

Regular Civil Suit No. 155/2021
Vishwanath Vs. Mandabai & others.
CNR No. MHSO07-000191-2021

ORDER BELOW EXH.05

(Passed on 22.08.2023)

Plaintiff has filed this application vide order XXXIX rule 1 (c) of The Code of Civil Procedure, 1908 (hereinafter referred as 'the CPC', for the sake of brevity) for the grant of relief of temporary injunction against the defendant nos.1 to 4 to restrain them from causing obstruction over road existing in property of defendant nos.1 to 4.

2. **Description of the suit property:-**

a. Block no.197/2/B, ad-measuring about 1 H. 10 R. with the boundaries as mentioned in the plaint and more particularly described in plaint para no. 1A.

b. Block no.197/2/A, ad-measuring about 1 H. 11 R. with the boundaries as mentioned in the plaint and more particularly described in plaint para no. 1B.

3. Plaintiff has filed this suit for the relief of declaration and easement by necessity and consequential injunction. With this application, he submitted that, suit property para 1A was owned by father of the plaintiff and mother-in-law of defendant no.1. The original block number was 197. By the order of Tahsil officer, Pandharpur dated 28/05/2001 property of the eastern side was allotted to the plaintiff and the western side property was allotted to defendant nos.1 to 4. Further 5 R. out of block no.197 was kept

in common. The plaintiff has no relief and claim against defendant no.5 to 11. However, he impleaded them as necessary party to this suit.

4. Suit property para 1B is owned by defendant nos.1 to 4 and on the western side of suit property para 1A and the southern side of suit property para 1A, there is a road ad-measuring about 40 to 50 ft. length and 10 ft. width. Said road proceeds towards western side at Wadikuroli to Pirachi Kuroli Shiv and ends at north – south shiv road. Said shiv road further proceeds towards Pandharpur – Pune straight road. The plaintiff is using said road since long years. He has no alternative road except than the said road. Other neighbours on the western side of defendant nos.1 to 4 have also kept the said road. Still defendant nos.1 to 4 are causing obstruction to the plaintiff to commute for the same. As per the partition, it was agreed to use the said road. Yet defendant nos.1 to 4 allegedly obstructs the plaintiff for commuting from the said road. In the month of February 2021, they obstructed such road. Hence, it is necessary to restrain defendants from causing obstruction to plaintiff's possession over the suit property. The plaintiff has prima facie case. Hence, he prayed to grant interim injunction against defendants from causing obstruction to the plaintiff for commuting said road and to use the same till the decision of the suit.

5. Defendant nos.1, 2 and 4 failed to appear before the court and failed to file say, hence the application is proceeded without their say.

6. Defendant no.3 has filed his say to this application at Exh.29. He denied all the contentions in the application in toto. He specifically submitted that, the plaintiff has filed application vide section 5 of the Mamlatdars' Court Act, which is still pending. Hence, plaintiff cannot avail two remedies in respect of one claim. On perusal of the order of Tahsil officer of the partition, there was no mention of alleged road. Accordingly, since year 2001 said road was never in existence and today also is not in existence. On the eastern side of the land owned by defendant nos.1 to 4, there is land of plaintiff i.e. suit property. On the north side of the suit property there is Wadikuroli Shiv which is heading from east – west direction. That road next proceeds to west side and then to south side. On the south bandh of the suit property there is block no.188. Since year 2001 the plaintiff is commuting from that eastern bandh adjacent to plot no.188 and used to commute from the Pandharpur – Pune road. Accordingly the alternative road is available to the plaintiff. Nevertheless, the plaintiff is used to creating new road from the land of defendants. Today there is sugarcane crops are lying in defendants' property. Hence, only in order to damage said crops, the plaintiff has filed this suit. Alleged road was never in existence. Hence, there is no question arise of easement of necessity for the plaintiff. Not only this, there is borewell and pipeline in the land of defendants. Only to damage them he has filed this application with ill-motive. With these reasons, he prayed to reject the application with costs.

7. The points for determination along with the findings

and the reasons thereon are as under.

