

MHYA210025882022

**ORDER BELOW EXH.5 IN RCS No.80/2022.**

(Pramod Natthu Pawade -VS- Madan Daulatrao Pawade +9)
(Passed on 8th day of May 2023)

The plaintiff made the present application for grant of temporary injunction to restrain defendants from interfering his peaceful possession over the suit property.

02. In short, plaintiff's case is as under-

The plaintiff is owner and possessor of agricultural field Gat No.129/2A, area 1.88 H.R. situated at mauza Wani, Ta. Wani, Dist.Yavatmal. The four boundaries of the suit property are as under-

Towards The East – Land of Gat No.128

Towards The West – Land of Gat No.129/2B

Towards The North – Mohurli to Waghdara way(Pandan)
thereafter, land of defendant No. 1 Gat
No.129/1

Towards The South – Naskarli nullah(Nala) near Dhabapur-Manki
Shiv.

03. Present application is filed under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908. The plaintiff contended that he is lawful owner and possessor of the land Gat No.129/2A, area 1.88 H.R., situated at mauza Wani, Tal.Wani, Distt.Yavatmal. The land of defendant No.1 bearing Gat No.129/1 is situated towards northern

side after Mohurli to Waghdara road (Pandan) of the suit property. All defendants are farmers and their lands are situated at mauza Dhabapur, Tq.Wani, Distt.Yavatmal. He further contended that relatives of plaintiff and defendants and other farmers namely Prashant Ramesh Pawade, Ramesh Khushal Pawade, Pranay Sanjay Pawade and Sanjay Dattatraya Pawade all r/o Waghdara, Tq.Wani, Dist.Yavatmal have owner of Gat No.30/1, 30/2, 28/2 & 28/3. They filed case bearing No.रा.मा.क्र.०७/एम.सी.ए.०५/२०१९-२० of mauza Dhabapur under Mamlatdar Act against Sumit Padmakar Matte, Suyog Padmakar Matte and Sau. Sadhana Padmakar Matte for clearing encroachment on the approach way of aforesaid agricultural lands Wani via Dhabapur Shiv. In that case, final decision has been taken on 22.07.2020 after inspection of site and recording of evidence and open road which is shown by letter D-C in the plaint map. He further contended that all farmers of mauza Waghdara including defendants having way for approaching their farms from north-south common dhura width 33 feet between Gat No.128 and 127 which is shown by letter E-F in the plaint map. All farmers are using said way since long and toady also. Therefore, after considering the actual position and inspection report of revenue officer in Prashant and others -Vs- Sumit and others, the Mamlatdar Court passed order and given direction to open cart way by removing wire fencing made by the non-applicants Sumit and others which is shown by letter C-D in the plaint map.

04. All applicants in रा.मा.क्र.०७/एम.सी.ए.०५/२०१९-२० of mauza Dhabapur are resident of mauza Waghdara and they travel to from their farms on mauza Waghdara via Wani-Kayar road (shown

by letter A-B in the plaint map) from their farms towards western side of railway under pass. Said way is available to defendants for approaching their fields. Defendants made an application bearing No.रा.मा.क्र.१२/एम.सी.ए.०५/२०१९-२० of mauza Wani to the Tahasildar under Mamlatdar Act for claiming cart way through the common dhura of suit property towards eastern side Gat No.129/2A. They contended that it is convenient way for reaching to their fields. Defendants concealed the material facts of different ways available to them to reach their fields while applying to Tahasildar. The Mamlatdar Court without taking into consideration of spot inspection report of Revenue Circle Officer dated 14.06.2020, Mamlatdar Court passed an order on 07.06.2022 and directed to the plaintiff to leave 5 feet land of plaintiff towards eastern side boundary mark of Gat No.129/2A. The order of Tahasildar is against the principle of natural justice and provisions of law. Said order was confirmed by Sub Divisional Magistrate, Wani in अपील रा.मा.क्र.२९/एम.सी.ए.२३/२०२१-२०२२ of mauza Wani on 31.10.2022, without considering the factual position and objection raised by the plaintiff. Accordingly, he prayed for declaring order of Tahasildar dated 07.06.2022 and confirmed by S.D.O. on 31.10.2022 as illegal, null and void and not binding on him. In this application, plaintiff is claiming interim relief to stay the order of Tahasildar and S.D.O. till conclusion of the trial.

