

ORDER BELOW EXH.74

R.C.S. No. 107/2016.

(Passed on : 21.09.2021)

Perused the application and say filed by defendant at Exh.77. Heard Ld. Advocate Shri. J. R. Shaikh for the plaintiffs and Ld. Advocate Shri. S. A. Gaikawad for the defendant.

2. Present application is filed by plaintiff U/O-39, Rule-1 and 2 of C.P.C. seeking order restraining defendant from creating new road with the help of order passed by Ld. Tahsildar, Yeola, from the property belonging to the plaintiffs.

3. The case of the plaintiffs in nutshell is as follows :-

The suit is filed for declaration and perpetual injunction and other incidental reliefs against the defendant. The suit property i.e. property described in para No.1 of the plaint i.e. Gat No.477, ad-measuring area 6-90 H.R. is owned and possessed by plaintiffs. Plaintiffs have submitted that Gat No.477 is owned and possessed by plaintiffs. Defendant is owner and possessor of Gat No.488/2. For the Gat No.488, there is road from western side towards Lasalgaon road and they have been using the same since long. In spite of having said alternative road, defendant is trying to create new road through the boundaries of Gat No.477 and 494 on the basis of order passed by Ld. Tahsildar Yeola in Vahivat Case No. 13/2011. Plaintiffs have filed appeal before Ld. S.D.O., Yeola. However, Ld. S.D.O. remanded the matter for re-enquiry to Tahsildar. Accordingly, in re-enquiry also Ld. Tahsildar passed order against plaintiffs. Plaintiffs again filed appeal. However, same was dismissed. Present application is filed when the Circle Officer, Savargaon served notice dated 21.05.2019 and also

recently notice dated 27.08.2021 for execution of the order of Ld. Tahsildar on 22.09.2021. Therefore, plaintiffs have filed present application seeking order restraining defendant or any other person on his behalf from creating the new road.

4. Defendant has filed say to the application at Exh.77 and denied the application and suit in *toto*. Further, contended that plaintiffs are trying to misuse the process of law. Plaintiffs had filed applications for interim injunctions at Exh.5, 27 and 35 respectively. The application at Exh.5 was disposed of by passing order that it will be heard along with suit for want of urgency. Applications at Exh.27 and 35 were not pressed by plaintiffs on 14.07.2021. Hence, same were filed and disposed of by the court. Present application for dismissal of the suit is filed on the ground that on 04.01.2017, the court was pleased to allow the application for appointment of Court Commissioner filed at Exh.08. However, after passing the orders, plaintiffs failed to comply the necessary fees for the appointment of the Court Commissioner. Thereafter, inspite of reminder plaintiffs have failed to comply the order passed at Exh.08. Defendant has succeeded before the Ld. Tahsildar and Ld. S.D.O. in Vahivat case No.13/2011. Earlier on 17.07.2019, Circle Officer Savargaon has executed order passed by Ld. Tahsildar and the obstruction was removed from the said road. Memorandum to that effect is executed on 17.07.2019. Under these circumstances, just to harass the defendant plaintiffs have filed present suit. Plaintiffs do not have prima facie case. Balance of convenience does not lie in favour of plaintiffs. If injunction is granted irreparable loss will be caused to the defendant and not to the plaintiffs. Hence, prayed for the rejection of the application.

5. Considering the pleadings and documents on record, following points arise for my determination and I have recorded my findings with reasons thereon as under :-

SR. NOS.	POINTS.	FINDINGS.
1.	Whether plaintiffs are having <i>prima facie</i> case ?	“Affirmative”.
2.	Whether balance of convenience lies in favor of plaintiffs ?	“Affirmative”.
3.	Whether plaintiffs will be at irreparable loss if injunction is not granted ?	“Affirmative”.
4.	What order and relief ?	As per final order.

