

Vasudev Gavankar etc.1

Vs. Shivram Kolambkar etc.14

(CNR: MHSI05-000183-2021)

ORDER BELOW EXH. 05.

This is suit for recovery of possession and permanent injunction along with an application for interim permanent injunction under Order XXXIX, rule 1 and 2 of the Code of Civil Procedure, 1908 to restrain defendants from obstructing peaceful possession of plaintiff. Plaintiff also seeks interim mandatory injunction against defendants for directing them to remove constructed road from the place which is prepared by defendants by making encroachment over the suit properties.

2] Description of the suit property -

It includes lands bearing survey no. 105/3, 105/5, 105/6, 105/9 and 100/1 situated within limits of village-Bhogave, Tal. Vengurla, Dist. Sindhudurg. (Hereinafter, referred as 'suit properties'.)

The pith and substance of plaintiff's case :-

3] It is the case of the plaintiffs that, suit properties mentioned at sr. no. 1 to 4 in plaint para no. 1 are tenanted properties of plaintiff no. 1. He is in possession of the same, whereas suit property mentioned at sr. no. 5 para no. 1 of the plaint is owned and possessed by plaintiff no. 2. According to plaintiffs, defendants have made encroachment over the suit properties by excavating the soil. Defendants have made rough road passing through the suit properties. Plaintiffs pleaded that, rough road is lying at north direction of S.no. 105/3. This rough road is in existence since many years. Some of the defendants are residing in houses which are situated in S.no. 108. No road is in existence going towards the houses of defendants. Only foot-path going toward houses of defendants is in existence. The said foot-path starts from S.no. 105/3, passes through S.no. 105/1, S.No. 100/1, S.no. 105/6, S.no. 105/9, S.no. 105/10, Hissa no. 11, 12 and enters into S.no. 108. According to plaintiffs, on 14/11/2020, defendants have made encroachment over the suit

properties by making rough road having 8 to 9 foot in length. It passes through S.no. 105/3, S.no. 105/1, S.no. 100/1, S.no. 105/6, S.no. 105/7, 8, 9, 10, 11, 12 and reaches to S.no. 108 at southern side. Plaintiffs are old aged person. Defendants have no concern with the suit properties. Defendants are obstructing peaceful possession of plaintiffs over the suit properties by constructing rough road over there. Road is already constructed defendants used to access the road. They used the road for their transport. Hence, plaintiffs are constrained to file the present suit. Plaintiffs are having prima facie case. Balance of convenience lies in their favour. If application is dismissed, it will cause ir-reparable loss to the plaintiffs. Hence, the application.

4] Defendants have appeared in the suit proceeding and filed their common say at exh. 41. They contested the application on ground that grounds in the application are false and imaginary. Defendants contended that, suit properties mentioned at sr. no. 1 to 4 in the plaint para no. 1 are tenanted properties. This Court has no jurisdiction to try the present suit. According to defendants suit properties are situated at village-Bhogave, Chindarwadi. Defendants are also resident of chindarwadi. The Parule-Bhogave road is lying in east-west direction. At south side of the said road, another road lies, which reaches to Chindar Lake. The said road comes in jurisdiction of Grampanchayat Bhogave. Chindar Lake is situated in S.no. 103, Hissa no. 1/ D, S.no. 105 Hissa no. 1/1 since before many years. Plaintiff and defendants are using the water of Chindar Lake for farming purpose. Villagers of Chindarwadi used to construct Bandhara having 9 to 10 foot in length and 4 to 5 foot in length for the reservation of water per year. Villagers made request application to Zhila parishad, Sindhudurg for R.C.C. Construction of Bandhara through Government Schemes. Gate is also fixed over Bandara. Villagers are keeping the maintenance of Bandhara. Defendants are residing in S.no. 105 Hissa no. 6, 10, 12, S.no. 108. There is one foot-path having 4 to 5 foot width starts from Bhogave Grampanchayat road passes through Chinder lake Bandhara which is in existence since many years. The said foot-path passess

through S.no. 105/3, Hissa no. 1, S.no. 100/1, S.no. 105/6, 105/7, 105/8, 105/9, Hissa no. 10, 11, 12 and enters into S.no. 108, where defendants are residing. Defendants are using the said foot-path since many years. Defendants get right to access the foot-path by having right to easement by prescription. The said foot-path is damaged by lapse of steep high face of rock (डोंगर दरड). Villagers have tried to repair the said foot-path. The plaintiffs pretends that, defendants have constructed the new road instead of foot-path. The suit is barred by law of limitation. The present suit is hit by principle of estoppel. Hence plaintiffs have no prima facie case. No balance of convenience lies in favour of plaintiffs. Hence, they prayed to reject the application.