05. Defendants denied all adverse allegations and submitted that the suit of plaintiff is not maintainable since plaintiff has exercised remedy of revision under Section 23 of the Mamlatdar Act. They submitted that plaintiff has filed this suit only to harass them. There is survey number dhura between the suit property and Gat

No.129/1. The defendants were using said dhura for approaching to their fields but the plaintiff has obstructed defendant's way by digging dhura. Thus, 'defendants properly approached to the Mamlatdar Court and Mamlatdar Court after perusal of spot inspection report of Circle Officer and evidence passed an order in favour of defendants. The S.D.O. Court confirmed the said order after taking into consideration of inspection report conducted by Naib Tahasildar. As per law, every field owner has a duty to provide a road which is convenient to the adjacent land owner. Therefore, order of Tahasildar and S.D.O. is not against the principle of natural justice and law. The other road which is mentioned by the plaintiff is not convenient to defendants. Mamlatdar Court has passed an order after giving opportunity of being heard to the plaintiff and after taking into consideration of spot inspection report, therefore order of Mamlatdar Court is not illegal or against the principle of natural justice. Defendants further submitted that they have been using eastern side dhura of the suit property as a way to approach their fields since more than 25 years. But, in the year 2020, the plaintiff obstructed them, therefore, they have filed case before the Mamlatdar Court. Thus, they submitted that plaintiff is having no prima facie case and accordingly, prayed for rejection of application.

06. Heard learned Advocate for the plaintiff Shri R. H. Haidery and learned Advocate Shri N. R. Chaudhary for defendants, following points arises for my determination and my findings for the reasons discussed below.

Sr.No.	POINTS	FINDINGS
1	Whether the plaintiff has made out ----	No.

prima-facie case?

- 2 Whether the balance of convenience ---- No.
lies in plaintiff's favour?
- 3 Who would suffer irreparable loss, ---- Defendants.
if, the injunction has been granted ?
- 4 What order? ---- Application is
rejected.

REASONS

07. The present suit has been filed by the plaintiff claiming to declare that the order dated 07.06.2022 passed by Mamlatdar Court in रा.मा.क्र.१२/एम.सी.ए.०५/२०१९-२० of mauza Wani and confirmed by S.D.O. Court Wani in अपील रा.मा.क्र.२९/एम.सी.ए.२३/२०२१-२२ of mauza Wani vide order dated 31.10.2022 is illegal, null & void and not binding upon him. In this application, he prayed for interim relief to stay the said order.

08. The plaintiff has filed on record order of S.D.O. & Mamlatdar Court vide list of documents Exh.3/1 & 3/2 respectively. He has also filed on record map of Gat No.129, spot inspection report of Circle Officer, spot map prepared by Circle Officer, 7/12 extract of Gat No.129/2A, 7/12 extract of Gat No.127/2, order of Naib Tahasildar dated 06.02.2022 on record.

09. Defendants have filed xerox copy of spot inspection report of Naib Tahasildar dated 06.05.2022, Spot map with list of

documents Exh.47/1 & 47/2 and 47/4 four photos of spot.

10. Learned Adv. Shri Haidery for the plaintiff has submitted that the Mamlatdar Court has not considered the objection raised by the plaintiff in respect of his loss due to granting a way towards the eastern side boundary of the suit property. Learned Mamlatdar Court has not considered the spot inspection report dated 14.07.2020 carried out by Circle Inspector and without giving opportunity of being heard to the plaintiff, passed an illegal order on 07.06.2022 and confirmed by the S.D.O. Wani in revision on 31.10.2022. He has further argued that as per proviso of Section 5 of Mamlatdar Act, if any case, the Mamlatdar considers it inequitable or unduly harsh or caused to be remove any such impediments, in such situation Mamlatdar Court ought to refer the matter before the Civil Court. However, in this case, without taking into consideration of proviso of Section 5 of the Mamlatdar Act, the Mamlatdar Court has passed illegal order which may cause irreparable loss to the plaintiff.

