

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

WRIT PETITION NO. 626 OF 2016

Gurunath Dashrathsa Katwe & Anr.	...	Petitioners
V/s.		
Abhimanyu Bhagwan Gaikwad	...	Respondent

- Mr.Anand S. Kulkarni for the Petitioners.
- Mr.Sumit S. Kothari for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 6th FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the Petitioners and the Respondent.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 22nd June 2015 passed by the District Judge-3, Solapur, thereby allowing the Civil Miscellaneous Appeal No.70 of 2015.

3] The said appeal was preferred by the Respondent herein against the order dated 19th March 2015 passed by 6th Joint Civil Judge Junior Division, Solapur, below Exhibit-5 in Regular Civil Suit No.736 of 2014.

4] The application at Exhibit-5 in the said suit was preferred by the present Petitioners/the original Plaintiffs to restrain the Respondent from using the road which was constructed by the Respondent towards the northern side of the suit property and from obstructing him from taking crops in the said area.

5] The case of the Petitioners is that the area admeasuring 1-Hectare 14-R out of Gat No.251 described in detail in paragraph (1) of the plaint, was purchased by them by virtue of registered sale-deed on 11th August 2000. When they purchased the suit land, there was no road in existence from the northern part of the suit property. However, recently, the Respondent has started creating such east-west road unauthorizedly and illegally. According to the Petitioners, Respondent is having a separate access to the public road from his land bearing Gat No.247. The said public road is used by other neighborers also. Despite that, as Respondent is passing through the Petitioners' land and has constructed such kachha road in January-2013, initially the Petitioners approached the Tahsildar. The Tahsildar had made enquiry, call for the report of the Circle Officer and has held that the road constructed in the suit property is illegal. However, the Talsildar directed both the parties to approach the Civil Court. Hence,

in August-2014, the Petitioners filed the suit in the trial Court along with application for interim injunction.

6] This application for interim injunction came to be resisted by the Respondent, contending *inter alia* that this road is in existence since last more than 50 years and they are using the same since then. It was also contended that this road was damaged due to rain and hence it was repaired. Taking advantage thereof, the Petitioners have filed this false suit.

7] The trial Court after hearing learned counsel for both the parties, was pleased to hold that except the affidavits of witnesses filed on record by the Respondent there was no other documentary evidence to show the existence of the road and hence, the Petitioners were entitled to protect their possession in the suit property. The trial Court has, accordingly, allowed the application for interim injunction.

8] Against the said order, the Respondent, herein approached the Appellate Court by filing Civil Miscellaneous Appeal No.70 of 2015. The Appellate Court has, vide its impugned judgment and order, reversed the finding of the trial Court and allowed the Civil Miscellaneous Appeal, thereby setting aside the order of interim injunction passed by the trial Court.

9] While challenging the order of the Appellate Court, the submission of learned counsel for the Petitioners is that the trial Court has rightly considered the order passed by the Tahsildar, which was based on the report of the Circle Officer, showing that there was no such road in existence and the Respondent has constructed the said road illegally. It is further submitted that the trial Court has also found that the affidavits and counter affidavits are filed by both the parties for proving the existence and non existence of such road. Hence, evidence of affidavits being word against word, the trial Court was right in not giving much weightage to them. It is urged that the Appellate Court has however, interfered with the discretion exercised by the trial Court on the basis of the material produced before it and has substituted its own view, holding that as the road was in existence since prior to January 2013 and suit is filed in August-2014, by filing the application for interim injunction, the Petitioner is seeking the relief of mandatory injunction, thereby directing the Respondent to remove such road and not to use it. Hence, the Appellate Court allowed the Respondent's appeal and vacated the order of interim injunction, which order, according to learned counsel for the Petitioners needs to be quashed and set-aside.

10] Per contra, learned counsel for the Respondent has supported the said order by pointing out to the affidavit of the predecessor in title to the present Petitioners and also to the very fact that the suit is filed at a very belated stage and by this application for interim injunction, the Petitioners were seeking the relief of interim mandatory injunction.

11] In the light of these submissions advanced by learned counsel for both the parties, if the material on record is scrutinized, then it can be seen that, admittedly since prior to January-2013, according to the own case of the Petitioners, the road was constructed and was being used by the Respondent. The suit is filed by the Petitioners, however, one and half year thereafter in August-2014. Thus, the Appellate Court has rightly held that, by this application for interim injunction, the Petitioners want indirectly the relief of removal of such road and non user thereof and such relief cannot be granted at the interim stage.

12] Moreover, the order passed by the Appellate Court also shows that the predecessor in title of the Petitioners, namely Amin Sayyad has filed affidavit stating that this road was in existence since 1970, when he has purchased the said suit property from its earlier

owner, by registered sale-deed. This affidavit of predecessor in title of the present Petitioners assumes significance. Even if all other affidavits of adjoining occupants are ignored, considering the affidavit of the predecessor of the Petitioners, it has to be held that the road was in existence and the Respondent has merely repaired it. Hence, at the interim stage, the relief of injunction as claimed by the Petitioners, restraining the Respondent from using the said road cannot be granted. The Appellate Court has, therefore, rightly set-aside the order of the trial Court granting such relief.

13] The submission of learned counsel for the Petitioners is however to the effect that the Appellate Court has not considered the order passed by the Tahsildar relying upon the report of Circle Officer, that this road was recently constructed and it was not in existence and it was also not shown in the village map.

14] All these contentions, whether it was recently constructed or whether it was in existence, are a matter of evidence. At this stage, one has to see that since about one and half year prior to filing of the suit itself, the road was in existence and the Respondent was using the same. If it is so, then whether at the interim stage, the Respondent can be stopped from using the same, is the question and it has to be held

that the Appellate Court has rightly answered the said question holding that the suit is filed at the belated stage and therefore, such relief of interim injunction, which is in the nature of mandatory injunction, cannot be granted.

15] Therefore, the impugned order passed by the Appellate Court being just, legal and correct; no interference is warranted therein. Writ Petition stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]