<u>Sr.</u> <u>No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether plaintiff has prima facie case in his favour?	No.
2.	Whether plaintiff would suffer irreparable injury, in case, temporary injunction is rejected?	No.
3.	Whether the balance of convenience lies in favour of the plaintiff?	No.
4.	What Order ?	Application is rejected.

REASONS

8. Heard Learned advocate for plaintiff and defendant no.3. They reiterated their contentions as per the pleadings. In view of O. XXXIX R. 1 (c), when defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may grant temporary injunction. Now, in this case, as the plaintiffs prayed for the relief of interim injunction against defendants, it has to be examined that, whether defendants threaten to dispossess the plaintiffs or otherwise cause injury. Accordingly, I would lead to discuss the facts in following points.

As To Point No. 01:-

9. Perused the record. In order to prove the prima facie case of the plaintiff, he has to establish that,

- a. That there exists such road from the suit property;
- b. That the plaintiff has no alternative road to proceed from his land;
- c. That defendant no.3 is obstructing the plaintiff to use the said road.

10. In such circumstances, the plaintiff has submitted that, by the order of Tahsil officer dated 28/05/2021, suit property was allotted to the plaintiff which is on eastern side. However he has not submitted that, by the effect of said partition alleged road of 40 to 50 ft. length and 10 ft. width was kept for the commutation. Defendant nos.1 to 4 submitted that, alleged order of Tahsil officer also does not mentioned about existence of such road from the property of defendant nos.1 to 4. In order to support this contention they have filed on record certified copy of order dated 28/05/2001 of the Tahsil officer at list Exh.32/2. On perusal of said order, it prima facie appears that, there is no such mention of any alleged road to be in existence or created from the property of defendant nos.1 to 4 for the commutation of plaintiff.

11. Further ld. advocate for the plaintiff submitted that, he has easementary right over the said road by the effect of necessity. The plaintiff also prayed for the relief of declaration of using said road by easement of necessity. In such circumstances, on perusal of plaint para no.3, it appears that, plaintiff submitted that, he is using said road since long years. Accordingly, these contentions of

the plaintiff seems to be contradictory as on one hand he submitted that, he is using said road since long years and on the other hand he submitted that, he is in necessity of said road by easementary right and for the declaration of the same.

12. In the perspective of easement, right of way by necessity is different than the existing right of way which may be called as easement by description, if the plaintiff submits that he is using said road since long years. Both the easementary rights are totally supplant each other and not the supplementary one. Hence, one of the contention of the plaintiff cannot be believe in derogation of another.

13. Not only this ld. advocate for plaintiff made attention to this court towards the map filed at list Exh.4/5 which is hand sketch map and submitted that, on the western side of original block no.197 there is shiv road. Defendant nos.1 to 4 are obstructing plaintiff's right to commute that road from their property. To counter this, ld. advocate for defendant no.3 made attention to this court towards map filed by the plaintiff himself at list Exh.4/3 and submitted that, certified copy of map of block no.197 shows different boundaries than shown by the plaintiff through hand sketch map. Hence, the hand sketch map is not believable and certified copy of the map will prevail over the hand sketch map. On perusal of those maps, it appears that, through the certified copy of map at list Exh.4/3 following boundaries appears for the block no.197.

East - block no.187
South - block no.188
West - block no.195, 196 and shiv road
North - Shiv road.

On scrutinizing hand sketch map filed by the plaintiff at list Exh.4/5, following boundaries appears for block no.197 as

East - not mentioned
South - block no.188
West - Wadikuroli to Pirachikuroli shiv road
North - not mentioned.

14. The plaintiff submitted that, he has to proceed towards Wadikuroli to Pirachi Kuroli shiv road from the property of defendant nos.1 to 4 which is situated on western side of the suit property. However, on perusal of certified copy of map, it appears that, on western side there are block nos.195, 196 and shiv road. Further, certified map shows that, on the north side there is shiv road. However, the plaintiff through hand sketch map shows shiv road on the west and south side. In view of section 83 of Indian Evidence Act, there is rebuttal presumption in favour of certified copy of map that, said map are made by the authority of State Government and are accurate. Hence, the court shall presume accurateness of said map. In such situation certified copy of said map prevails over the hand sketch map filed by the plaintiff. Further, there is inconsistency between the hand sketch map and the certified copy of the map issued by the authority of the State Government. Hence, contention of the ld. advocate for

the plaintiff that, defendant nos.1 to 4 are obstructing the plaintiff from commuting to shiv road on western side from their property is not convincible. Further, the plaintiff has filed photographs of the suit property at list Exh.4/4 and submitted that, defendant nos.1 to 4 are obstructing him. However, there is no such receipt or affidavit of the photographer to show that those photographs are as of the suit property and there exists such road in the suit property. Hence, at this stage, those photographs also are not beneficial to the case of the plaintiff.