-:REASONS:-

As to Point Nos.1 to 3:-

6. To substantiate their arguments, plaintiffs have relied upon the documents at Exh.3 namely 7/12 extract of Gat No.477, 494, 476/2, 495, certified copy of order and judgment passed by Ld. Tasildar in Vahivat case No.13/2011, certified copy of order and judgment passed by Ld. S.D.O., Yeola, dtd. 18.01.2014, copy of order passed by Ld. Tahsildar in Re-enquiry Vahivat Case No.13/2011 dtd. 21.08.2015, order and judgment dated 03.05.2016 passed by Ld. S.D.O., Yeola, in R.T.S. Revision No.20/2016.

7. Defendant has relied on documents filed along with Exh.48 namely letter dated 22.07.2019 given by Circle Officer, Savargaon to the Ld. Tahsildar Yeola, letter dated 01.06.2019 given by Tahsildar, Yeola to Circle Officer Savargaon, letter dated 21.05.2019 given by Circle Officer to Tahsildar Yeola, letter dated 09.11.2018 given by

Tahsildar, Yeola to Circle Officer, Savargaon, statement of defendant dated 21.05.2019 before Circle Officer, panchnama dtd. 21.05.2019 before Circle Officer, panchanma dtd.17.07.2019, statement of plaintiffs and defendant dtd. 17.07.2019 letter dtd. 10.04.2018 given by Circle Officer to Tahsilar, Yeola, two photographs and true copy of affidavit given by plaintiffs and defendant before Tahsildar, Yeola.

8. Ld. Advocate Mr. J. R. Shaikh for the plaintiffs argued that the suit is filed seeking declaration that order passed by Ld. Tahsildar and Ld. S.D.O. Yeola, being illegal and passed without authority are not binding upon the plaintiffs and injunction against the defendant. To substantiate their argument on the point of maintainability of the suit, plaintiffs have referred the following judgments, namely,

1. **Vasudev Pandharinath Raikar V/s Manoj Mohan Dalavi 2018 (4) Mh. L.J. 927.**
2. **Vidya Karandikar V/s. State of Maharashtra 2006 (3) BCJ 26.**
3. **Vishwanath V/s. Usha writ petition No. 4027/2009 order dated 13.07.2010.**

9. Ld. Advocate Mr. J. R. Shaikh argued that in all the above referred judgments, Hon'ble High Court of Bombay has held that a suit is maintainable and the Civil Court has jurisdiction to entertain and decide the question the validity of the order passed by the Mamlatdar. Therefore, the present suit is maintainable and plaintiff has right to claim interim relief by way of temporary injunction.

10. Plaintiffs' advocate has referred the judgment passed in **Vasudev Pandharinath Raikar V/s Manoj Mohan Dalavi 2018 (4) Mh. L.J.** passed by the bench of Hon'ble Justice Dr. Smt. Shalini Phansalkar-

Joshi of the High Court of Judicature at Bombay. In which judgments passed in **Mohammad Rahim Khan V/s. Shankar Maruti Dhage and Anr., 2017(3), Mh.L.J., 135** is also referred. In the said judgment in para No.10 it is held that:-

“In this case, admittedly, the respondents are not challenging the orders of Mamlatdar or the Sub Divisional Officer. They have filed the suit for injunction, restraining the petitioners from causing obstruction to their possession in the suit lands and from using the alleged road for their access. Even assuming that they are challenging the said orders indirectly. Considering the legal position which is no more res integra, the Civil Court has jurisdiction to entertain, try and decide the suit challenging the order passed under section 5 of the Mamlatdar's Court Act”.

11. It is also held that, *“this view is fully endorsed by another single bench of this court in the case of Mohammad Rahim Khan V/s. Shankar Maruti Dhage and Anr.(supra)”.*

12. Apart from this, in the case referred by the plaintiff, in **Vishwanath V/s. Usha, Writ Petition No.4027 of 2009**, order dated 13.07.2010, the Hon'ble Court held that orders passed by Mamlatdar are subject to the decision of Regular Civil Suit. Plaintiffs have also relied upon the judgment in **Vidya Karandikar V/s. State of Maharashtra, 2006(3) B.C.J., 26**. In which, Hon'ble Court in para No.17 held that:-

“Due to these reasons, it would be clear that filing of revision

against the order of Nayab Tehsildar before the Sub-Division Officer u/sec.23 is no manner a legally available remedy at all”.

