

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2001 OF 2014

Arihant Domestic Applicances Pvt. Ltd.

Through its Authorized Signatory

Mr. Somnath Chavan

: Petitioner.

Versus

Mrs. Surekha Hanumant Pawar and anr.

: Respondents.

**Mr. Karl Tamboly with Mr. Rahul Hingmire i/by Hariani & Co. for the
Petitioners.**

Mr. Sudhir S Hardikar for the Respondents.

CORAM : R. M. SAVANT, J.

DATE : 20th February 2015

P.C.

1 There is a concurrent finding recorded against the Petitioner as regards its entitlement to the discretionary relief of temporary injunction. Both the Courts below on the basis of the material on record have come to a conclusion that the Petitioner/Plaintiff is not entitled to the said discretionary relief by way of temporary injunction.

2 The bone of contention in the suit in question being Regular Civil Suit No.284 of 2008 is an access road to approach Pune Nagar Highway through Gat No. 1261 and Gat No.1260. In so far as the lands bearing Gat No.1262 and 1261 are concerned, they are belonging to the Plaintiff whereas the land bearing Gat No.1260 is concerned, the said land is belonging to the Defendants. The road in question as appearing in the map which is annexed to

the above Petition at Exhibit A is between the land bearing Gat No.1260 and the land bearing Gat No.1261. The Plaintiff claims the said road to be of 12 meters in width. The Plaintiff lays a claim to the said access road on the basis of the a licence agreement dated 08/09/2001 executed by the owners in its favour as also the agreement executed dated 17/09/2001 between the original owners one Rohit Group, the Plaintiff and the State Government by which agreement the State Government had granted permission to the Plaintiff to use the government land to carve out the said access road to approach the Pune Nagar Highway. The Plaintiff has described the suit property i.e. the road in paragraph 1 of the plaint. It seems that the proceedings under Section 5 of the Mamlatdars Court Act were initiated by one Smt. Alka Kaluram Dhamdhare to which the Plaintiff and the Defendant were the parties. It seems that the Tahsildar had allowed the said Application filed by Smt. Alka Dhamdhare, as a consequence of which the Respondents to the said application were directed to remove the alleged obstruction on the road. There is some dispute as to whether the order passed by the Tahsildar has been executed or not.

3 In the instant suit, the Plaintiff filed an application for temporary injunction which was numbered as Exhibit 5. The said Application was founded on the fact that the Plaintiff has been using the said access road for ingress and egress and that apart from the said access road, the Plaintiff has no other access road to approach its property being Gat Nos. 1261 and 1262.

4 The said Application (Exhibit 5) filed by the Plaintiff was opposed to on behalf of the contesting Defendants. At this stage it is required to be noted that the Defendants lay a claim to the land bearing Gat No.1260 on the basis of the sale deed executed by the original owners through their Power of Attorney. The Defendants took up various defences and questioned the maintainability of the suit on account of non-joinder of necessary parties, incorrect valuation of the suit and that the relief is hopelessly time barred. The Defendants denied the case of the Plaintiff that the access road through the land of the Defendants is being used by the Plaintiff's employees. The Defendants denied the existence of the road as also the right to use the said access way. It was the case of the Defendants that the Plaintiff does not have right to use it either by way of easement of grant or event by easement of necessity.

5 The Application (Exhibit 5) was considered by the Trial Court and the Trial Court by its order dated 18/10/2011 rejected the said Application. The Trial Court observed that the description of the suit property i.e. the access way does not meet the requirements of Order VII Rule 3 of the Code of Civil Procedure. The Trial Court in the light of the fact that the very existence of the disputed way is in question as also the right of the Plaintiff to use the said access way as also having regard to the fact that there was a dispute as regards

the order passed by the Tahsildar under the provisions of the Mamlatdars Court Act was executed or not, held that the Plaintiff has not satisfied the three tests which have been laid down which are the requirements the Plaintiff has to satisfy viz. prima facie case, balance of convenience and irreparable loss. The Trial Court observed that the facts disclose that on the day the suit was filed that there was no obstruction has not been proved as also the fact that the order passed by the Tahsildar having been executed, the access way could be used. The Trial Court accordingly by its order dated 18/10/2011 rejected the said Application (Exhibit 5).

