] What is mentioned above was earlier pleaded by defendants. However, in the meantime defendants have carried out amendment in written statement and have specifically pleaded that Survey no.116 and 117 were owned by grandfather of plaintiff as ancestral field. They further pleaded that Survey no. 116 was forfeited to Late Kanhaiyalal who sold same to Atmaram and same was inherited by his sons Sheshrao, Mahadeo, Pralhad and Rama, wherein after death of Pralhad his wife Shobha acquired right.

14] They further specifically pleaded that Survey no. 116 was partitioned between legal heirs of Atmaram and after that it was sub-

divided which had approach way from eastern boundary of Survey no. 163 shown as ABCDEFG. They further contended that plaintiff had purchased Survey no. 116/2 and now he is using said way ABCDEFG, so no question of he acquiring way by prescription. Lastly they prayed for rejection of application.

15] Plaintiff earlier relies upon order of Naib Tahsildar and Sub-Divisional Officer, Katol and bunch of supporting affidavits which include affidavit of son of previous owner of Survey no. 106 Shri Mohun Kawadse. Now he filed few photographs showing that defendants have kept thorny bushes and closed the way and complaint filed by him. During argument, one issue was raised by ld. Counsel for plaintiff that it requires to be verified whether the stay order is still in existence or not. Accordingly, on 8-09-2015 he filed the certified copy of the order-sheet of proceeding pending before Additional District Collector, Nagpur which shows that the record and proceeding of the lower Court is already received. Needless to mention that the stay order was effective till receipt of record. Ld. Counsel for plaintiff also filed his affidavit contending that the photographs filed on record are taken by him. Further, on 15-09-2015 plaintiff filed affidavit contending that all the record of Sub-divisional Officer Katol is received by office of Additional Collector Nagpur for purpose of appeal.

16] On other hand, defendants filed order of Naib Tahsildar, statement, spot inspection report and supporting affidavits particularly of owner of Survey no. 163 and others. At the cost of repetition, they filed order dt. 18-07-2007 as per which order of Sub-Divisional Officer is stayed. In reply to the certified copy of order-sheet filed by plaintiff, on 10-09-2015 defendants filed certified copy of entire order-sheet of

proceeding pending before Additional Collector, Nagpur. Thereafter, he also filed order-sheet of revenue proceeding decided by Naib Tahsildar and order dated 30-04-2004. Yesterday defendant no.1 filed his affidavit contending that the record of proceeding decided by Naib Tahsildar is still available at Tahsil office which means the stay order is still in existence.

17] Apart from above amendment, this suit also went through major change i.e. trial is commenced and plaintiff, witness Mohun, witness Wasudeo, witness Punjab and witness Baburao have went through probing cross examination. Suit was fixed for defendants evidence when order of Hon'ble Appellate Court was received by this Court. Now the question is whether cross examination can be looked in. During argument, ld. Defence Counsel submitted that it can be considered. Though, I am not in confirmity with his submission as it will be hardship on plaintiff. But even if same is considered, it is helping plaintiff only.

18] Admittedly, survey no. 117 is ancestral field of plaintiff, whereas he purchased survey no. 116/2 on 11-03-1988. Further, admittedly for Survey no.116/2 plaintiff claimed way from field no.163 to 116/2 as pleaded by defendants and for that purpose he applied to Tahsildar who granted the way. However, in appeal plaintiff was granted way for survey no.116/2 from field of defendants which order is stayed by Additional Collector.

19] Admittedly both fields of plaintiffs are sorrounded by other fields and naturally he requires approach way. Interestingly he claimed two different ways for both the fields. But ironically now he is legally

fighting for both as respective field owners have obstructed him saying that alternate way is available.

20] Whether plaintiff can claim two way for both fields is another fact, now issue is whether plaintiff made out prima facie case of having prescriptive easement to approach his field no.117 from field of defendants. In this context, plaintiff placed heavy reliance upon affidavit of son of previous owner of survey no. 106 i.e. Mohun Kawadse who clearly said that plaintiff was approaching his field from boundary of survey no. 106 and 118. Much is argued that during his cross examination, he admits of alternate way i.e. way from survey no. 163 to 116/2. Firstly, at this juncture evidence need not be looked in, but even if considered fact remains that prior to 1999 plaintiff was using way AB and it was suggested to witness and he admits it. Though he said that there is no mention of way in sale deed executed in favor of defendants and he is not visiting fields involved, hence is unaware about it. But suggestion given to him leave no room except to infer that plaintiff was using way since 1999.

21] Further, interestingly if plaintiff was using way as shown by defendants, then there had to be something on record. However, admittedly plaintiff is still fighting legal battle for obtaining legal right of that way. Plaintiff purchased survey no. 116/2 in the year 1988, so as per claim of defendants, plaintiff should be using way they suggested since then. However, defendants themselves come with contradictory pleas as they suggested witness Mohun that plaintiff was using way till 1999. So contention of defendants fall.

22] Regarding use of way AB, conduct of parties needs to be

considered. Admittedly on appeal filed by plaintiff, Additional Collector stayed the order by which he was granted way from field of defendants to approach survey no. 116/2 and that too in the year 2007. So it clearly means since then plaintiff is using way AB to approach his field survey no.117 as owner of survey no.116/1 have already restrained him from using their field boundary. It is not case of defendants that they challenged order of S.D.O., Katol.