5] Heard Advocate for plaintiffs Shri. S. U. Harmalkar and Advocate for defendants Shri. K.R. Paradkar at length.

6] On rival contentions raised by both parties and documentary evidence produced on the record, following points arise for my determination and I have recorded my findings along with reasons are as follows:-

Sr.No.	<u>POINTS</u>		<u>FINDINGS</u>
1.	Whether Plaintiffs have made out prima-facie case ?	:	Yes.
2.	Whether plaintiffs prove that balance of convenience lies in their favour ?	:	Yes.
3.	Whether plaintiffs would suffer irreparable loss, if the order of injunction is not granted in their favour ?	:	Yes.
4.	What order ?	:	The application is partly allowed.

REASONS

7] Ld. Advocate for the plaintiffs has relied on copy of 7/12 extracts of S.no. 105/3, 105/5, 105/6, 105/9, 100/1 situated within limits of village-

Bhogave, Tal. Vengurla, Copy of power of attorney dt. 23/05/2000 given by plaintiff no. 2 in favour of plaintiff no. 1, photoes of the suit properties (total 4), receipt of photoes filed along with list at exh.4.

8] Ld. advocate for Defendants has relied on copy of Gatbook map of S.no. 105 Hissa no. 1 to 13 situated at village-Bhogave, Copy of letter dt. 07/09/2016 given by Deputy Engineer Zhilla parishad, Vengurla to Grampanchayat Sarpanch, Bhogave, Copy of complaint dt. 10/11/2000 given by villagers of Bhogave to Sarpanch, Grampanchayat Bhogave in resepct of maintenance of Bhogave main road Zhilla Parishad to Chindar lake filed along with list at exh. 47.

9] It is not in dispute that -

- a. The suit properties mention at sr. no. 1 to 4 in plaint para no. 1 are owned as tenant and possessed by plaintiff no. 1.
- b. The suit properties mentioned at Sr. no. 5 in plaint para no. 1 is owned and possessed by plaintiff no. 2.
- c. Existence of Bhogave main road Zilha Parishad to Chindar Lake.

As to point no. 1 to 3-

10] All points are interlinked, hence in order to avoid repetition all points taken for discussion altogether.

11] It is not in dispute that, suit properties mentioned at Sr. no. 1 to 4 in plaint para no. 1, i.e. 105/3, 105/5, 105/6 and 105/9 are possessed by plaintiff no. 1. Plaintiff no. 1 remains in possession of above mentioned survey numbers as tenant. Whereas, plaintiffs no. 2 is in possession of S.no. 100/1 i.e. suit property mentioned at Sr. no. 5. Also Plaintiff no. 2 is owner of S.no. 100/1. It is admitted fact that, Bhogave main road Zhila Parishad to Chindar Lake is old road, it is in existence since many years. It is also not in dispute that, foot-path passing through S.no. 105/3, S.no. 105/1, S.no. 100/1, S.no.

105/6, S.no. 105/9, S.no.105, Hissa no. 7, 8, 9 and further passes through S.no. S.no. 105/10, S.no. 105/11, S.no. 105/12 after that enters into S.no. 108.

12] According to plaintiffs, defendants have made encroachment over the suit properties and construct the rough road overthere by making excavation of the soil. On the other hand defendants contended that, the said road is very old, both plaintiffs and defendants are using the said road since many years. Here, plaintiffs come with plea of encroachment. But it is matter of record that, Court commissioner is not appointed to measure the suit properties. Commissioner report is not on the record, which enables the Court to determine whether defendants have made encroachment over the suit properties or not. Also record shows that, until now plaintiffs not moved an application for appointment of Court Commissioner. It is also brought on record that, the foot-path mentioned in para no. 4 of the present application (exh.5) is not in dispute. Also, Bhogave main road Zhila parishad to Chindar Lake is also not in dispute. The said road is came within jurisdiction of Grampanchayat, Bhogave and Zhila parishad, Sindhudurg. Upon perusal of plaint and application (exh.5) prima facie appears that, plaintiffs have described the alleged rough road in vague. It is not clear that about which rough road plaintiffs have their grievance. Only the fact clear to mind is that, plaintiffs have grievance with respect to rough road having 8 to 9 foot in breadth constructed on 14/11/2020. The foot-path which is mentioned in para no. 8 of say filed by defendants at exh. 41. Its existence is admitted by plaintiffs in the para no. 4 of the present application. Therefore, it reveals that the rough road in dispute has not been described properly by plaitiffs.

