

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

WRIT PETITION NO.4039 OF 2015

- | | | |
|----|---------------------------------------|----------------------|
| 1] | Abdulmajid Khatal Hawaldar |] |
| | Age : Adult, Occu : Service |] |
| | |] |
| 2] | Miss Sayera Khatal Hawaldar |] |
| | Age : Adult, Occu : household/service |] |
| | |] |
| 3] | Yasmin Khatal Hawaldar |] |
| | Age : Adult, Occu : Household |] |
| | |] |
| 4] | Reshma Khatal Hawaldar |] |
| | Age : Adult, Occu : Household |] |
| | |] |
| 5] | AkbarBadshah Khatal Hawaldar |] |
| | Age : Adult, Occ : Service |] |
| | |] |
| | All R/o. Near Deshpande Dairy |] |
| | in front of Shivaji Stadium |] |
| | Miraj, Tal : Miraj, Dist. Sangli |] |
| | |)]... Petitioners |
| | |)](Orig. Plaintiffs) |

versus

- | | |
|-------------------------------------|--|
| Shri Siddhivinayak Diary Pvt. Ltd. |] |
| Through Shri Vilas Vyankatesh Hedge |] |
| Age : Adult, Occ : Business |] |
| At post Siddhivinayak Diary |] |
| Near Lions Nab Hospital |] |
| M.I.D.C. Miraj, Tal : Miraj |] |
| Dist. Sangli |)].... Respondent/
)](Orig. Defendant No.1) |

Mr. S S Shah for the Petitioners

Mr. Umesh Mankapure a/w Mr.P G Kathane for the Respondent.

**CORAM : R. M. SAVANT, J.
DATE : 30th September 2015**

ORIGINAL JUDGMENT :

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order dated 20/03/2015 passed by the learned Adhoc District Judge-2, Sangli by which order Misc. Civil Appeal No.58 of 2013 came to be allowed and resultantly the order dated 18/02/2013 passed by the Trial Court i.e. the learned 2nd Joint Civil Judge, Junior Division, Miraj allowing the application (Exhibit 5) came to be set aside.

3 It is not necessary to burden this order with unnecessary details having regard to the nature of directions to be passed. The bone of contentions between the parties is the 7 meter wide road running North to South on the Southern boundary of the plot of the Plaintiffs and on the Eastern side of the plot of the Defendant No.1 i.e. the Respondent herein who is the main contesting Defendant in the suit in question. The suit in question being Regular Civil Suit No.71 of 2013 was filed for a declaration that the plot No.2 which the Plaintiffs have purchased from the Defendant Nos.3 to 8 is the same plot No.2 which is shown in the new layout which has been sanctioned in the year 1986. The Plaintiffs are also seeking an injunction that the Defendant

No.1 should be restrained from obstructing the Plaintiffs from using the said 7 meter wide road. The cause for filing the suit in question was the fact that the Defendant No.1 had put up a gate on the said road and was claiming that he is the owner of the land on which the road is situated and was therefore obstructing the Plaintiffs. The Plaintiffs had therefore sought an injunction on the said basis.

4 At this stage it is required to be noted that the Defendant Nos.3 to 8 to the suit were the original owners of the plot of land. The predecessor of the Plaintiffs had agreed to purchase the said suit plot of land from the predecessor of the Defendant Nos.3 to 8. The registered agreement to sale of the Plaintiffs is dated 07/11/1974. In view of the fact that the Defendants were not coming forward to execute the sale deed, the Plaintiffs filed Regular Civil Suit No.382 of 1991 for specific performance. The said suit came to be decreed and the Plaintiffs got the document executed through the Court Commissioner who was appointed in the execution proceedings. It appears that the Defendant Nos.3 to 8 got sanctioned the new layout in the year 1986. The same was without informing the Plaintiffs and the some part of the land comprising in the new layout was sold by the Defendant Nos.3 to 8 to the Defendant No.2 which the Defendant No.2 in turn sold to the Defendant No.1. It seems that the Plaintiffs to the present suit had earlier filed Regular Civil Suit No.692 of 2012 claiming the same reliefs as claimed in the present suit. The

said suit was withdrawn by the Plaintiffs in view of the change of description which was occasioned in view of the sanction of the new layout plan. After the withdrawal of the said suit, the Plaintiffs filed the instant suit claiming the reliefs which have been adverted to in the earlier part of this order. The Plaintiffs filed an application for temporary injunction in the instant suit. The Plaintiffs during the course of the prosecution of the said application for injunction made a statement that they are interested in prosecuting the application for temporary injunction only against the Defendant No.1 and not the Defendant Nos.2 to 8. The said application was opposed to on behalf of the Defendant No.1. It was the case of the Defendant No.1 that he has purchased the entire portion which was remaining with the Defendant Nos.3 to 8 and therefore the road in question is part of his property i.e. the plot No.3.

