

Order below Exhibit 5

1. Suit is for declaration, permanent injunction and mandatory injunction. This is plaintiff's application to temporarily restrain defendant No.1 to 9 from making illegal construction in the lane used by plaintiff since long.

Plaintiff's case -

2. Plaintiff has received suit-property 1-a by will-deed. The right of way to property 1-a is towards North. There is 8 to 10 feet broad lane between property 1-a and 1-d i.e. Survey No.3105 owned by defendant No.4 to 9. Plaintiff has been using the said lane since long. Plaintiff does not have any other road to access his property. Property-1-b is towards east of property 1-a. Property 1-b is owned by defendant No.1 to 3. Without taking permission from defendant No.12 i.e. Yeola Municipality, defendant No.1 to 3 and defendant No.4 to 9 have begun unlawful construction in the said lane. Plaintiff requested defendants to remove obstruction from the said lane, but he was refuted by defendants. Plaintiff also applied to defendant No.12, Yeola City Police Station and other authorities. Plaintiff sent legal notice to defendants. All these efforts of plaintiff were in vain. Hence, plaintiff has filed this suit to protect his easementary right and wishes to restrain defendants from making illegal construction in the said lane vide this application.

Defence :-

3. Reply of defendant No.1 to 11 is vide Exh.23. They have denied plaintiff's easementary right. They have denied the boundaries and description of property 1-a and 1-b. They had further claimed that the access road to property 1-d i.e. Survey No.3105 is towards east. The lane shown in map to the South of Survey No.3105 is part of S.No.3105 and extends only upto some portion of S.No.3105/1. There is portion of S.No.3104/2 to the west of the said lane. There is north-south wall to the east of of S.No.3103/1 and S.No.3103. The said wall is in between S.No.3104, 3104/1, 3104/2, 3105/1 and 3105/2. The access road to S.No.3103 and 3103/1 is to the South. Plaintiff's own sale-deed also shows the access road towards South. The way as alleged by plaintiff never existed. Construction carried-out by defendants is within limits of their property, it merely amounts to repairs and plaintiff does not have any concern with it. Plaintiff does not have locus-standi to complain about construction carried out by defendants. Plaintiff has filed false application to harass the defendants and the same is liable to be rejected.

4. Reply of defendant No.12 is vide Exh.64. It is averred that the suit is barred by Section-80 of C.P.C. Plaintiff did not wait for sixty days after sending notice to defendant No.12 and hastily filed suit within 10 days only. Defendant No.1 to 3 have not obtained permission for construction. Defendant No.12 is ready to take action against defendants if, their construction is found to be illegal.

5. Rival contentions give rise to following points for determination. Their findings aided by reasons are as follows -

POINTS

FINDINGS

- | | |
|---|------------------------|
| 1. Does plaintiff have prima-facie case ? | ...Partly Yes |
| 2. Is balance of convenience in favour of plaintiff ? | ...Partly Yes |
| 3. Whether irreparable loss would cause to plaintiff if injunction is not granted ? | ...Partly Yes |
| 4. What order? | .. As per final order. |

REASONS

As to point no.1 to 3 :-

6. Heard rival counsels. Perused record.
7. Plaintiff has filed following documents,
- 1) Property Card of S.No.3103/1,
 - 2) Property Card of S.No.3104/2
 - 3) Property Card of S.No.3105/2
 - 4) Property Card of S.No.3105
 - 5) Legal notice to defendants dtd. 21/04/2015
 - 6) Photographs of suit-property,
 - 7) City Survey Map
 - 8) Complaint to police station.
8. Defendant No.1 to 11 have filed following documents,
- 1) Property Card of S.No.3105
 - 2) Property Card of S.No.3105/2
 - 3) Rough Map showing situation of the Property - 3101, 3103, 3104, 3105

- 4) City Survey Map of the Property – 3101, 3103, 3104 & 3105
- 5) Sale-deeds of S.No.3103, 3103/1,
- 6) Sale-deeds of Survey No.3104, 3104/1, 3104/2
- 7) Notice reply of defendant
- 8) Acknowledgement receipts of notice reply
- 9) Photographs of suit-property
- 10) Property Card of S.No.3103, 3103/1

9. Plaintiff has rightly argued that property S.No.3103 and 3103/1 constitute two independent properties. Their separate property cards are filed on record by both parties. Both plaintiff and defendants have relied upon city survey map. The only difference is that map filed by defendants does not show any highlighted portion whereas, map filed by plaintiff shows a portion highlighted by fluorescent sketch-pen. We shall have to consider the non-highlighted map. A lane like portion is seen towards South of Survey No. 3105, however, the said lane touches only a minor portion of S.No.3105/1 and 3104/2. It does not stretch upto 3103/1 as alleged by plaintiff. Plaintiff appears to have gone out of the way to show the said lane as stretching upto S.No.3103/1 by highlighting the lane. But, plaintiff's case is contradicted by the non-highlighted map.

