

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6641 OF 2014

1. Ashok s/o Bhaskarrao Kulkarni,
Age: 47 years, Occ: Agri.,
R/o. Deopimpri, Tq. Georai,
Dist. Beed.

2. Vasant s/o Shamrao Kulkarni,
Age: 75 years, Occ: Agri.,
R/o. Depimpri, Tq. Georai,
Dist. Beed.

...Petitioners

versus

1. Dr. Govind s/o Divakar Kulkarni,
Age: 46 years, Occ: Agri., & medical practice,
R/o. Deopimpri, Tq. Georai, Dist. Beed,
At present residing at
Harmesh Heritage, Phase No.2,
Room No. C-6, 4th Floor, Shastri Nagar,
Nagar Road, Yerwada, Pune-411006.

2. Sow. Kumudini w/o Divakar Kulkarni,
Age: 72 years, Occ: Agri.,
R/o. Deopimpri, Tq. Georai,
Dist. Beed.

...Respondents

.....
Mr. Rahul P. Dhase, Advocate for petitioners.
Mr. V. D. Salunke, Advocate for respondent Nos. 1 and 2.
.....

CORAM : N.W. SAMBRE, J.

DATE : 2ND MARCH, 2015

ORAL ORDER :

. This petition is by the original defendants questioning the
legality and validity of the order dated 10/07/2014 passed by 3rd

Joint Civil Judge, Junior Division, Georai, whereby an application Exhibit-31 preferred by the present petitioners-defendants for re-hearing of Exhibit-5 an application for grant of injunction, came to be rejected. The application is moved under the provisions of Order 39 Rule 4 of the Code of Civil Procedure.

2. The present respondents filed Regular Civil Suit No.548 of 2012 against the petitioners herein for injunction, though proceedings before the Tahsildar in relation to the right of way was pending, in which the present respondents were party.

3. The present petitioners have failed to file their written statement and reply to Exhibit-5 application for injunction, resulting into passing of order of injunction dated 31/10/2013. In the proceedings pending before the Tahsildar at the behest of petitioners seeking right of way, the Tahsildar passed an order on 05/12/2013 granting right of way from the bandh of Gat Nos. 19 and 20, which order was not brought to the notice of the learned Court below by the respondent-plaintiff while seeking injunction. According to them, they have filed the written statement subsequent to the order of passing injunction which was allowed by learned trial Court and as such, the application for re-hearing is maintainable.

4. Mr. Salunke, learned Counsel for the respondents-plaintiffs, while opposing the request of the petitioners-defendants would urge that the petition preferred by the petitioners is misconceived as it was open for the petitioners to challenge the order of granting injunction in an appeal. He would further urge that the cause cited for rehearing of Exhibit-5 does not qualify the requirements of Rule 4 of Order 39 of the Code of Civil Procedure. He would further urge that the petitioners were duty bound to place on record the copy of the order of Tahsildar before the Court below and there was no sufficient cause as to why the petitioners themselves why have not brought on record at the time of hearing application Exhibit-5 or even in an appeal against the order of granting injunction. Mr. Salunke, learned Counsel for the respondents would further urge that it is dealing with the facts on the part of the petitioners and the petition is liable to be rejected.

5. Having considered the rival contentions of the parties, it is noticed that the trial Court has rejected the application of the petitioners for rehearing on the ground that after issuing notice and after filing of the written statement, there is no provision as regards the grant of rehearing in the matter, as order was not *exparte* order. In support of said view, learned trial Court relied upon the judgment of the Rajasthan High Court in the case of **Laxmi Devi vs. Dula**

Ram reported in **AIR 1992 Raj 165**. Learned trial Court also noticed that the petitioners have not made specific averments as regards false statement by the plaintiffs-respondents.

6. If we perused the application Exhibit-31, it is noticed that in the said application, the petitioners have come out with the case that they were permitted to file their written statement by subsequent order. They have also placed on record a copy of written statement-cum-reply to the application Exhibit-5 wherein they have alleged that the Tahsildar on 05/09/2013 has ordered grant of way. In the said written statement/reply, the petitioners have invited attention of this Court that the said fact is suppressed by the respondents from the Court below while seeking injunction though the said fact was well within the knowledge of the respondents at the time of seeking injunction i.e. passing of order by the Tahsildar on 05/09/2013, as according to him, the order of injunction is passed by learned trial Court on 31/10/2013. It is also required to be noted that said order of Tahsildar still holds the field and against order passed below Exhibit-5 no appeal was preferred by the petitioners.

7. Perusal of Rule 4 of Order 39 of Code of Civil Procedure depicts that if party makes false or misleading statement, certain circumstances necessitated by change in the events and if the Court

is satisfied, the Court may order variation of the order of injunction.

8. The fact remains that the order granting right of way dated 05/09/2013 was well within knowledge of the respondents which has bearing over the claim of the injunction. The fact remains that the order passed by the learned trial Court granting injunction on 31/10/2013 not reflect consideration of the said fact, perhaps because the said fact was not within the knowledge of the Court while granting injunction as not pleaded by either party.

9. In view of above, in my opinion, present one is a fit case wherein learned trial Court should have granted the application Exhibit-31 for rehearing of Exhibit-5 application as certain circumstances were brought before it which necessitated the grant of re-hearing.

10. In view of above, the writ petition is allowed. The order dated 10/07/2014 passed by 3rd Joint Civil Judge, Junior Division, Georai, below Exhibit-31 in Regular Civil Suit No. 548 of 2012 is hereby quashed and set aside. The application Exhibit-31 stands granted. Learned trial Court is directed to grant rehearing of the application Exhibit-5 after giving opportunity to the parties to the suit. The hearing of an application Exhibit-5 be concluded within period of

four weeks from today. The writ petition stands allowed in above terms.

[N.W. SAMBRE, J.]