

ORDER BELOW EX. 5 IN RCS No. 5 of 2018*Janardan B. Kubal**Vs.**Makrand Takkar*

This is an application on behalf of the plaintiff inter alia seeking relief under Order 39 Rule 1 of the Code of Civil Procedure, 1908.

Brief facts of the application

2. Survey no. 6 (old 738) hissa no. 3, admasuring about 0-12-0 (0-02-5 pothkharab is the suit property.(hereinafter referred as suit property for the sake of convenience). It is owned and possessed by the plaintiff. The plaintiff has his house, well and different plants inside it. It is compounded from all four side. It has a gate for having access to plaintiff's only. The defendant removed said gate with the help of police after the order of Appar District Collector. However the plaintiff no. 1 has restored it after the order of District Collector.

3. Towards the northern side of the suit property there is property of defendant. It is bearing survey number 14 (old 683) (herinafter referred as defendant's property). The father of plaintiff got measured the suit property in the year 1992. In the map drawn accordingly a east west directed public road was shown. It is not disputed to the plaintiff. Moreover from the said map there is no north directed road going towards the defendants property. Such road is not even the gat book map acquired by plaintiff's father in the year 1991. Even in the measurement done for the fixation of boundaries in the year 2004, such road was not shown in the map.

4. In such background, the defendant being adjacent owner filed application under section 5 of the Mamlatdar Court's Act and contended therein that there was a existing road going from the plaintiff's property. It was alleged that the plaintiff has reduced the width of said road and he is about to close it. The defendant even approached the police. However after looking at the document the police did not took any action. Thereafter the Circle Inspector

called the plaintiff for hearing. There also the plaintiff showed all the relevant documents. Thereafter the plaintiff acquired redrafted gatbook map (punerlek gat book nakasha). From that map it was revealed that a road goes towards the northern side in the suit property from the existing east west grampanchayat road.

5. The plaintiff applied under the right to information act and demanded for information showing how the road came to be shown in the map. In reply he got the answer that the road so shown in the dotted line within the suit property. However there is no information available to show that how the road got mutated in the map either on a personal application or on behalf of the grampanchayat. Thus there is no entry showing as to when the road was created in the suit property. Accordingly the plaintiff believed that there is something smoky and the defendant should have done something in collusion with the officers of survey department. Hence he acquired

6. Hence he acquired the original draft page no. 5. When he perused that extract it appeared to him that the employee for survey department has shown the road by dotted line which goes towards the northern side in the suit property. It is marked there upon that rectified sheet is prepared as per "punergatan mohimet tayar" the year of 1995-1996. However such entry is made in respect to old survey no. 6 hissa no. 10 which was subdivided. It appears that the defendant took disadvantage of such entries and got the road entered in the map. The plaintiff claims that such entry of road is made recently as it would have been made in the past then it could have been shown the maps drawn in the year 1992 and 2004.

7. Accordingly the plaintiff approached to secretary Revenue Department (land survey) and Jamabandi commissioner and Director, Land Record Pune, Deputy Director Land Record Mumbai, Superintendent Land Record Oros, Deputy Superintendent Land Record Verngurla vide his notice under section 80 of the Code of Civil Procedure. The District Superintendent Land Record replied to the plaintiff's notice by which direction given by Deputy

Superintendent Land Record Vengurla for taking necessary action. Deputy Superintendent Land Record Vengurla also replied to the plaintiff and submitted that 'as per the record produced by plaintiff and the gatbook available in their office the road is not mention in your map, however in the punerlekhan gatbook the road shown in red doted line. However, it can't be ascertained that who and when recorded that road (पाऊलवाट) in the map.' He further submitted that he does not has the jurisdiction to remove such road as shown in the map. Thus the plaintiff has to approach his senior.