11. As per the submission of learned Advocate for the plaintiff, the Mamlatdar Court considers it inequitable or unduly harsh to direct the plaintiff to leave 5 feet of his land towards eastern boundary of the suit property. In this situation, the Mamlatdar Court have without passing order to refer the concerned party for establishing their rights in the Civil Court. In this respect, it is submitted that as per proviso of Section 5 of the Mamlatdar Act, if in any case, the Mamlatdar considers it inequitable or unduly harsh to remove or caused to be removed any such impediment or to give possession of any such property or to restore any such use to a persons who has become entitled thereto, in this situation, if it

appears to him that such case can be more suitably dealt with by a Civil Court, he may in his discretion refused to exercise the aforesaid powers. Thus, as per proviso of Section 5 of the Mamlatdar Act, if the Mamlatdar considers it inequitable or unduly harsh in that situation, he may refuse to exercise the power conferred him by Section 5. It means it is discretionary power vested to the Mamlatdar under Section 5 to refuse to exercise the power. Thus, merely because of not exercising discretionary power vested to Mamlatdar under proviso of Section 5 cannot be treated the order passed by the Mamlatdar Court without exercising his discretion is illegal.

12. Learned Advocate for the plaintiff has further argued that the Mamlatdar Court passed order without taking into consideration spot inspection report of Circle Officer dated 14.07.2020. Said report has filed on record vide list of documents Exh.3/4. Perusal of said documents Exh.3/4, wherein, it is mentioned that there is common dhura between the plaintiff's land Gat No.129/2A and defendant No.9's land Gat No.128/1 and not found any obstruction by digging dhura. In the said document, it is also mentioned that if way given to defendants, it is convenient to them. However, possibility of loss to the plaintiff cannot be ruled out. So as per spot inspection report dated 14.07.2020, if way given on common dhura between the suit property and Gat No.128/1 which may possibly cause loss to the plaintiff and also convenient to defendants for reaching their fields. Thus, in this situation, inspection report dated 14.07.2020 cannot be said to be wholly in favour of the case of plaintiff.

13. Learned Advocate for the plaintiff has further argued that finding given by the Tahasildar as well as S.D.O., Wani is foreign to

the pleading of both parties. Perusal of document Exh.3/1, order of S.D.O. dated 31.10.2022 and document Exh.3/8 order of Naib Tahasildar/Mamlatdar Court dated 07.06.2022, it shows that learned Mamlatdar Court as well as S.D.O. Wani Court has after considering the pleading and argument of both parties and after taking into consideration of spot inspection report of revenue authority have passed order and accordingly given its finding.

14. Now, reverting back to the case of defendants, learned Advocate for defendants Shri Chaudhary has argued that order of Mamlatdar Court dated 07.06.2022 and court of S.D.O. dated 31.10.2022 have been passed after giving opportunity of being heard to both parties. He further argued that defendants are not claiming new way under Section 143 of M.L.R. Code. But, they are claiming to remove obstruction which caused by the plaintiff on the way of common dhura of the suit property and Gat No.129/1. He further submitted that defendants are using way on the common dhura for approaching their fields since last 20 to 25 years. The proceeding under Mamlatdar Act and civil proceeding under the Code is different and both courts are exercising different jurisdiction. Order of Tahasildar dated 07.06.2022 has been challenged by the plaintiff before S.D.O. Court, Wani. Learned S.D.O. after verifying documents and record of the case and spot inspection report of Naib Tahasildar dismissed the revision preferred by the plaintiff and confirmed the order of Mamlatdar Court dated 07.06.2022.

15. Suit is filed for declaring order of Mamlatdar Court and S.D.O. Court, Wani dated 07.06.2022 & 31.10.2022 respectively as illegal and not binding upon the plaintiff. In fact, the present

application is made to stay the aforesaid orders by granting temporary injunction. Perusal of order dated 07.06.2022 and 31.10.2022, it shows that both orders were come to be passed after giving opportunity to both parties. Mamlatdar Court and S.D.O. Court are competent revenue authority. Both courts were passed its order as per procedure and after taking into consideration of factual position and spot inspection report of Circle Officer and Naib Tahasildar.

16. As per order of Mamlatdar Court dated 06.07.2022, direction is given to the plaintiff to leave 05 feet land of suit property towards eastern boundary and defendant No.10 has voluntarily agreed to leave her 05 feet land of Gat No.128/1. Plaintiff himself contended all defendants are farmer and their fields are situated at mauza Dhabapur. Defendants submitted that they have been using way on common dhura between suit property and Gat No.128/1 since last 20 to 25 years. It means between eastern boundary of suit property and Gat No.128/1, there is common dhura. Mamlatdar Court and S.D.O. Court orders dated 06.07.2022 & 31.10.2022 are competent authority and they having ample power to exercise powers under M.L.R. Code and Mamlatdar Act.