13. Ld. Advocate Mr. S. A. Gaikawad argued that above mentioned case laws referred by plaintiffs are not applicable to the present case. Suit is not maintainable as on 06.09.2011 Vahivat Cae No.13/2011 was filed. Accordingly, spot inspection was carried out. Order was passed in favour of defendant. However, Revision Application No.66/2014 by order dated 18.01.2014 the said Vahivat Case was remanded back for re-enquiry. After the due enquiry conducted Ld. Tahsildar again re-enquiry Vahivat Case No.13/2011 was decided in favour of defendant on 21.08.2015. The second Revision Application No.20/2016 was dismissed and therefore the order of Revision is also in favour of defendant. So all the orders of Revenue Authorities are in favour of the defendant. Therefore, balance of convenience lies in favour of defendant and not in favour of plaintiffs.

14. Considering the case on the hand, the report of the Tahsildar dated 02.08.2014 and the rough map sketch does not bear the signatures of either of the plaintiffs or defendant. It is specifically pleaded by the plaintiffs that defendant is having alternative road from the western side of Gat No.488 and the same has been used by the defendant since long. As per the order passed at Exh.08, the Commissioner is appointed to carry out the spot inspection. Alternative road if any, will be revealed in the report of the Court Commissioner. Therefore, defendant is trying to create new road by executing the order of Ld. Tahsildar. This application was filed when Circle Officer

Savargaon sent notice dated 21.05.2019 and recently notice dated 14.09.2021. If the new road is created as per the order of Revenue authorities, plaintiffs will be at irreparable loss. If injunction is not granted, plaintiffs will be at irreparable loss and not the defendant, as he has been using alternative road, which is alleged to be passing from north boundary of Gat No.488 towards western side.

15. U/O-39, Rule-1 of C.P.C., injunction may be granted when any property in dispute in a suit is in danger of being wasted or damaged or if the defendant threatens to dispossess the plaintiff or otherwise cause injury to the suit property in dispute.

16. Considering above mentioned position of Law as discussed in above referred judgments about the maintainability of the suit, considering the pleadings and prayer made in the suit, suit is maintainable. Therefore, plaintiffs are having prima facie case. Balance of convenience lies in favour of plaintiffs. If the defendant creates the alleged road, it is the plaintiffs' who will suffer irreparable loss and not the defendant. The alternative road if any, will be revealed in the report of the Court Commissioner. At the most suit will be decided on merits. Considering above circumstances, above referred judgments, this is a fit case to grant injunction. In view of above discussion, I answer point Nos.1 to 3 in the affirmative and in answer to point No.4, I proceed to pass the following order:-

ORDER

1. The application at Exh.74 is allowed.
2. Defendant is hereby temporarily restrained from creating new road from Gat No.477 of village Katarni, Tal. Yeola,

Nivrutti Kacharu Kadam and others. ::8::
V/s. Baburao Bhikaji Jadhav.

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Dist. Nashik, either by himself or through any other person
on his behalf until the disposal of the suit.

3. Parties to take note and act accordingly.

(Dictated and pronounced in open Court in presence of
both parties).

Place : Yeola
Date : 21.09.2021

(Atish Pralhad Khollam)
Jt. Civil Judge, Jr. Division,
Yeola, Dist. Nashik.

CERTIFICATE

I affirm that the contents of this PDF file Order / judgment are same, word to word, as per the original order / judgment.

Name of Stenographer : P.A. Bargal (L.G. Stenographer)
Name of the Court : Shri. A.P. Kholam, Jt. CJJD,
Yeola, Dist. Nashik.
Date of Order / judgment : 21.09.2021.
Order / judgment signed by
Presiding officer on : 21.09.2021.
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