8. After receiving such reply the plaintiff approach Jamabandi Commission and Director Land Record and Superintendent Land Record, by his notice dated 5/12/2016. The Superintendent Land Record received such notice, directed the Deputy Superintendent Land Record and made aware about his rights. Due to it the Deputy Superintendent Land Record Vengurla got angry and sent letter dated 4/1/2017 to the plaintiff and defendant and communicated that he will visit the spot personally to assert if there is road existing in the suit property. The plaintiff submits that the existence of such road can be divided in Civil Court only. The Deputy Superintendent Land Record did all such things only to point save his staff person. Accordingly the plaintiff sent said notice to Deputy Superintendent Land Record and intimated that his act is illegal. However then also Deputy Superintendent land record visited the spot i.e. suit property. Therefore plaintiff has filed the suit bearing no. 5/2017 with that regard before Hon'ble Civil Judge Senior Division. It is subjudice. The road so shown in the map is now deleted from the gatbook and new gatbook map is made available to plaintiff after the plaintiff approached various authorities as mentioned above.

9. The plaintiff further submits that the defendants have a different road to approach their land. In spite of that the Tahasildar appointed Circle Inspector before giving notice to the plaintiff in the proceeding as per section 5 of the Mamlatdar Courts Act. He further submits that the Tahasildar ought to have followed the Civil Procedure Code as the application under section 5 of Mamlatdar Courts Act is treated to be a suit. However without following such

procedure the Tahasildar allowed the suit no. 2/2016 before him. Said order was challenged before District Collector Sindhudurg by Revision Application 1/2017. However it came to be dismissed. Therefore the plaintiff approach Honb'le Bombay High Court by Rivision Pettition No. 525/2017, Hon'ble High Court was pleased to pass order in said petition and quash the order of District Collector in Revision Application 1/2017. The matter was further remanded back to Collector. The Collector thereafter particularly allowed the application of plaintiff and remanded back the matter to Tahasildar for fresh hearing by canceling Tahasildar's previous order. Accordingly the suit no 2/2016 again came before Tahasildar Vengurla. The Tahasildar again passed exparte order for maintaining status quo. The said order was served on plaintiff on 16/1/2018. However before that the plaintiff had restored the gate in the suit property.

10. Thus the plaintiff contend that defendants have collusion with the revenue and survey officer. The act of defendants are thus causing nuisance to plaintiff. The plaintiff was also called to the police station just after decision of Tahasildar in the proceeding before him under the Mamlatdar Courts Act. The police also immediately gave protection to the defendants. The plaintiff intimated the police that he has filed Revision Application but then also the police did not took considered the plaintiff's side. On the contrary they supported the stand of defendants. The plaintiff thus submits that there is no way or easementary right to the defendants from the suit property. Thus the defendants are trying to take the disadvantage of their collusion with the Government Officer and thus he is trying to develop the road from suit property. The plaintiff claims that the defendants shall not by any means cause obstruction to the possession of plaintiff, the defendant shall not remove the gate which is made to enter in the suit property, the defendant shall not create any way in the suit property till the final disposal of the suit.

11. The defendant nos. 1 and 2 have filed their written argument cum their say on the application below exh. 12. The defendant nos. 1 and 2 have submitted that there was 3 meter wide road going from the suit property towards

their property. The plaintiff has minimized its width and he has also raised a gate before the suit came to be filed before Tahasildar. The defendants thereafter applied to Vengurla Police Station on 30th June 2016 and they visited the spot and made understood the plaintiff, however there was no effect on plaintiff. Hence the defendant filed suit before Tahasildar on 11th July 2016. It is the main contention of defendant that the disputed suit property, right of the plaintiff and the defendants are subject matter of the jurisdiction of Tahasildar. Therefore, the Tahasildar has right under section 5 of the Mamlatdar Courts Act . Accordingly the defendants approached Tahasildar. He has thereafter reiterated the proceeding before Tahasildar till Hon'ble Bombay High Court and orders passed in it. It is their contention that said authorities or even Hon'ble High Court has not stated any where in their order that Tahasildar does not has the right to entertain the dispute. As per them as Hon'ble High Court remanded the matter to Collector Sindhudurg and thereafter the Collector remanded the matter to Tahasildar Vengurla, the Tahasildar Vengurla has authority to deal with case. It is further contended that after completion of about 100 days from the order of Tahasildar, the poles so raised by plaintiff were removed by the defendants with the help of police. However, the defendants claim that the act of plaintiff reconstruction the poles i.e. the gate is illegal, as no court has given any direction about it. Thereafter on 15th January 2018 Tahasildar has again passed order to maintain status quo between the parties. However, he is contented that the plaintiff has infringed that order.

