

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1115 OF 2018**

Shakuntala Shrirang Naik & 3 Others Petitioners
Versus
Veer Hanuman Devalaya, Thr. its
Present Managing Committee Respondent

Mr. Preetam Talaulikar, Advocate for the Petitioners.

Mr. Ashwin D. Bhobe with Ms. Annelise Fernandes, Advocates
for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 13th June, 2019

ORAL ORDER:

The challenge in this petition is to the judgment and order dated 18.07.2018, passed by the learned Additional Collector, North Goa in Case No. AC-II/MCA/REV/5/2015. By the impugned judgment, the learned Additional Collector, has allowed the revision application filed by the respondent and has set aside the order dated 08.07.2015, passed by the learned Joint Mamlatdar, under Section 4 of the Goa, Daman and Diu Mamlatdar's Court Act, 1966 (Act, for short), on an application for temporary injunction, filed by the petitioners.

2. The petitioners had approached the learned Mamlatdar, under Section 4 of the Act, for an injunction

restraining the respondent from interfering with the suit motorable access and from obstructing the petitioners from using the access in any manner. The petitioners also sought a direction to the respondent to forthwith unlock the two gates, which the respondent has erected on the suit access, thereby permitting the petitioners a free and unobstructed access to the petitioner's property, being survey no. 279/2 of village Morambi-O-Grande. According to the petitioners, they have been using the customary access through the adjoining property bearing survey no. 278/1, which the respondent has obstructed. Pending the main application, the petitioners sought temporary injunction both, prohibitory and mandatory in the aforesaid terms.

3. The learned Mamlatdar, by an order dated 08.07.2015, granted the application in the following terms:

- 1) *The opponent is directed to handover the set of keys of the locks on the gates of suit motorable access through open space to the applicant immediately till the disposal of main application.*
- 2) *The applicant after entering and going out of the gate should put lock again and no third party should be allowed.*
- 3) *The applicant will use the said motorable access to transport agricultural produced*

and for taking the equipment, implements for carrying out agricultural, cultivation work and allied activities pertaining to the said property, including bullock carts, ploughs, tractors.

- 4) *In case any misuse or violation from the applicant the respondent shall bring to the notice of this Court.*

4. The respondent challenged the same before the Additional Collector in Case No. AC-II/MCA/REV/03/2015. Incidentally, the petitioners also filed a revision application against the impugned order being Case No. AC-II/MCA/REV/5/2015. The learned Additional Collector decided both these revision applications by separate judgment and order dated 18.07.2018. The learned Additional Collector allowed the revision application, filed by the respondent and the order passed by the Joint Mamlatdar, has been set aside. Feeling aggrieved, the petitioners are before this Court.

5. I have heard Mr. Talaulikar, the learned Counsel for the petitioners and Mr. Bhobe, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

6. It is submitted by Mr. Talaulikar, the learned Counsel for the petitioners that the access through plot no. 9-A and plot no. 10-A, is only a pathway, while the suit access, which is through the open space of the layout is a motorable access, which the petitioners have been using since last many years. The learned Counsel has pointed out that the said open space is for enjoyment of the purchasers of the various plots and has also been used by the petitioners as an access. He has referred to the rough sketch (Exhibit-A to the application), in order to demonstrate that the access (which is shown by brown colour), connects with 5 metres wide layout road on the northern side and land survey no. 279/2 on the southern side. It is submitted that the Mamlatdar after extensive consideration of the material on record had rightly granted the application and the order passed by the Mamlatdar ensured that the interests of the petitioners as well as the respondent are protected, in as much as, the only reason shown by the respondent for erecting the gates and putting a lock thereon is on account of nuisance being created by some unidentified persons gathering in the open space. It is submitted that if, both the parties have a key to the gate, the access can be conveniently used and at the same time, the apprehension expressed by the respondent, can also be taken care of. It is submitted that the learned Additional

Collector was not justified in interfering with the said order.

Mr. Talaulikar, the learned Counsel for the petitioners has placed reliance on the decision of the Gujarat High Court in the case of **Lakshmanbhai Ukabhai Parmar & Another Vs. Karmsibhai Lalabhai Parmar & Others (2014) 55 (3) GLR 2148.**

7. Mr. Bhobe, the learned Counsel for the respondent has supported the impugned order. It is submitted that the respondent is the purchaser of plot nos. 9-A and 10-A, from out of the said layout and there is a Hanuman temple in the said plots. It is submitted that the access, as claimed by the petitioners was never used by the petitioners. It is submitted that there is a recital in the sale deed, of the various purchasers of layout plots, to the effect that the open space is for common enjoyment, which has to be restricted to such purchasers and not to strangers as petitioners. It is submitted that there was nuisance being caused on account of use of open space, which required the respondent to put the gate. He submitted that the Additional Collector has rightly found that the recital in the sale deed cannot enure to the benefit of the petitioners and the impugned order does not need any interference.

8. I have considered the rival circumstances and the submissions made.

9. *Prima facie*, at this stage, it appears that the suit access, which is claimed as a motorable access, is claimed from right middle of the open space of the layout in survey no. 278/1. The respondent is the owner of plot nos. 9-A and 10-A. The open space of the suit access is the part of the bigger layout. The recitals in the sale deed, about the common enjoyment of the open space, would *prima facie* be restricted to the purchasers of the various plots in the layout. The disputed access is not shown in the survey plan, which aspect has been noticed by the learned Additional Collector. *Prima facie*, at this stage, there is no material produced to show the existence of the suit access. The learned Mamlatdar, although, has noticed the three pre-requisites for grant of temporary injunction, namely, *prima facie* case, balance of convenience and irreparable loss and injury, has failed to examine whether, the petitioners have shown *prima facie* case of existence of the suit access. The learned Mamlatdar has merely made an attempt to find out a workable solution in the matter. It is evident that unless and until the existence of *prima facie* case is made out, which is the first and foremost condition for grant of injunction,

the Mamlatdar could not have passed the order dated 08.07.2015.

10. Mr. Talaulikar, the learned Counsel for the petitioners has placed reliance on the decision of the Gujarat High Court in the case of **Lakshmanbhai Ukabhai Parmar** (supra), in order to submit that the Mamlatdar, under the provisions of the Act, can entertain a claim of access, on the basis of a right of easement. There cannot be any manner of dispute with the said proposition. In the case of **Lakshmanbhai Ukabhai Parmar** (supra), the constitutional validity of the Mamlatdar's Courts Act, 1906 was challenged. One of the contentions raised in support of the plea was that the right of easement, being a mixed question of law and fact, the same could not be adjudicated by the Mamlatdar in a summary manner. The Court while repelling the said contention held that there is no bar for such adjudication by the Mamlatdar as the Mamlatdar would be a Court within the meaning of Section 3 of the Evidence Act as the Mamlatdar is legally authorized, under the said Act to take evidence.

11. I have already held that *prima facie*, at this stage, the petitioners have not shown that they have been using the suit

access by way of easement for the prescribed period. The question would evidently depend upon the trial of the main application before the learned Mamlatdar, which is still pending.

12. Considering the overall circumstances, I find that no case for interference is made out. The petition is dismissed, with no order as to costs. The learned Mamlatdar shall decide the main application as expeditiously as possible and preferably within a period of six months from the receipt hereof. Needless to mention that the learned Mamlatdar, while deciding the main application, shall not be influenced by the observations of the Additional Collector or this Court, which are limited for the purpose of deciding the application for temporary injunction.

C. V. BHADANG, J.

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