

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.3252/2021

1. Varco Realities Private Limited,
a Company duly registered and
incorporated under the provisions of the
Companies Act, 1956 having its office at
Laxmi Residency, Behind Tilik Samark,
Mahadeo Temple Road, Yavatmal,
represented through its Director
Shri Rajesh s/o Ramswareup Gupta (Bhoot),
aged about 45 years, Occupation:- Business,
R/o Rajendra Nagar, Yeotmal – 445001.
2. Atul s/o Sureshrao Mangulkar,
aged about 45 years, Occ- Business,
r/o Yeotmal, Tah & Dist. Yeotmal. **PETITIONERS**

// VERSUS //

1. Mahila Sewa Mandal, A Public Trust
registered and incorporated under the
provisions of Maharashtra Public Trust
Act, 1951 and a Society registered
under the provisions of Societies
Registration Act, through its Secretary,
having its office at Mahila Ashram,
Sevagram Road, Wardha.
2. The President, Mahila Sewa Mandal,
having its office at Mahila Ashram,
Sevagram Road, Wardha.
3. The Secretary, Mahila Sewa Mandal,
having its office at Mahila Ashram,
Sevagram Road, Wardha.

RESPONDENTS

WITH

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Sevagram Road, Wardha. **RESPONDENTS**

Mr. Devendra V. Chauhan, Advocate for petitioners in both petitions.
Mr. S.P. Dharmadhikari, Senior Advocate along with Mr. Piyush S.
Kadam,
Advocate for respondent Nos.1 to 3 in both petitions.

CORAM : AVINASH G. GHAROTE, J.
DATED : 16/11/2021

ORAL JUDGMENT :

1] Heard Mr. D. V. Chauhan, learned counsel for the
petitioners and Mr. S. P. Dharmadhikari, learned Senior Advocate along
with Mr. Piyush Kadam, learned counsel for respondents.

2] **Rule.** Rule made returnable forthwith. Heard finally by consent of the learned counsel appearing for the parties.

3] The petitioners are the original plaintiffs and the respondents are the original defendants, before the Trial Court. For the sake of convenience, the parties are referred by the status they have before the Trial Court.

4] The plaintiffs have filed a suit for claiming a relief of permanent injunction restraining the defendants, their agents or anyone claiming on their behalf from creating obstruction, hurdle to the plaintiffs and its beneficiaries and plot owners of their layout from developing, using, access to the alleged 12 meters road shown in letters FGHIJKLMNO in the plaint map, being Regular Civil Suit No.212/2019.

5] An application under Order XXXIX Rule 1 and 2 of the C.P.C. also came to be filed by the plaintiffs seeking interim injunction for restraining the defendant No.1 from causing any obstruction in the development, use and access of the road. A counter-claim was filed by the defendant No.1 seeking a declaration that the plaintiffs have no right over the alleged suit 12 meters way/road and further permanently restraining them from using the same. An application under Order XXXIX Rule 1 and 2 of the C.P.C. was also filed by the defendants before

the learned Trial Court which is Ex.16. The learned Trial Court by an order dated 07.12.2019 rejected Exh.5 and allowed Exh.16.

6] Being aggrieved by the same, two Misc. Civil Appeals bearing M.C.A. Nos.36 of 2019 and 37 of 2019 came to be filed by the plaintiffs. The learned District Judge-1, Wardha by the common Judgment dated 18.08.2021 has dismissed both the appeals, leading to filing the present petitions.

7] Mr. Chauhan, learned counsel for the plaintiffs submits that the defendant No.1 was the original owner of the property bearing Survey No.47, situated at Mouza Chinchala bearing Mouza No.143, PH No.40 within the limits of Gram Panchayat, Chinchala, Tahsil and District Wardha. By a sale-deed dated 31.10.2015, an area admeasuring 14 acres from and out of the land of Survey No.47 came to be sold to the plaintiffs for a consideration of Rs. 28,21,00,000/-. The balance area remaining out of Survey No.47, came to be renumbered as Survey No.47-P. There is no dispute between the parties regarding the execution and registration of the deed of sale which was done after obtaining requesting permission under Section 36 of the Maharashtra Public Trusts Act.