23] At the cost of repetition, defendants tried to take advantage that plaintiff challenged the order and obtained stay, but fact remains that plaintiff was claiming right from boundary of Shri Kade to approach Survey no.116/2 which need arose after he purchased that property, whereas suit way is used by him since time immemorial. It clearly appears that defendants are trying to take advantage of legal provisions and stay order of Additional Collector.

24] Controversy raised during argument till today results in filing of certified copies of revenue proceedings and counter affidavits shows that the parties are intersted in showing that existence or non existence of stay order is crucial fact. Copy of order-sheet filed by defendanats itself shows that there is no uniformity and consistency in it as at some places it is mentioned that the record of both the lower court is received whereas subsequently the case is kept for receipt of record. Even the affidavits filed by plaintiff and defendant no.1 is inconsistent with the order-sheet. As such, it can not be concluded whether the stay is in existence or not.

25] Legally the order of Revenue Court is not at all binding on the Civil Court. Then also why the parites are pressing on the fact of

pendency of appeal before Additional Collector is unanswered. As per defendants, the stay order is still in existence. Even if, same is considered, it can safely be concluded that the order by which plaintiff was given the right to use the boundary of defendants to approach survey no.116/2 is stayed. As per the pleadings of present suit, plaintiff is claiming easementary right of survey no.117 and not 116/2. In such circumstances, the proceeding pending before Additional Collector Nagpur is not at all a decisive factor. In fact, it creates doubts on conduct of defendants as in spite of having the right to challenge the order of S.D.O., Katol, they maintained silence till today.

26] As such, affidavits of parties to the suit and the documents related with the revenue proceedings filed by them are not at all considerable factor at this stage.

27] Existence of suit way is prima facie proved by plaintiff. The supporting affidavits filed by defendants are only saying about alternate way available to plaintiff i.e. way coming from field of Shri Kade and others. Affidavit of Shripad Bhajan, son of previous owner of Survey no.118 says that no way exist from property as claimed by plaintiff, whereas affidavit of Mohun Kawadse, son of previous owner of Survey no. 106 speaks otherwise and now there is oath against oath. Supporting affidavit filed by parties have to pass test of cross examination and as there is oath against oath, something more is required which plaintiff has provided by relying upon affidavit of Mohun and even his cross examination leaves no room for doubt that plaintiff was using the way as it exist.

28] Way about which defendants are pleading was earlier not going till Survey no.117, that way was created only after plaintiff

purchased Survey no.116/2, and naturally no one will give any way from his property to other without any reason. Hence contention of defendants is not sound.

29] If plaintiff was really using way as claimed by defendants then they could have filed any other document or supporting affidavit particularly of Shri Kade, with whom dispute is already pending. It appears that defendants are taking advantage of dispute of plaintiff with Shri Kade, due to which plaintiff is left helpless.

30] No doubt now the way coming from field of Shri Kade goes till Survey no.117, but plaintiff now does not have that way also due to order of Sub Divisional Officer. Due to having field located in between others property, plaintiff has to knock door of various competent authorities.

31] Plaintiff claims existence of suit way and right over that by easement of prescription and its obstruction by defendants. With the help of affidavit of Mohun and even his evidence, plaintiff prima facie proves existence of suit way and circumstances clearly shows that plaintiff was using that since long. Hence plaintiff prima facie proves his case and accordingly Point no.1 is answered in Affirmative.

32] As prima facie case is proved by plaintiff, so balance of convenience also tilts in his favor and hence Point no.2 is also answered in Affirmative.

33] Survey no.117 is surrounded by other properties which means that plaintiff needs approach way and it is prima facie proved that

plaintiff was using suit way, hence now if injunction is not granted in favor of plaintiff, it is definitely he who will suffer heavy loss. Plaintiff will not be able to cultivate his property, which will put him in heavy loss. Present is harvesting season and if now plaintiff is not able to cultivate his field, his land will remain uncultivated for entire year. Due to dispute with Kade pending before Additional Collector, plaintiff had no way from field of Shri Kade as pleaded by defendants, so plaintiff cannot be left helpless as he undoubtedly requires way to approach his field. Hence, his valuable right has to be protected. On other hand, defendants nowhere pleads that use of way by plaintiff was causing any loss to them, even otherwise plaintiff can be asked to use the way so as not cause loss to defendants. Hence I answer Point no.3 also in Affirmative.

34] Before parting, necessary to mention that defendants said that present application became infructuous as plaintiff himself says that defendants have put thorny bushes in the way. That fact is apparent from photos, though no affidavit of photographer is filed. However, photo shows that bushes are kept on one side only and even photo itself shows that there is bullock cart way till adjacent field, which goes in favor of plaintiff. So objection raised by defendants does not stand. In nutshell, plaintiff prove his claim and also proved the essential ingredients for granting this equitable relief of injunction. I proceed to pass the following order.

:: ORDER ::

- 1] Application at exh.5 for grant of temporary injunction is allowed.

- 2] Defendants, their agents, servants, relatives are hereby temporarily restrained from interfering into peacefull use and enjoyment of plaintiff over suit way A-B, till decision of suit.
- 3] Cost in cause.

Date : 19.09.2015

(Ku. Samta K. Choudhary)
Jt. Civil Judge, Jr. Division,
Narkhed.