6 The aggrieved Plaintiff carried the matter in Appeal by way of Misc. Civil Appeal No.356 of 2011. The Lower Appellate Court as can be seen from the reading of its order has virtually reiterated the findings of the Trial Court. However, the Lower Appellate Court observed that the existence of the access way in view of the documents which were produced by the Plaintiff could not be disputed. However, the question was whether the Plaintiff was entitled to use the said way. In so far as the documents are concerned i.e. the licence agreement and the agreement with the State Government, both the Courts below have held that they would have to be proved by the Plaintiff at the trial of the suit and could not be accepted at the prima facie stage. The Lower Appellate Court observed that in the light of the pleadings there was some ambiguity as to whether the access way passes through the lands bearing

Gat Nos.1260 and Gat No.1261 or whether it passes over the survey boundary of both the lands. The Lower Appellate Court observed that the description in the leave and licence agreement makes it clear that the disputed way nowhere asserts and exists over the survey boundary. The Lower Appellate Court further observed that since the Plaintiff claims that the right of way is to the extent of 12 meters through the lands it has to be established through its existence in revenue record. The Lower Appellate Court observed that the existence of the access way nowhere finds its effect and entry in the revenue record. The Lower Appellate Court adverted to Sections. 149 and 150 of the Maharashtra Land Revenue Code and observed that existence of such encumbrances over the land assessed to land revenue has to be reflected in the column of "other rights" of the 7x12 extracts. The Lower Appellate Court therefore observed that several triable issues are involved which have been raised by the contesting Defendants which issues involved, the issue as regards the Plaintiff's right to use the disputed way by the Plaintiff. The Lower Appellate Court lastly observed that the existence of the disputed access way on site cannot be disputed. The aspect as to whether the Plaintiff was using the said disputed access way on the date of filing of the suit is the question. The Lower Appellate Court observed that the Trial Court having deemed it appropriate not to exercise the discretion, the Lower Appellate Court should be slow to interfere with the order passed by the Trial Court in support of which finding the Lower Appellate Court has referred to the judgments of the Apex Court which are

reflected in Paragraph 11 of its order. As indicated above the Lower Appellate Court by its impugned order dated 21/8/2013 has dismissed the Appeal filed by the Plaintiff.

7 The learned counsel appearing for the Petitioner original Plaintiff Shri Tamboly would seek to reiterate the case of the Plaintiff in the Trial Court in support of the grant of temporary injunction. In so far as the right of the Plaintiff is concerned, the learned counsel would seek to place reliance on the licence agreement as also the agreement with the State Government. The learned counsel would contend that the said licence agreement provides that the same is also binding on the assignee of the original owners.

8 Per contra, the learned counsel appearing on behalf of the Respondents-original Defendants Shri Hardikar would support the impugned order and would contend that both the Courts below having refused to exercise discretion in favour of the Plaintiff, this Court need not exercise its writ jurisdiction under Article 227 of the Constitution of India.

9 Having heard the learned counsel for the parties, in my view, there is no merit in the contentions of the learned counsel for the Petitioner. In so far as the two documents on which much store has been laid by the learned counsel for the Petitioner are concerned, both the Courts below have observed

that the same would have to be proved by the Plaintiff at the trial of the suit. In so far as the entitlement of the Plaintiff is concerned, as indicated above, both the Courts below in the light of the triable issues which arise for consideration in the suit have held that the discretion cannot be exercised in favour of the Plaintiff at the said stage. It is also required to be noted that the impugned order has been passed in August 2013 and the above Petition has been filed in February 2014. Having regard to the concurrent orders passed by the Courts below in my view, the exercise of writ jurisdiction is not warranted. The above Writ Petition is accordingly dismissed. However, the hearing of the suit in question is expedited. Needless to state that the observations made by the Courts below as well as this Court are only for consideration of the Application for temporary injunction, the suit in question would undoubtedly be tried on its own merits and in accordance with law uninfluenced by the instant order as well as the orders passed by both the Courts below.

[R.M.SAVANT, J]