8] It is the contention of Mr. Chauhan, learned counsel for the plaintiffs, that on 02.06.2015 an application had already been filed by the defendant No.1 for conversion of the user of Survey No.47 to non-agricultural use, which came to be allowed by the Sub-Divisional Officer, Wardha by his order dated 29.09.2015, along with the map. Mr. Chauhan, learned counsel for the plaintiffs contends that this map which is also signed by the defendant No.1-Trust, indicates a 12 meters wide road at the western portion of the map which is indicated by the shaded lines. This map thereafter came to be revised by the learned Sub-Divisional Officer, Wardha by his order dated 24.06.2016.

9] Thereafter, a Memorandum of Understanding (hereinafter to be referred as “MOU”) came to be executed between the plaintiffs and the defendant No.1 on 01.05.2016, whereunder, certain terms and conditions were agreed by the parties, Clause No.(iii), of which related to the responsibility of the plaintiffs to construct 12 meters wide road in the area demarcated by the letters “f g h i j k l m n o” in the map annexed with said MOU. It is contended that under this MOU certain rights were given to the plaintiffs for user of the road, which, on account of the sanction of the layout plan by the Sub-Divisional Officer as approved by the Town Planning Authority was converted into a public road. As the use of the said road was sought to be obstructed by the defendant No. 1, a suit came to be filed claiming a decree for permanent injunction for restraining the defendants from creating any obstruction

or any hurdle to the plaintiffs and their beneficiaries from developing, using, access of the 12 meters wide road as shown by letters “f g h i j k l m n o” in the plaint map.

10] Mr. Chauhan, learned counsel for the plaintiffs further contends that the question of violation of the MOU dated 01.05.2016, was a matter to be decided at the trial, and the plaintiffs and their beneficiaries could not be restrained from developing, using and accessing the said road. He further submits, that since the MOU dated 01.05.2016 granted the plaintiffs a right as contemplated by Clause (iii) therein, the same could not have been taken away without due process of law, and therefore, the action on part of the defendants in causing obstruction was clearly unwarranted. He submits that the learned Trial Court has not appreciated the rights granted to the plaintiffs, under the MOU dated 01.05.2016 in a proper and appropriate manner and the Appellate Court does not even go into the issue altogether. He submits, that since the execution of the MOU dated 01.05.2016 was not disputed, the Courts below ought to have ruled in favour of the plaintiffs.

11] Mr. Dharmadhikari, learned Senior Counsel for the defendants, submits that both the Courts have rendered a concurrent finding of fact and relying upon ***Wander Ltd. and another Vs. Antox India P. Ltd, 1990 (Supp) SCC 727***, contends that the scope of interference by this Court in exercise of writ jurisdiction, was

extremely limited and was restricted to a case being made out as to the discretion having being exercised arbitrarily, capriciously, perversely or the settled principles of law regulating grant or refusal interlocutory applications have been ignored. It is also held therein that if the discretion has been exercised in a reasonable and judicial manner the fact that a different view was possible would not justify interference.

12] He further invites my attention, to the averments in para no.8 of the plaint, and contends that the case of the plaintiffs is based upon a position, that due to sanctioning of the layout on 22.06.2016, the concerned road, had become a public road and therefore, was accessible to one and all. Reliance is also placed on para no.12 of the plaint in support of the said contention. He further submits, that the revised plan, which ultimately came to be sanctioned on 22.06.2016 by the Sub-Divisional Officer, Wardha, was submitted by the plaintiffs and not by the defendant No.1 which is indicated by the absence of the signature of the defendant No.1 on the said plan and therefore was not binding upon the defendants. He further submits that even considering the MOU dated 01.05.2016 the obligation casts upon the plaintiffs vide Clause (iii) therein was not fulfilled as no road was constructed by the plaintiff as agreed thereto and since the plaintiffs did not fulfil their obligation under the MOU dated 01.05.2016 the same came to be cancelled by the defendant No.1 by the communication dated 20.04.2019, and therefore, there was no legally enforceable right