12. With regard to the land record the defendants have submitted that the officers of land record have supported the plaintiff by changing the main gatbook map. They have pointed out the letter of District Superintendent of land record. The gist of his submission is that the deputy superintendent of land record Vengurla gave his report on 23/11/2016. By virtue of that report it was conveyed that in the gatbook there is a way pointed out in road doted line. However there is no record to show as to who and how way was entered in the map. Thus he does not has jurisdiction to remove such road from the map. Thereafter he has mentioned the action taking by superintendent land record upon

that letter. As per said action the deputy superintendent of land record again submitted his report. In that report it was mentioned that a way goes towards the property of defendants within the suit property, However such way was not shown in any of the survey done before. Therefore it is necessary to remove such way. He also opined that the way is shown mischievously in the gatbook map. Therefore it will be proper to remove it from the gatbook and accordingly he removed it. Thus the defendants claim that the deputy superintendent Land Record gave inconsistent report about the way. Thus the Deputy superintendent discarded such way from the map of the suit property without taking any order of office superior.

13. The defendants have further pointed out that the maps so produced by the plaintiff and original gatbook map. The gatbook map shows the road going towards the property of defendants. The defendants further relied upon the statement of plaintiff which is made by him on 28th July 2016 whereby he admitted that after the father of defendants purchase survey no. 14, 15B/2, he requested to give a way (पाऊलवाट) to them for approaching the road which goes from Manseshwar temple to Nawabag sea shore. The defendants use that road. They have also relied on the inspection made by circle inspector. In such situation the defendants claim that in the gatbook map of 1991 no road at all was show in it. However, in the measurement so carried out by the plaintiff and map drawn according them it shows the east-west road. It is not disputed. The road from north south direction is disputed. The said maps are also drawn with the help of survey department. Thus the defendants claim that as their father purchased survey no. 14 hissa no. 15B/2 and the plaintiff himself is saying that defendants used to have access to such road then the map shown by the plaintiff is false. Thus defendants claim that the plaintiff has illegally claim for removal of such road from the gatbook map. It is further contented that the Land Record officers should have not altered the main gatbook map on the basis of the maps of plaintiff.

14. The Hon'ble High Court has remanded matter before Collector and

thereafter its action remanded to Tahasildar. Therefore, this court shall not entertain the demand of plaintiff. As per defendants the plaintiff is wrongly interpreting the order of status quo. As per them, the gate so restored by the plaintiff is made after the order of Tahasildar. Thus it is false claim by the plaintiff that the gate is made prior to such order. It is pointed out that the Tahasildar has given status quo order, therefore this court shall have give respect to the Tahasildar and Collector and reject the claim of plaintiff. It is also prayed that the road so going towards the property of defendants be kept open.

15. I heard arguments advanced by both sides. Upon considering rival pleading, documents and the facts affirmative before me, following point for determination arise for my consideration. I have recorded my findings upon with reasons to be followed thereafter.

Sr.No.	Points	Findings
1	Whether the plaintiff proves that, he has made out a prima facie case?	Yes.
2	Whether the balance of convenience tilts in granting injunction?	Yes.
3	Whether the irreparable loss caused to the plaintiff, if injunction is not granted?	Yes.
4	What order?	Application is allowed.

REASONS

Point no. 1 to 3

16. It appears that it is not disputed fact that the land of plaintiff and the defendants are adjacent to each other. There is road in east-west direction from the suit property. It goes from Manseshwar temple till Nawabag sea shore. The dispute is about other road.