15. Further, in order to prove existence of the road, plaintiff has filed affidavits of alleged adjacent owners and respective 7/12 extracts at list Exh.26/A/1 to Exh.26/A/7. On perusal of these affidavits, it appears that, these affiants submitted that, they know plaintiff and defendants. Block no.195/1 is owned by Jijaba Sanawle, block no.196/2 is owned by Haridas Tate, block no.196/1 is owned by Pandurang Tate, block no.197/1 is owned by Bhagwat Sawant. They submitted that, there is 40 to 50 ft. length and 10 ft. width road exists from the property of defendants. Said road further proceeds from western side from their property and ends at Wadikuroli – Pirachi Kuroli shiv road.

16. At the time of deciding interim injunction application, documents have to be seen formally. Yet in view of section 1 and 3 of the Indian Evidence Act, affidavit is not the evidence. Affidavits are not included in the definition of the evidence in the section 3 of the Indian Evidence Act. Hence, the affidavits filed by the plaintiff at list Exh.26/A cannot be presumed and included as

evidence of existence of such road. Therefore, these affidavits are not helpful to the case of the plaintiff.

17. In such circumstances, it appears from the certified copy of map at list Exh.4/3 that, there exists no such road for the plaintiff. On the contrary, it appears that, from the eastern bandh of his land he can proceed towards Pandharpur – Pune road. In such situation, contentions of defendant no.3 as to existence of alternative road to the plaintiff seems to be believable. Moreover, ld. advocate for defendant no.3 has placed his reliance upon the authorities laid down in *Ponnaiyan Alias Ponnusami Gounder Vs. Karuppakkal Alias Ponnayal, 2002 GoJuris (MAD) 194*, wherein it has been observed by Hon'ble Madras High Court that, where alternative path way is available to the plaintiff, however inconvenient it may be, there cannot be a claim on the ground of easement of necessity. This authority is helpful to the case of defendant no.3 as it appears that, from the eastern bandh there exists alternative road to the plaintiff. Further, he relied upon the authorities laid down in *Madhavan Vs. Narayanankutti and Ors., 2019 GoJuris (KER) 1418*, wherein it has been held by Hon'ble Kerala High Court that, in case of easement by necessity also, the essential ingredients including the existence of way, its user and absence of any other way, can also be established by visible physical materials. This authority also helps the case of defendant no.3 as the plaintiff has claimed easement by necessity then establishment of absence of any other way has to be proved prima facie by the plaintiff himself. However, not so.

18. From the above discussion and on perusal of all the material brought before this court, it would be probable to say that, the plaintiff failed to prove on the face of record that, there exists such road for the commutation from the land of defendant nos.1 to 4 and that the plaintiff has no alternative road to proceed from his land.

19. Nonetheless ld. advocate for defendant no.3 submitted that, the plaintiff obtained two remedies in respect of one claim. To support this contention, defendant no.3 has filed on record photocopy of S.R. no.36/2022 filed at list 32/1 with Mamlatdars' Court Act by the plaintiff.