available with the plaintiffs. He further submits that the land under the so called road belonged to the defendant No.1 and whatever rights were being claimed, were only on account of the sanctioned map dated 22.06.2016 and the MOU dated 01.05.2016. He further submits that the said land which is claimed as a road still is an agricultural land, as the N.A. order dated 20.11.2015, did not take into consideration the area which is claimed to be the area under the road nor was the layout plan sanctioned in respect of the so called road. He further submits, that the defendant No.1, therefore had every right to erect the compound wall over the western boundary of the land sold to the plaintiffs under the sale-deed dated 31.10.2015, as there were Educational Institutions run by the defendant No.1 upon the balance land of Survey No.47 and the adjacent land of the Survey No.48 and it was necessary to physically separate the land sold to the plaintiffs from the land owned by the defendant no.1, so as to avoid any complications and disputes in the future.

13] Mr. Chauhan, learned counsel for the plaintiffs in rebuttal submits, that the plea regarding Educational Institutions and their safety was never a part of the pleadings before the learned Courts below. He further contends, that the original map was submitted under the signature of the owner/defendant No.1, and therefore, there was no need to obtain signature of the defendant No.1 on the revised map. Relying upon ***Ambalal Sarabhai Enterprise Limited Vs. KS***

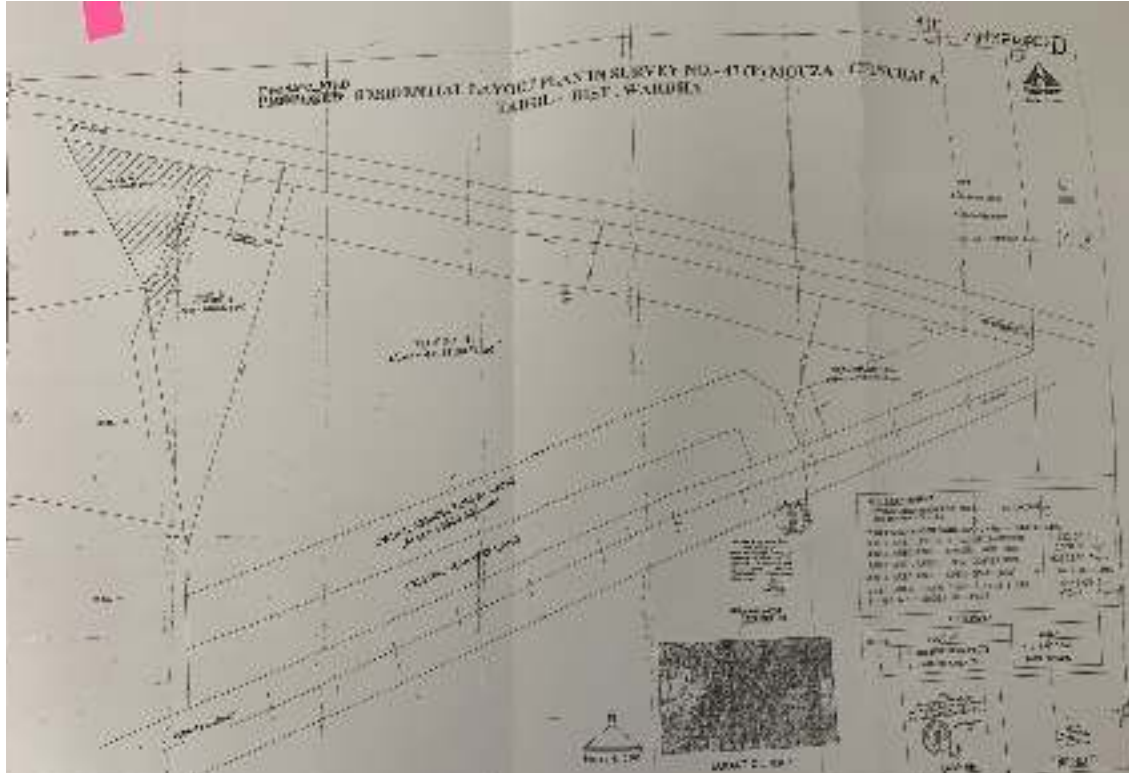
Infraspace LLP Limited and another, (2020) 5 SCC 410, he submits, that the Hon'ble Apex Court has held that ***Wander Ltd. and another*** (Supra) prescribes a rule of precedence only and much will depend on the facts of the case.

