

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8779 OF 2021**

Shobhadevi Dindayal Jhanwar

...Petitioner

Versus

Vitthalrao A. Naik Nimbalkar (Sarkar) Co-
operative Gruh Nirman Sanstha Ltd. & Ors.

...Respondents

Mr. Tejpal S. Ingale, for the Petitioner.

Mr. D.V. Sutar, with Nirmal Pagaria, Sayli Thakur, & K. Garg,
for Respondent No. 1.

Mr. V.S. Nimbalkar, AGP, for Respondent Nos. 2 to 5.

CORAM: Smt. Bharati Dangre, J.

DATED: 9th December 2021

P.C.:-

1. By the present Writ Petition, the Petitioner/original Plaintiff assails the legality and validity of the impugned Judgment and Order dated 01.04.2021 passed by the District Judge – 1, Ichalkaranji in Miscellaneous Appeal No. 55 of 2019, by which the Appeal was allowed and it set aside the order passed by the Trial Court below Exhibit 5 on 08.11.2019

in Regular Civil Suit No. 216 of 2016, granting temporary injunction in favour of the Plaintiff.

2. I have heard learned Advocate Mr. Ingale for the Petitioner and learned Advocate Mr. D.V. Sutar for Respondent No. 1. Respondent Nos. 2 to 5 are represented by learned Advocate Mr V.S. Nimbalkar.

3. The dispute involved in the Petition revolve around, a right to user indicated with letters A-B-C & D in the map annexed to the plaint in the suit instituted by the Plaintiff, with the width of 20 feet situated towards the southern of the Plaintiff's land bearing Gat No. 659. The Plaintiff claims that he purchased the land situated in Gat No. 659 admeasuring 1 Hectare 15 Are by registered Sale Deed dated 06.02.2003 with an intention to set up a small scale industry in the form of a textile unit and he purchased the land after being satisfied that it has an access road from the main road passing from the southern side land of Gat No. 642. The Plaintiff claim that the suit way is in existence since last more than 70 years and which is reflected in the Village Map and the old map of the year 1870 that is Patwari Poostak and Tipan Utara shown by dotted line. The Defendant No. 1 is the purchaser of Gat No. 642 and 642-A situated towards the southern side of the Plaintiff's land and the said piece of lands were purchased vide registered Sale Deed dated 10.08.2009 and 11.12.2009

respectively. The Defendant No. 1 is the Housing Society, which purchased the said land with an intention of tapping its potential by constructing residential premises for its members.

4. The case of the Plaintiff as set out in the plaint where he sought permanent injunction against Defendant Nos. 1 to 5 from restraining the Plaintiff and those using the right of way for approaching their respective properties when it was revealed to him that the Defendant No. 1 had forwarded its plan for sanction to the Assistant Director of Town Planning (**ADTP Kolhapur**) and tentative sanction was granted on 25.06.2015 on the erroneous lay-out submitted by the Defendant No. 1-society demarcating residential plot on the area of the existing suit way. The Plaintiff also send notice through his Advocate to the Defendant Nos. 2 to 5 inviting their attention to the erroneous plan as submitted by the Defendant No. 1-society and requested for necessary corrections to be carried out to the tentative sanction granted to the lay-out.

5. In the suit, the Plaintiff filed an application below Exhibit 5 seeking temporary injunction, restraining the Defendants from obstructing the user of the suit way by the Plaintiff during the pendency of the suit.

By an order dated 08.11.2019, Exhibit 5 was allowed

and temporary injunction came to be granted in favour of the Plaintiff by recording that there exist a way passing through Gat No. 642 belonging to the Defendant No. 1 and the Plaintiffs have a right of user, thereby rejecting the contention of the Defendant No. 1 that the Plaintiff is seeking a right of way on a road, which was never in existence. The learned Trial Court on perusal of the Affidavits of witnesses who had deposed that the Plaintiff, her predecessors and peoples in the vicinity are using the way which exists between the plot of the Plaintiff and that of Defendant No. 1 and in utter ignorance of the said access road, the Defendant No. 1 is attempting to disturb their easementary right of way by allotting plots to its members. Recording a prima facie case and balance of convenience in favour of the Plaintiff, injunction came to be granted.

This order is challenged in Appeal which is upset, by allowing the Appeal by recording that the tentative lay-out submitted by Defendant No. 1 has been sanctioned by the Planning Authority but it is not a final one and since on the lay-out being sanctioned, the Plaintiff can always file an Appeal, which would be an efficacious remedy, the Trial Court is found to be in error.

6. The learned Counsel Mr. Ingale has invited my attention to the 7/12 extract of Gat No. 642 when the property was

standing in the name of the predecessor of Defendant No. 1 and it is accompanied by a map reflecting the location of Gat No. 642 as well as the location of Gat No. 659 belonging to the Plaintiff where a dotted line is clearly appearing. Another document showing the property of Deshbhakta Ratnappanna Kumbhar Panchganga Sahakari Sakhar Karkhana Ltd., owner of Gat No. 642 placed at page 65 of the paper-book also reflect a 20 mtr. wide road demarcating the property of the Plaintiff and the Defendants. Apart from this, another document placed at page 117 which is the lay-out plan of Gat No. 642 sanctioned in 2009, also indicate existence of the 20 mtr. wide road on the northern side of Gat No. 642 and to the southern side of the property of the Petitioner.

7. The submission of the Counsel for the Respondent that this right of way has now become extinct cannot be accepted since the Defendants have failed to produce the recent Village Plan showing that the right of way has been done away with. The Google picture based on Google map placed on record by the Petitioner clearly reflect a road to the southern side of the plot of the Petitioner and on the northern side of the plot of the Defendant which he is intending to develop.

8. It is informed that the development plan is pending for its finalization before the Sub-Divisional Officer and at that time the Village Plan would be considered. It is to be noted

that the proposed plan of Gat No. 659 sanctioned on 6.05.2009 placed at page 53 of the record clearly indicate 12 mtr. wide existing road on the southern side of the land of the Plaintiff which provided him an access to his plot, i.e. Gat No. 659. While granting the sanction in Gat No. 642, i.e. the land of the Defendant, the lay-out of the Plaintiff will bear significance and since the benefit cannot be taken by the Defendants of the provisional sanction to its lay-out where the existing road is given amiss.

9. The Appellate Court has clearly erred in disturbing the finding of the Trial Court which was based on the existing Village Map and the sanction plan of the lay-out of the Plaintiff is merely on an assumption that the provisional sanctioned lay-out plan of the Defendant No. 1 do not indicate the right of way. Evidence will have to led by the Defendants to establish that the existing right of way has been done away with in the subsequent Village Plan by the Planning Authorities. In absence, the material brought on record by the Plaintiff establish a prima facie case in his favour. Irreparable loss would be caused to him if he is not allowed to use the right of way which is included in the sanctioned plan. The balance of convenience being in favour of the Plaintiff, which has demonstrated a prima facie case, the injunction granted by the Trial Court deserve to be restored.

10. Needless to state that the Defendant No. 1 is entitled to get final lay-out sanctioned of his property, subject to the existence of the right of way as shown in the existing Village Plan by the dotted lines.

11. With the aforesaid observations, the Writ Petition is allowed. The impugned order is quashed and set aside by restoring the temporary injunction in favour of the Plaintiff.

(Smt. Bharati Dangre, J.)