

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7495 OF 2016

- 1) Tukaram s/o Rajaram Patil,
Age: 56 years, Occ: Agri.,
R/o Naigaon, Tq. Muktainagar,
Dist. Jalgaon.
- 2) Vishwanath s/o Rajaram Patil,
Age: 49 years, Occ: Agri.,
R/o Naigaon, Tq. Muktainagar,
Dist. Jalgaon. ... Petitioners

Vs.

- 1) Marabai w/o Sadashiv Marathe,
Age: 47 years, Occ: Agril,
R/o Naigoan, Tq. Muktainagar,
Dist. Jalgaon.
- 2) Sadashiv s/o Khandappa Marathe,
Age: 52 years, Occ: Agril,
R/o Naigoan, Tq. Muktainagar,
Dist. Jalgaon.
- 3) Dipak s/o Sadashiv Marathe,
Age: 29 years, Occ: Agril,
R/o Naigoan, Tq. Muktainagar,
Dist. Jalgaon.
- 4) Sonu w/o Sadashiv Marathe,
Age: 27 years, Occ: Agril,
R/o Naigoan, Tq. Muktainagar,
Dist. Jalgaon. ... Respondents

Mr. Milind M. Joshi, Advocate for the petitioner.
 Mr. Vijay B. Patil, Advocate for the respondents.

CORAM : SUNIL P. DESHMUKH, J.
DATE : 10-08-2016.

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of the parties.

2. The petitioner who is original plaintiff in regular civil suit no. 38 of 2013 pending before Civil Judge, Junior Division, Muktainagar is before this court aggrieved by an order dated 23-03-2016 passed by District Judge-2, Bhusawal in Miscellaneous Civil Appeal No. 11 of 2016 whereunder order passed on application of the petitioner on exhibit-6 placing restraint on respondents who are defendants in the suit from using 3 feet x 21 feet length as the passage to carry cattle, is set aside.

3. After hearing learned counsel for the parties, the factual position which generally is not disputed is that, houses no. 188 and 189 have been purchased by the petitioners/their ancestors from the ancestors of present respondents around 1992 under registered instruments. Houses no. 188 and 189 each have been divided by a passage (referred to as '*Bol*') in the sketch map annexed at page no. 19 of the writ petition. The dispute is in respect of the user of said '*Bol*' by the respondents to carry their cattle.

4. Though, learned counsel for the petitioner has contended that, the sale deed makes reference to '*Bol*' for private

use of the owners of houses no. 188 and 189, learned counsel for the respondents finds it difficult to accept said contention. However, said controversy may not be germane while considering the writ petition at the stage at which it has been preferred against the order passed by the appellate judge in Miscellaneous Civil Appeal No. 11 of 2016.

5. There does not appear to be dispute about that, the passage size and its dimensions are 3 feet x 21 feet, as such, the trial court appears to have taken into account dimensions of the lane (*Bol*) and has considered that *prima facie* it does not appear to be a public road and that reference to the '*Bol*' has been made in the sale deed executed in favour of petitioner/their ancestors.

6. The trial court has additionally considered that defendants are having alternate way to their houses and that no grave prejudice is likely to be caused to the defendants and having regard to the nature of the claim in the application the trial court has passed following order:

- i]* Application Exh.6 is hereby allowed.
- ii]* Defendants, their agents, servants or anybody else acting on their behalf are restrained by way of temporary injunction not to use the disputed road for carrying their animals.
- iii]* Cost in cause.

7. The contents of paragraphs no. 9, 10 and 11 of order

passed by District Judge-2, Bhusawal in Miscellaneous Civil Appeal No. 11 of 2016, appears to have allowed it to be swayed by considerations which are not germane while one considers the request under the temporary injunction application. The appellate court appears to be oblivious of the size and dimensions of the lane. The appellate court also got entangled into a consideration as referred to in paragraph no. 10 which would not be germane and that would not be a reason to decline the relief as has been prayed. The *prima facie* case, the balance of convenience and the irreparable and irretrievable loss in the process appears to have taken back seat.

8. In the circumstances, the discretion which has been exercised judiciously by following judicial principles by the trial court tends to be dabbled with by the appellate court under considerations which are not relevant. In the circumstances, the writ petition is allowed, the appellate order dated 23-03-2016 in Miscellaneous Civil Appeal No. 11 of 2016 passed by District Judge-2, Bhusawal stands set aside. Rule is made absolute accordingly in terms of prayer clause 'D'. It is expected that the suit would be expeditiously proceeded with. Writ petition stands disposed of.

(SUNIL P. DESHMUKH)
JUDGE