14] As held in ***Ambalal Sarabhai Enterprise Limited*** (supra) that ***Wander Ltd. and another*** (Supra) prescribes a rule of precedence only and much will depend on the facts of the case, it is necessary to look into the facts of the case and determine whether the learned Courts below on its basis were correct in arriving at the conclusion that the plaintiffs had not made out a case for grant of temporary injunction and that the defendant no.1, had so done.

15] After considering the rival contentions, it is apparent that the sale by virtue of the sale-deed dated 31.10.2015, in favour of the plaintiffs, was in respect of 14 acres of land only and not otherwise. The land upon which the alleged 12 meters road is claimed, was not the subject matter of the sale deed dated 30.10.2015. That being the position, no right can be claimed by the plaintiffs, in respect of the alleged 12 meters road, which admittedly is not part and parcel of the sale-deed dated 30.10.2015, as the same, falls beyond the boundary of the land purchased by the plaintiffs. Admittedly, there is no clause in the sale-deed dated 30.10.2015 regarding the defendant No.1, providing any road to the plaintiffs. Thus, any entitlement to the alleged road, has

to be made out, on the basis of something which is beyond the sale-deed. For this purpose, reliance is placed by Mr. Chauhan, learned counsel for the plaintiffs, on two positions (i) that because of the sanction of the layout plan on 29.09.2015 and revised sanction on 22.06.2016, there came into existence 12 meters wide road beyond the western boundary of the land purchased by the plaintiffs and (ii) under the MOU dated 01.05.2016, the plaintiffs were accorded right to construct and use the road.

16] A perusal of the plaint in R.C.S. No.212 of 2019 would indicate that in Para nos. 8 and 12 therein, a plea has been raised that the said road is a public road which as indicated above, is based upon the sanction dated 29.09.2015 and revised sanction dated 22.06.2016. Admittedly, the plan for sanction was initially submitted by the defendant No.1 which came to be returned back on 21.07.2015 by the Town Planner, Wardha, which would indicate that there was no sanction accorded to the same. It was then again submitted by the defendant No.1 and it was sanctioned on 29.09.2015 and the position therein can be depicted as under :



A perusal of this plan would indicate that the alleged road is shown only part of the way from North to South and is beyond the western boundary of the land purchased by the plaintiffs and is wholly within the balance land of survey no.47 (renumbered as survey no.47-P) owned by the defendant no.1.

17] Thereafter, admittedly a revised map has been submitted by the plaintiffs/petitioners which came to be sanctioned by the order dated 22.06.2016, which can be depicted as under :

18] The above being the position, any road shown in the said revised plan, would clearly be only at the behest of the plaintiffs without the consent and concurrence of the defendant No.1. The contention that since the original plan contained the signature of defendant No.1, it was not necessary, that the revised plan should also bear signature of the defendant No.1, is clearly fallacious for the reason that the revised plan was not restricted to the land sold under the sale-deed dated 30.10.2015, but was in respect of an area much more than that which is indicated by the 12 meters wide road shown running beyond and adjacent to the western boundary of the land purchased by the plaintiffs, to which admittedly the plaintiffs had no title. Since the revised sanction affected the land owned by the defendant No.1, any sanction thereto could not have been awarded unless consented by the defendant No.1. This being the position, the sanctioned layout plan, in so far as it shows a 12 meters wide road towards the western boundary of the land purchased by the plaintiffs by the sale-deed dated 31.10.2015, cannot be held to be binding upon the defendant No.1. Holding otherwise would lead to a situation, where an owner of a property, though not a signatory to a plan submitted for sanction, would be held bound by some third person showing the land of the owner, as being affected by certain rights, not assented to by the owner.