20. On perusal of that, it appears that, in respect of the same suit property, the plaintiff being applicant no.5 in S.R. no.36/2022 has made claim vide section 5 of Mamlatdars' Court Act in order to remove obstruction if any over the said road. This fact also supports that, on one hand the plaintiff claims right of way as easement by necessity and on the contrary he filed application vide section 5 of the Mamlatdars' Court Act to remove the obstruction on existing road. Hence, whether there exist such a road previously or the plaintiff is in need of such a road is in question itself. Hence, case of the plaintiff is not believable. Besides he has not brought on record this material fact to the notice of the court in this proceeding. Then in view of settled law also, the party who suppresses the material fact is not entitled to claim the equitable relief. Hence, the plaintiff suppressed this material fact is not entitled to claim equity relief of injunction

against defendant nos.1 to 4. Furthermore, in view of section 41(h) of Specific Relief Act, if the efficacious remedy is available to the party then relief of injunction cannot be granted. Then, if plaintiff's claim easementary right by necessity then he has efficacious remedy in view of section 143 of the Mamlatdars' Court Act. This also dis-entitles the plaintiff to claim equity remedy.

21. From above all discussion, it appears that, conduct of plaintiff would not entitled him to claim equitable remedy. Not only this regardless he failed to prove prima facie case in his favour. Thus, it looks as if, there seems no bonafide contest between the parties in regard to alleged rights. Taking into consideration this aspect, it is apparent on face of record that, there is no prima facie case to the plaintiff in his favor. In the result, answer to point no.1 is in the **negative**.

As To Point no. 2:-

22. In this suit, dispute is in respect of immovable property. Hence, the adjudication has to be made in consonance with the irreparable injury. For that perspective, it is necessary to consider the fact of obstruction as alleged to be caused by defendant nos.1 to 4. However, the plaintiff himself failed to establish prima facie case in his favour. Now, in respect of alleged obstruction, he has to establish that, there is a reasonable apprehension that, defendant nos.1 to 4 are causing obstruction. However, from the contentions, prima facie it appears that, the

same is a mere imaginary apprehension of the plaintiff. The mere prospect or apprehension of injury or mere belief that the act complained, may or will be done, is not sufficient.

23. It is well settled principle of law that, injunction can be issued only on prima facie proof of actual interference or threat of interference and not in the absence of it. In the present case, it is not the case of the plaintiff that, there is such a reasonable apprehension that, defendant nos.1 to 4 are causing such obstruction unlawfully. In such circumstances, it seems that, the fact that, the plaintiff would suffer irreparable loss if the injunction would be refused is not believable. Thus, the possibility can be ruled out that, refusal to grant of injunction would result in irreparable injury to plaintiff and hence, there is no need to protect him from the consequences of apprehension and injury which cannot be compensated in terms of money. For these reasons, answer to point no. 2 is in the **negative**.

As To Point No. 3:-

24. In this aspect of comparative mischief and inconvenience which is likely to be caused to the plaintiff by refusing to grant injunction will not be greater than that which is likely to be caused to the defendant nos.1 to 4 by granting it. Considering the alleged threatening as to obstruction, it can be said that, the plaintiff would not suffer greater hardship if interim relief is refused, as he himself failed to bring on record such material even to assume prima facie existence of road and the

reasonable apprehension as to obstruction and thus thereby he might suffer such irreparable loss. Thus, plaintiff's need for such protection does not weigh more against corresponding need of the defendant nos.1 to 4 to be protected against injury resulting from his rights for which he could be adequately compensated. Hence, it is appropriate to say that, the balance of convenience not lies in favour of plaintiff. Resultantly, answer to point no.3 is in the **negative**.

As To Point No. 4:-

25. In view of above discussion and considering the nature of suit, it will be going to decide differing rights of parties finally. In the result, as per O. XXXIX R. 1(c), it would not be just and proper to grant interim relief of injunction to restrain defendant nos.1 to 4 from causing any said obstruction. Consequently, in answer to point no. 4, the application being devoid of merits and thus, liable to be rejected. In the result, following is the order.

ORDER

1. The application at (Exh.05) is rejected.
2. Parties to bear their own costs.

(Dictated and pronounced in open court).

Date:- 22.08.2023

(S. A. Salunkhe)
I/c. 3rd Jt. Civil Judge J. D.,
Pandharpur.

Certificate

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

Name of Stenographer :- S. S. Tupdauru

Court :- 3rd Jt.C.J.J.D. & J.M.F.C.
Pandharpur

Date :- 22.08.2023

Judgment/Order signed by :- 24.08.2023
the Presiding Officer

Judgment/Order uploaded on :- 24.08.2023