10. According to the P.R. Card, S.No.3103/1 first belonged to one Bhika Mahadu Pawar. The registered sale-deed by which Bhikaji purchased property from Sitabai Babulal Shinde is filed on record. It is of two separate houses. One is situated in Survey No.3103 and another is situated in S.No.3103/1. The access road as alleged by plaintiff does not find any mention in the sale-deed. Plaintiff has come up with the ancient

easementary right. The said right would have surely found place in the sale-deed. But, the said lane is conspicuously absent in the sale-deed of plaintiff's property. Instead as per the sale-deed there is open space to the South of Survey No.3103/1 and S.No.3107 to the North along with drainage from South. The description of property in sale-deed and plaint do not tally with each other.

11. Commissioner report is vide Exh.41. The report is submitted by Adv. Surse who was appointed as Court-Commissioner with consent of both parties. Defendants have rejected the report by reply vide Exh.43. The said report is accompanied by map drawn by Court-Commissioner. However, the situation of S.No.3104/1 and S.No.3104/2 as shown by Court-Commissioner does not match the City survey map filed by plaintiff himself alongwith list vide Exh.34. The location of these two survey numbers is crucial as per plaintiff's pleading. Prima-facie commissioner report appears to be erroneous as well contradictory to the plaintiff's case.

12. Plaintiff's Ld. counsel has relied upon decision in Shalini Vadnerkar Vs. Bank of Baroda [2006(3) Mh.L.J. 828]. However, the said case law is against plaintiff's case since, its ratio is that "Easement of necessity must be an absolute necessity and not merely a convenient mode of enjoyment of property and an easement of necessity cannot be granted merely on the ground of convenience and advantage." Plaintiff has not been able to show his right of absolute easement. Therefore, the said case law does not help him.

13. The Ld. counsel for defendant No.1 to 11 has relied upon and drawn support from following case laws,

- 1) Pundalik Narayan Xet Pednekar & ors... Vs. Augusto Fernandes & ors...[2012 STPL(LF-Civil) 48741 BOM, wherein it is held that “when there is no pleading that the suit access has been used as of right and case of easement is not properly pleaded in the plaint, plaintiff cannot be given any reason.”
- 2) Sree Swayam Prakash Ashramam and Another Vs. G Anandavally Amma and others.. [2010(1) B C J 45] wherein it is held that “ easement of necessity necessary involves an absolute necessity and if there exists any other way, there can be no easement of necessity.”
- 3) Smt. Shalini Laxman Wadnerkar Vs. Bank of Baroda Employees Co.Operative Housing Society Ltd. And Another... [2006 BHCCO 1496], wherein it is held that “Easement of necessity must be an absolute necessity and not merely a convenient mode of enjoyment of property and an easement of necessity cannot be granted merely on the ground of convenience and advantage.”

14. Apart from bare words of plaintiff's case is not supported by any document. Plaintiff has failed to show prima-facie existence of easementary right.

15. However, defendant No.12 i.e. Yeola Municipality has admitted in para-10 on page no.5 of its reply vide Exh.64 that defendants have not taken permission for construction. Under these circumstances, it becomes imperative to restrain defendants from carrying-out construction without permission of defendant No.12. On this point, plaintiff certainly has prima-facie case. Accordingly the point no.1 to 3 are answered partly in the affirmative.

As to point no.4 :-

16. In view of above findings following order is passed,

ORDER

- A) Application is partly allowed in the terms that defendant No.1 to 11 are temporarily restrained from carrying-out any construction in the suit-property without obtaining due permission from defendant No.12 till disposal of the suit.

Yeola, Dist.Nashik,
Date : 27/07/2015

(Sau. A.R. Rahane)
Civil Judge, J.D., Yeola.