17. I heard that arguments the advance by Ld. Advocate for plaintiff and defendant in person. They have not engaged any advocate. It appears from the case that defendants have concerned to the matter filed before Tahasildar which went upto Hon'ble High Court for some reasons. Both parties have filed

many documents.

18. During the arguments the defendant has given much concern and importance to the matter before Tahasildar. The defendants claim that the Tahasildar has right to adjudicate the rights between the parties. The dispute has other side which is about the maps so drawn by department of survey.

19. The matter before Tahasildar is claim to be filed under section 5 of the Mamlatdar Courts Act. In such circumstances it is necessary for me to advert relevant provision under section 5 of the Mamlatdar Courts Act which is under :-

(1) Every Mamlatdar shall preside over a court, which shall be called a Mamlatdar's Court, and which shall, subject to the provisions of Sections 6 and 26, have power, within such territorial limits as may from time-to -time be fixed by the State Government,-

(a) to remove or cause to be removed any impediment, erected otherwise than under due authority of law, to the natural flow in a defined channel or otherwise of any surface water naturally rising in or falling on any land used for agriculture, grazing, trees or crops, on to any adjacent land, where such impediment causes or is likely to cause damage to the land used for such purpose or to any such grazing, trees or crops thereon;

(b) to give immediate possession of any lands or premises used for agriculture or grazing, or trees, or crops or fisheries, or to restore the use of water from any well, tank, canal or water-course, whether natural or artificial used for agricultural purposes to any person, who has been dispossessed or deprived thereof otherwise than by due course of law, or who has become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person, not being a person, who has been a former owner or part-owner, within a period of twelve years before the institution of the suit of the property or use claimed, or who is the legal representative of such former owner or part-owner :

Provided that, if in any case the Mamlatdar considers it inequitable or unduly harsh to give possession of any such property or to restore any such use

to a person, who has become entitled thereto merely be reason of the determination of any such tenancy or other right, or other right, or if it appears to him that such case can be more suitable dealt with by a civil Court, he may in his discretion refuse to exercise the power aforesaid, but shall record in writing his reasons for such refusal.

20. On perusal of this section it is apparent that Mamlatdar has power to remove any impediment to the natural flow in a defined channel or otherwise of any surface water naturally rising in or falling on any land. The copy of application of the case under section 5 before Mamlatdar Courts Act below exh. 4/9. The such application is expected to be treated as plaint as per the Mamlatdar Court act. On perusal of that application in toto and particularly in the prayer clause it appears that the plaintiff therein i.e. defendants herein prayed for declaration that they have easementary right from 40 to 45 years from the suit property to approach their land. A declaration to that fact and consequential relief of injunction was also prayed by which it was claim that the defendants therein i.e. plaintiff herein shall not minimize width of that right.

21. In such circumstances the Ld. Advocate for plaintiff has argued that the Mamlatdar Courts Act is Code in itself and he has pointed out that the provision of the acts wherein the procedure is being provided how trial is to be conducted. Section 19 of the said act provides the issue to be framed and heard by the Mamlatdar. Out of those issues the issue under provision 'aa' provide as under:-

- (aa) If the plaintiff avers that the natural flow of surface water from his land has been impeded by any erection raised by the defendant causing damage or likeli-hood of damage to the plaintiff's land or to any grazing, trees or crops thereon-
- (1) *whether surface water flowed, in a defined channel or otherwise, naturally from plaintiff's land on the defendant's land;*
 - (2) *whether the defendant erected any impediment to such flow, otherwise than under due authority of law;*

- (3) *whether such erection impeded such natural flow of water within six month before the suit was filed ;*
- (4) *whether such impediment has caused or is likely to cause damage to plaintiff's land or to any grazing, trees or crops thereon;*

22. On perusal of such issues it appears that the section 5 (1) authorizes Mamlatdar to remove the impediment about the natural flow of surface water. It is not about a way. Therefore prima facie it appears that Mamlatdar can't decide the dispute about easementary right or the say within a particular property.