19] Merely because the sanctioned plan dated 29.09.2015, shows a 12 meters wide road towards a part of the western side of the

land purchased by the plaintiffs by the sale-deed dated 31.10.2015, the same for the reason, as stated above, cannot be termed as a public road. To be termed as a public road, the terms of the sanction, would require the road to be termed as such, and therefore, open to the public at large or the land underneath the road vesting in the Public Authority, by the terms of the sanction, so as to make it available and accessible to the general public. No such term in the sanction has been brought to my notice, in view of which, the above described road cannot be termed as a public road, even on the basis of the sanction dated 29.09.2015.

20] That brings me to the consideration of the MOU dated 01.05.2016. The execution of this MOU is not disputed between the parties. Clause (iii) of this MOU being material is reproduced as under:-

“(iii) The party No.2 shall construct 12 mt. wide road in area F G H I J K L M N O F. The construction cost shall be borne by party No.2 and the said road shall be constructed within a period of six months from today. The said road shall be assessable to both parties and all ownership rights shall vest with party No.1. The party No.2 has to carry out all repairs in future of the said road. The Party No.1 shall not construct any compound wall adjacent to the Area marked as F G H I J K and Party No.2 shall always have free access to the said road.”

This would indicate that even as on 01.05.2016, no road was in existence, as is the position today also, as admitted by the learned counsel for the parties and thus there is only a road on paper, as

indicated above.

21] It is again an admitted position that the plaintiffs in pursuance to this MOU dated 01.05.2016 have not constructed the road, which would indicate that the MOU has not been acted upon by the plaintiffs. It is also the position on record, that by communication dated 20.04.2019, the MOU has been cancelled by defendant No.1. As against this, a perusal of the plaint would demonstrate that the cancellation of this MOU has not been questioned by the plaintiffs and no relief has been sought in R.C.S. No.212 of 2019 in that regard. This being the position, the tenability of a simplicitor suit for permanent injunction, may become questionable. However, since the learned counsel for the parties have not addressed me on this point, I refrain from going into it.

22] The submission that the question of violation of MOU dated 01.05.2016 was a matter to be decided at the trial, would necessarily depend upon the MOU being sought to be enforced, which does not appear to be the case as is apparent from the prayer clause in the suit.

23] The order passed by the learned Trial Court below Exhs. 5 and 16 and the judgment of the Appellate Court, therefore, in my considered opinion cannot be interfered with, as no legal right has been established even on a *prima-facie* basis by the plaintiffs, for the use and access of the alleged non-existent road. That apart, since the road has

not been constructed at all, the question of any hardship to the plaintiffs, on account of its non-use does not arise at all. So also, since the plaintiffs, have failed to act upon the MOU dated 01.05.2016 by constructing the road, the balance of convenience is also not in favour of the plaintiffs. It would be proper for the plaintiffs, to establish any right which they claim, on merits in trial before the learned Trial Court. The defendant no.1, being the admitted owner of the land in question, and in possession thereof, would be fully entitled to ensure its safety and protection. This being the position, I do not see any merit in both the petitions and they are accordingly dismissed. Rule is discharged. There shall be no order as to costs.

24] Mr. Chavan, learned counsel for the plaintiffs makes a request for continuation of the interim order dated 30.08.2021, by which the statement of Mr. Kadam, learned counsel for the defendants was recorded that the defendants shall not proceed with the construction of the boundary wall. Since I have held that the road is not in existence at all and the plaintiffs have no legal right over the land of the alleged road nor a *prima-facie* case has been established for user of the road, on account of failure on part of the plaintiffs themselves to construct the same, I am not inclined to accept the request. The same is declined.

(AVINASH G. GHAROTE, J)