5 The Trial Court considered the said application for temporary injunction and allowed the same by the order dated 18/02/2013. The Trial Court as can be seen from a reading of its order has referred to the agreement to sale executed in favour of the Plaintiffs by the Defendant Nos.3 to 8 wherein the road on the west and southern side of the plot no.2 was shown. The Trial Court adverted to the sale deed which was executed by the Defendant Nos.3 to 8 in favour of the Defendant No.2 wherein the 7 meter road in question was shown. The Trial Court also adverted to the sale deed which the Defendant No.2 in turn has executed in favour of the Defendant No.1 wherein also the

road was shown. The Trial Court had also adverted to covenants in the sale deed of the Defendant No.2 wherein it was stated that the Defendant No.2 would be bound by the decision that would be rendered in Regular Civil Suit No.382 of 1991 and the other suits. The Trial Court on the basis of the said material came to a conclusion that the road existed on the southern side of the Plaintiffs' plot which they are using for ingress and egress to their property. The Trial Court observed that the very fact that the Defendant No.1 has put up the gate on the said 7 meter wide road is indicative of the fact that the Defendant No.1 is preventing the Plaintiffs from using the said road. The Trial Court therefore came to a conclusion that the Plaintiffs had made out a prima facie case and since there was no other road available to the Plaintiffs the balance of convenience was also in favour of the Plaintiffs and accordingly allowed the said application for temporary injunction by the order dated 18/02/2013.

6 The aggrieved Defendant No.1 carried the matter in Appeal by filing Misc. Civil Appeal No.58 of 2013. The Lower Appellate Court as indicated above has by the impugned order dated 20/03/2015 upset the order of injunction granted by the Trial Court. Before the Lower Appellate Court the contention was raised on behalf of the Defendant No.1 that the Trial Court had erred in rejecting the application for review of the order permitting withdrawal of the earlier suit filed by the Plaintiffs. The Lower Appellate Court observed that the said aspect is not in consideration before the Lower Appellate Court in

the instant Appeal. In so far as the merits of the case of the Plaintiffs for grant of temporary injunction is concerned, the reasoning of the Lower Appellate Court if any can be found only in paragraphs 12 and 13 of the impugned order. The gist of the reasoning of the Lower Appellate Court as can be seen from paragraph 13 is that after the new layout plan was sanctioned on 27/02/1986, the Plaintiffs have not produced any material on record to show that previously there were two roads in existence and after the layout plan was sanctioned in 1986 there is only one road i.e. towards southern side for the use of the Plaintiffs. The Lower Appellate Court has also found fault with the Plaintiffs as the Plaintiffs seem to be changing their stand as on one hand they are claiming that only the road on the southern side is available to them and on the other hand they claim that they have acquired easementary right over the said road. However, the Lower Appellate Court principally on the ground that after the new layout plan was sanctioned on 27/02/1986, the Plaintiffs to show that their access to the suit plot from western road has been closed have not produced any material on record, non-suited the Plaintiffs and held that the Plaintiffs have not made out any prima facie case and balance of convenience is also not in favour of the Plaintiffs and accordingly upset the order granting injunction passed by the Trial Court. As indicated above, it is the said order dated 20/03/2015 which is taken exception to by way of the above Petition.