23. Under Mamlatdar courts act section 21 deals about execution of Mamlatdar decision. In that provision its provided that the execution can be effected by orders to village officers or to any subordinate under his control. There is no provision by which Mamlatdar can direct police protection however in the given case while disposing the suit no. 2/2016. Mamlatdar appears to have given direction of using police force. It is apparently appearing to be illegal. Such order reflects the execution itself. This act is pointed out by the Ld. Advocate for plaintiff and he has submitted way with regard that the defendant is in police. Therefore the defendant are taking such disadvantage and thus acting in collusion with the revenue authorities. In the given circumstances of the case I find Prima facie substance the argument advance by Ld. Advocate for the plaintiff as the order of Tahasildar shows that he has mentioned about execution of his order in his final order apprehending the defendant therein with the plaintiff herein will cause obstruction to such order. The said act further provides taking evidence etc. The ld. Advocate for plaintiff has argued that the Tahasildar has not followed any of such procedure required for deciding such suit. In such situation the proviso of section 5 also shows that the Tahasildar can't determine the right as if acquired by easement. Thus these factors go to the very root of the authority of Tahasildar himself. The order passed by Tahasildar clearly shows that the Tahasildar has entertained the easementary rights between the parties and was also the claim of defendant before Tahasildar. Hence when the Act itself doesn't empowered Tahasildar to pass such order the order of Tahasildar is

nonest in eyes of law and those are nowhere binding upon this court.

24. The order of Tahasildar is filed below exh. 4/18. On perusal of said order it appears that the Tahasildar has relied on the gatbook map. The maps drawn by survey department. The report by Circle Inspector with regard to his visit to the spot the statement given by the plaintiff when such inspector visited the spot. The report of Circle Inspector etc. Other objections are with respect to map which will be dealt latter on . In such circumstances on perusing such order in toto it is apparent that the Tahasildar did exercise this power to declare easementary right which is not a matter of his jurisdiction. Thus even on this count also the order of Tahasildar passed in Suit No. 2/2016 appears to beper se illegal. I refrain from discussing the order passed by higher authorities on the said decision of Tahasildar. As today the matter is remanded back before Tahasildar for re-hearing. However, I would like to point out the order of District Collector dated 6/11/2018. In which even he has considered that no oral examination was taken in the matter nor the evidence was properly appreciated by the Tahasildar.

25. Thus in such circumstances it appears that the Tahasildar is not empowered to exercise the authority in the case before him. As orders are nonest and the order passed by Tahasildar about maintaining the status quo after remanding the matter back to him holds no water. Therefore, the plaintiff has made strong prima facie case with regard to the authority of Tahasildar. Thus the contention of defendants that Tahasildar has right to adjudicate the dispute between the parties is not acceptable. In this regard the ld. Advocate for plaintiff has relied on the decision of *Mohammad Khan Vs. Shankar Maruti Dhage reported in 2017(3) ALL MR 380* wherein its held that in absence of finality being attach to the Mamlatdar orders, the jurisdiction of Civil Court is not barred. Thus there is no exclusion to the Civil Court in the given circumstances of the case. The ratio in said case is applicable.

26. The other part of the dispute relates the maps so produced on the

record. In short case of plaintiff is that so called road was never shown in any maps of the survey department. As per plaintiff the recent gatbook map is improper. In such background at exh. 4/6 the plaintiff has produced map which is drawn on request of plaintiff by the Survey Department in the year 1992. On perusal of said map it appears that the road going from the east to west direction is shown in the map below exh 4/7. There is old gatbook map about suit property which does not shows any of the road which go from the east to west direction or which goes towards from the said road to have asses to the defendants property. The plaintiff has produced one more map below exh. 4/12 which shows the rectified map. There are various entries on said map. One of the entries is about rectification made in the year 1995, 1996. However, the plaintiff claim that said rectification was made with respect to survey no. 6 (old survey no. 738) hissa no. 3. It is pertinent to not that in the said map the road is shown going towards northern side of the suit property which meets the defendants property. Being aggrieved by said road the plaintiff issued notice to the authorities under revenue department and land record department and thus claimed to delete such road from the map. History of the proceeding before such authorities is not disputed to the parties. However the defendants claims that the plaintiff approach is completely wrong with respect to such road.