17. The plaintiff filed xerox copy of order of Mamlatdar Court in रा.मा.क्र.२७/एम.सी.ए.०५/२०१९-२० of mauza Dhabapur dated 22.06.2020 vide list of document Exh.3/2. Said order was passed in the case between Prashant Pawade and others -Vs- Sumit Matte and others. Learned Advocate for the plaintiff has submitted that as per the direction of Mamlatdar Court wire fencing of Gat No.30/1, 30/2, 28/1, 28/2 & 28/3 made by the Sumit Padmakar Matte is removed

and opened the way for approaching farmers to their field. Said way is convenient to defendants for approaching their fields. But, learned Mamlatdar Court as well as S.D.O. Court, Wani have not considered the said factual aspect while passing the orders. In this respect, learned Advocate for defendants submitted that they having no nexus with that order. The plaintiff has filed certified copy of order of S.D.O. Wani vide list of documents Exh.49/1. Perusal of said order it appears that revision preferred by Sumit Matte under section 23 of the Mamlatdar Act was dismissed by the Learned S.D.O. Court Wani on 08.03.2021. Thus, it appears that there is a way available to defendants for approaching their fields which is shown by letter C-D in plaint map. Perusal of addresses of defendants which are mentioned in the suit, some of the defendants are residing at Wani. Thus, it appears that said way i.e., shown by letter C-D in the plaint map is not convenient to defendants who are residing at Wani for approaching their fields.

18. The plaintiff has filed map of mauza Kasbe Wani Gaon No.337 on record vide list of documents Exh.52/1 and submitted that defendants having three different ways to approach their fields. In this respect at this stage, it is submitted that all those ways are long way and not convenient for defendants for approaching their farms.

19. Learned advocate for the plaintiff has placed reliance on the Judgment of Hon'ble Bombay High Court, Bench at Aurangabad in Ramesh s/o. Shriram Wani vs State of Maharashtra & Ors. (WP No.7701/2011) and submitted that right to property is constitutional right and the plaintiff is having right to his property from any

interference. He has further submitted that direction given by Mamlatdar Court for to leave 5 fts of land of the suit property towards eastern side boundary for a way amounts to infringement of his constitutional property right of the plaintiff and therefore illegal. In this respect with due respect to the Judgment of Hon'ble Bombay High Court, right of property is a constitutional right but, there is equally a duty cast by law upon the land owner to provide a suitable way to the adjacent land owners.

20. Learned advocate has further relied on the Judgment of Hon'ble Supreme Court in **Smt. Ramkanya Bai & Anr. Vs Jagdish & Ors. (Civil Appeal No.4922/2011)**. He has submitted that civil court has jurisdiction to decide the right to way or customary easement and plaintiff having no efficacious remedy available against said orders under challenged. I have gone through the Judgment of Hon'ble Supreme Court. It is respectfully submitted that this court is having jurisdiction to decide the customary way or right of easements. But, facts of the present case are totally different to the case before Hon'ble Supreme Court.

21. In the present suit, the plaintiff is seeking relief of declaration to declare the order of Mamlatdar Court dated 07.06.2022 and order of Learned S.D.O. Court dated 31.10.2022 as illegal and not binding upon him. Both orders were passed by Competent Revenue Court after giving opportunities of being heard to both parties and as per provisions of law. In this situation, at this stage granting stay on those orders by way of temporary injunction amounts to interfering with the concurrent findings of both revenue courts without ascertaining the legality of said orders. Considering

the facts of the plaintiff's case, plaintiff is not having strong prima-facie case. If injunction is granted at this stage as per the contention of plaintiff in the event of non-granting of injunction in his favour, he suffered irreparable loss. In this respect it is submitted that if injunction granted it caused irreparable loss to 10 farmers. Trail of suit will take its time. Thus, balance of convenience is not lies in favour of the plaintiff. Accordingly, I answered to point Nos 1 to 2 in the negative and issue No.3 in favour of defendants. In answer to point No.4, I pass following order.

ORDER

1. Application (Exh.5) is rejected.
2. Cost in cause.

Date :-08-05-2023.

(P. C. Bachhale)
Jt. Civil Judge, J.D.,
Wani.