13] Add to this, perusal of 7/12 extracts of Survey numbers reveals that, name of plaintiff no. 1 appears in other right column of revenue record of suit properties. It is brought on record that, plaintiff no. 1 is in possession of the suit properties as tenant, whereas name of plaintiff no. 2 is appeared in occupier column of S.no. 100/1. He is owner of S.no. 100/1. Name of

defendants, no where written in 7/12 extracts of the suit properties. Therefore, plaintiffs have been seen in prima facie possession of the suit properties whether as tenant or owner and not the defendants. Hence, prima facie case exists in favour of plaintiffs.

14] Add to this, photoes filed on the record by both sides, reveals that, photoes are of rough road in dispute. It appears that, it is rough road, at one side of it, there are high hills. However, there might be possibility of damage of rough road in dispute due to collapse of steep high face of rocks (डोंगर दरड).

15] During the argument, Advocate for defendants took objection that, this Court has no jurisdiction to try the suit, as suit properties are being tenanted properties. Nature of the present suit is of simple injunction suit. So far as this objection of defendants is concerned, it is matter of trial. It will be decided at the flag end of the suit, after adducing evidence by both parties.

16] Add to this copy of complaint dt. 10/11/2000 given by villagers of village- Bhogave filed along with list at exh. 47 reveals that, villagers including plaintiffs and defendants have given the complaint in respect of maintenance of Bhogave main road Zhila parishad to Chindar lake. Perusal of complaint reveals that, both plaintiffs and defendants are using the said road for the transport purpose since many years. It is beneficial for villagers.

17] As noticed earlier, Court Commission report is not on the record, Suit properties are not measured by Court Commission in respect of encroachment. Therefore, it is unable to determine at this stage that, whether defendants have made encroachment over the suit properties or not and prepared road over there. Therefore, the prayer of plaintiffs with respect to removal of road deserves to be dismissed.

18] So far as ingredience of balance of convenience and ir-reparable loss is concerned, plaintiffs are prima facie seen in possession of the suit properties and not the defendants. But there are also other co-owners which also resides as tenants in the suit properties mentioned at Sr. no. 1 to 5 of the plaint para

no. 1. Therefore, it is duty of the Court to protect possession of plaintiffs. Therefore, in order to avoid multiplicity of the proceeding and in view of peculiar facts and circumstances of the case, it will be proper to restrain defendants from obstructing possession of plaintiffs over the suit properties. Balance of convenience lies in favour of plaintiffs. If application is dismissed, it will cause ir-reparable loss to plaintiffs. On the Contrary, if application is allowed, no ir-reparable loss is caused to defendants. As discussed earlier, Bhogave main road Zhila parishad to Chindar lake is used by public at large, for their daily duties. Hence, prayer of plaintiffs with respect to removal of said road cannot be allowed. Therefore, I answer point no.1 to 3 in the affirmative.

AS TO POINT NO.4 -

19] The plaintiffs have established the golden rules i.e. prima-facie case, balance of convenience and irreparable loss which are required for issuance of temporary injunction against defendants. Therefore, application deserves to be partly allowed. Cost of this application shall follow the event. Hence, in answer to point no. 4, I pass the following order -

:- ORDER :-

1. The application (exh.5) is hereby partly allowed.
2. The defendants are temporarily restrained from causing obstruction to possession of plaintiffs over the respective suit properties till final decision of the suit.
3. The prayer of plaintiffs with respect to removal of rough road which is constructed by defendants by making encroachment over the suit properties is hereby dismissed.

4. Cost in cause.

(Dictated and pronounced in open Court.)

Sd/-

Vengurla.

(K.K.Patil)

Date : 06/05/2022.

Civil Judge, Jr. Dn., Vengurla.