7 The learned counsel appearing for the Petitioners Shri Surel S Shah would contend that whilst the Trial Court has recorded findings by taking into consideration the material on record i.e. the agreement to sale, sale deeds which have been executed in favour of the Plaintiffs, the Defendant No.2 and the Defendant No.1 by the owners i.e. the Defendant Nos.3 to 8, the Lower Appellate Court has not even adverted to the said material and merely on the ground that the Plaintiffs are not sticking up to their stand has non-suited the Plaintiffs. The learned counsel would contend that if the Lower Appellate Court wanted to upset the findings recorded by the Trial Court, the Lower Appellate Court in terms of the mandate of Order XLI Rule 31 of the Code of Civil Procedure ought to have considered the findings recorded by the Trial Court and thereafter recorded its own finding as to why the finding recorded by the Trial Court was erroneous. The learned counsel would contend that the Lower Appellate Court without carrying out the said exercise had set aside the order passed by the Trial Court.

8 Per contra, the learned counsel appearing on behalf of the Respondent i.e. the original Defendant No.1 Shri Mankapure made strenuous efforts to support the impugned order. The learned counsel questioned the grant of the temporary injunction by the Trial Court on the ground that in the earlier suit filed by the Plaintiffs i.e. Regular Civil Suit No.692 of 2012 which was in respect of the same suit property and for the same reliefs, the

application for temporary injunction was rejected and which suit was thereafter questionably withdrawn by the Plaintiffs. The Trial Court had erred in granting injunction. The learned counsel sought to draw this Court's attention to the order passed by the Trial Court in the earlier round in the said Regular Civil Suit No.692 of 2012. The learned counsel would contend that the gate in question has been put up by the Defendant No.1 right from the year 2002 and therefore the Plaintiffs could not have been granted injunction by the Trial Court as the Plaintiffs were not in use of the road in question.

9 Having heard the learned counsel for the parties, I have considered the rival contentions. In so far as the Trial Court is concerned, as indicated above, the Trial Court has on the basis of the material on record which material the Trial Court has dealt with item-wise in its order recorded a finding about the existence of the road on southern side which the Trial Court has dubbed as a common passage for the Plaintiffs and the Defendant No.1. In so far as the Lower Appellate Court is concerned, as indicated above, the Lower Appellate Court has not even adverted to the said documents much less the findings which have been recorded by the Trial Court. The Lower Appellate Court as can be seen from the impugned order has upset the order passed by the Trial Court only for the reasons mentioned in paragraph 13 of the impugned order which reasons revolve around the fact that the Plaintiffs seem to be changing their stand, as on one hand they are claiming that only the

southern side road is available to them and on the other hand they contend that they have acquired easementary right over the said road. In terms of Order XLI Rule 31 of the Code of Civil Procedure, the Lower Appellate Court was enjoined to test the findings recorded by the Trial Court in respect of the three ingredients which are to be satisfied for the grant of temporary injunction viz. prima facie case, balance of convenience and irreparable loss. However, the Lower Appellate Court has not carried out the mandate of Order XLI Rule 31 of the Code of Civil Procedure. It is well settled by the pronouncements of the Apex Court that if the Lower Appellate Court is to upset the order passed by the Trial Court, then it has to come to close quarters with the findings recorded by the Trial Court and records its own findings as to why the said findings are erroneous. In the instant case, unfortunately the said exercise has not been carried out by the Lower Appellate Court . The Lower Appellate Court has also not considered the ground urged on behalf of the Defendant No.1 that in the light of the rejection of the application for temporary injunction in the earlier round i.e. in Regular Civil Suit No.692 of 2012, the Plaintiffs were not entitled to the grant of any injunction in the present suit considering that the scope of the both the suits is identical. Though the learned counsel appearing for the Respondent No.1 i.e. the original Defendant No.1 Shri Mankapure sought to justify the impugned order passed by the Lower Appellate Court on the said basis, in my view, since the same is not the consideration that has weighed with the Lower Appellate Court whilst allowing

the Appeal, the order passed by the Lower Appellate Court cannot be sustained by this Court on the said basis. In my view, since the consideration of the Lower Appellate Court is not inconsonance with the powers of the Lower Appellate Court under Order XLI Rule 31 of the Code of Civil Procedure, the impugned order would have to be quashed and set aside and is accordingly quashed and set aside and the matter is relegated back to the Lower Appellate Court for a denovo consideration of the Appeal. The parties to appear before the Lower Appellate Court on 14/10/2015. The Lower Appellate Court to decide the Appeal within 8 weeks from 14/10/2015. The parties to maintain status quo as directed by the order dated 21/04/2015 passed in the above Petition. The above Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]

Certified to be true and correct copy of the original signed Judgment.