27. In such situation reply given by Deputy Suprentendent Land Record Vengurla dt. 23/11/2016 shows that there is no record available with their office which could show that how the impugned road 'going towards northern side and thus approaching the defendant property' came to be recorded in the map of disputed suit property. The resent situation is that after carrying out various procedure before land record authorities such entries of road going towards the northern side was deleted. Such rectified map is produced below exh. 4/17. Thus on prima facie proof of such evidence it is apparent that old gatbook map did not had such road going towards land of defendants which passes from the suit property.

28. The defendant has pointed out and strongly relied on the statement

of the plaintiff recorded by the Circle Inspector during his visit. However, as stated above every action of the Mamlatdar under question such visit does not attract any of the provision of the Mamlatdar Courts Act. Furthermore, on perusal of statement of plaintiff it appears that defendants have pointed out that only such relevant part of statement which is helpful for him. Infact on perusal of such statement in toto it appears that the plaintiff clearly denied existence of any way from the suit property which goes towards defendants property. No doubt, he said that 'the way (पाऊलवाट) was given to the defendant to have access the main road. But the defendants have falsely shown that there is three meter width road from their property. Lastly, he clearly stated that there is no road going towards the property of defendant'. In this background the existence gate is not disputed by the plaintiff.

29. The plaintiff has produced some photographs on record below exh. 16 . On perusal of such photos it appears that there is a way in the suit property but it is certainly not 3 meters width. Thus in such circumstances it appears that there is no answer about non availability of the record with regard to the alleged road with the land record department. If at all the road as alleged and contended by the defendants did existed then such road should have been shown in the map or at least in the grampanchayat record.

30. In such circumstances it is apparent that the defendants are fighting with their right of easement within the suit property. But he appears to have knocked wrong doors. If he has to establish his easementary rights then he has to approach the Civil Court. Moreover from the record of map it is clear that the record of the alleged road is not available with the Land Record Department. The plaintiff has thus prime facie show that there was no such road existing. Therefore, there is no question that the defendants will have right to approach the defendants property.

31. Both the parties have not filed copy of writ petition before Hon'ble Bombay High Court. Thus the contention raised in such petition are not before

me. The para. no. 9 of the order of Hon'ble High Court makes it clear that Hon'ble High Court has not adverted merits of the matter and of the contentions are kept open before the revenue authority. Thus said order is not hampering the jurisdiction of Civil Court. In precise the existence of road is not of much concerned here. The right to have access from it is disputed by defendant. It is certainly under Civil Courts dominion.

32. Thus in such circumstances plaintiff has shown said prima facie case. The balance of convenience lies in favour of granting injunction as there is no way as per the claim of defendants within the suit property. The land record department has no such record about alleged way. Ownership of property is not disputed. Irrespective of the proceeding pending before Tahasildar the defendants have not shown anything which could show his easmentary right over the suit property. The plaintiff being the owner of the suit property is entitled for its protection. Therefore the balance of convenience lies in favour of the plaintiff. The plaintiff has also filed some photographs which shows that the defendants have right to approach their property. I can't rely on such photographs as now for want of further evidence which is triable issue.

33. Thus there appears no irreparable loss to the defendants. It is also important to consider that loss can't be always counted or determines in terms of compensation. The loss is also with respect of the rights of the persons. Thus the loss appears herein with respect to the loss of plaintiff rights for enjoying his property peacefully. Thus I answer the point no. 1 to 3 in affirmative .

34. **Point no. 4**

Accordingly for the above reasons I pass following order.

1. Application is allowed.
2. The defendants are hereby restrain from disturbing the possession of plaintiff till disposal of suit.
3. They shall not caused obstruction to the compound and the gate so raised by the plaintiff till disposal of suit.

4. They shall not create anyway from the suit property till the disposal of the suit.

Date- 19/04/2018

Sd/-
(Vinayak D.Patil)
Civil Judge (J. D.) Vengurla.