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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9777 OF 2021**

Shri Anant Dinkar Pandhare

..... Petitioner.

V/s

Shri Prasad Pramod Khot

..... Respondent.

Ms. Neeta Karnik for the Petitioner.

Mr. Girish S. Godbole i/b Sumit Kothari and Shon Gadgil for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE : APRIL 13, 2022

P.C.:

1] This Petition is by the Plaintiff to the regular Civil Suit No.52 of 2020, questioning the order passed by the District Judge-1, Sindhudurg, whereby order of grant of temporary injunction below Exhibit-5 delivered on 08/12/2020 is set aside. As a consequence, prayer of the Petitioner/Plaintiff for grant of temporary injunction came to be rejected.

2] Facts necessary for deciding the Petition are as under:-

3] Property described in Schedule-A to the suit is owned by the Petitioner, whereas property described in Schedule-B is owned by Respondent/Defendant.

4] Property mentioned in Schedule-A and Schedule-B was initially

a single piece of land. Petitioner vide registered Sale Deed executed on 08/09/2015 transferred the same in favour of the Respondent. Petitioner has also carved out 6 meters road from the property mentioned in Schedule-A, thereby giving an approach road for property mentioned in Schedule-B. It appears that Respondent has approached Revenue Officer, seeking modification to the NA permission granted on 14/08/2015. Said modification to the NA permission was allowed by Tahasildar vide his order dated 02/06/2020. In the said order, condition is incorporated that the Respondent/Defendant will be entitled for 9 meters approach road instead of 6 meters, which has prompted the Petitioner to file suit in question. Amongst other reliefs claimed in the aforesaid suit are, the construction permission granted on 25/07/2016 is illegal as such same be set aside so also modified NA Order dated 02/06/2020 passed by Tahasildar. It is also prayed that Respondent/Defendant by injunction be restrained from permitting use of road by third party and in case if possession of the excess area is with Respondent/Defendant, same be directed to be given to the Petitioner. A declaration is also sought to demolish the construction which is illegally carried out by the Respondent.

5] In the aforesaid backdrop, vide Application-Exhibit-5, Petitioner sought temporary injunction, thereby restraining the Respondent from using the road in question of 9 meters instead of 6 meters and also from carrying out any changes in the revenue record.

6] Civil Judge, Junior Division, Sawantwadi vide order dated 08/12/2020 allowed the Application and passed an order of temporary injunction restraining the Respondent and 13 other persons who are residing in the property described in Schedule-B from using the suit road. Respondent and 13 others were also restrained from creating any third party interest in relation to the suit road and not to carry out any act which will prejudice rights of the Petitioner. Respondent, feeling aggrieved, preferred Misc. Civil Appeal No.26 of 2020 which was allowed vide order impugned dated 01/02/2021, whereby order granting temporary injunction came to be set aside. Feeling aggrieved, Petitioner/Plaintiff has preferred this Petition.

7] The learned Counsel for the Petitioner Ms. Neeta Karnik would urge that perusal of recitals in the Deed of Conveyance dated 08/09/2015 speaks of the use of the property for private purpose of the Respondent. According to her, Respondent, acting contrary to the recitals therein, has approached revenue authorities who while acting hand in gloves, changed alignment of the approach road passing from property described in Schedule-A to the property described in Schedule-B from 6 meters to 9 meters. He would urge that while passing order of change of alignment, Petitioner was not put to notice by the revenue Revenue Authorities and Revenue Authorities alongwith Respondent has practised fraud, thereby modifying the order of NA permission. So as to substantiate her contention, she would invite my attention to the NA permission order dated 14/08/2015, revised plan permission obtained on 25/07/2016, so

also order dated 02/06/2020 passed by Tahasildar. According to her, aforesaid orders are prima facie, contrary to the provisions of Section 44 of the Maharashtra Regional and Town Planning Act, 1966.

8] Her further contentions are, the Appellate Court has committed an error in recording a finding that Civil Court has no jurisdiction to try and entertain the suit. According to her, to the facts of the case in hand, law laid down by the Apex Court in the matter of *Horil vs. Keshav* reported in **2012 SC 1262** has no applicability. She would further urge that the Appellate Court, merely because different view is possible, ought not to have disturbed the findings of the Trial Court.

9] From the facts of the case in hand, she would urge that irreparable loss will be caused to the Petitioner in case if Respondent is permitted to carve out 9 meters road instead of 6 meters, whereby third party interest shall be created based on the same. As such, according to her, order impugned is not sustainable and same is liable to be quashed and set aside by restoring the order of the Trial Court, thereby granting temporary injunction.

10] Mr. Godbole, learned Counsel for Respondent would oppose the prayer. According to him, order impugned passed by the Appellate Court is based on prima facie interpretation of the recitals that too after plain reading of the covenant. According to him, in case, if in future, suit is allowed, width of the road can always be reduced and Respondent is not going to create any third party interest in the road

in question. He would also urge that Mutation Entries can accordingly be corrected in revenue record at an appropriate stage. As such, he would urge that Petitioner has failed to demonstrate prima facie case, irreparable loss, so also balance of convenience. As such, he has sought dismissal of the Petition.

11] I have appreciated aforesaid submissions.

12] Petitioner has initiated suit on 06/10/2020. In the said suit, the Petitioner has sought declaration that construction permission granted in favour of Respondent on 25/7/2016 be declared as illegal. Such relief is claimed by the Petitioner after a lapse of almost more than four years for which there is no convincing explanation coming forth. Fact remains that recitals in the Sale Deed in express terms provides for right of way of 6 meters for approaching the property described in Schedule-B from the property described in Schedule-A. However, the document also contain a condition which provide for making available 9 meters road by the Petitioner in case if there is such requirement by the Revenue Authorities or Town Planning Authorities for granting sanction under the relevant provision.

13] The said recitals, in my opinion, cannot be restricted to mean that Petitioner has no intention to provide 9 meters road, particularly for the purpose of deciding Application for grant of temporary injunction. Fact remains that the Petitioner has, in fact, agreed for providing 9 meters of road, if so required as per the norms of the Revenue/Town Planning Authorities.

14] In the aforesaid backdrop, if we appreciate nature of rights sought to be created by the Petitioner in favour of the Respondent by the deed of conveyance dated 08/09/2015, what can be noticed is, right of way is already created. The dispute is about the width of such road viz. 9 meters or 6 meters. Creation of easement by the Petitioner-owner in favour of the Respondent is by way of express grant. Petitioner who is a creator of easement, even if continued to be the owner of land, the Respondent will have right of user. Once the Respondent was permitted to use the same, such persons who are claiming right to enjoy the developed property on the plot described in Schedule-B includes right to use and enjoy the approach road. As far as the aforesaid proposition is concerned, support can be drawn from the judgment of Madhya Pradesh High Court in the matter of *Dhananjan Bisen vs. Devi Bai* reported in **AIR 2002 MP 79**. Para 4 of the said judgment is worth referring to. As such, what can be inferred is, it is trite law that once sale is completed in favour of the Respondent, it empowers the Respondent to have beneficial ownership of the property. Right to alienate such property is incidental and inseparable from ownership right accrued to the Respondent. That being so, there cannot be absolute restraint on the right of the Respondent to enjoy the property in accordance with law, if so required by creating third party interest. As far as aforesaid observations are concerned, support can be drawn from the provisions of Section 10 of the Transfer of Property Act. It can be inferred relying on the provisions of Section 8 of the Transfer of Property Act that once easement has become appurtenant to the dominant

tenement, it will *ipso facto* pass on with the dominant tenement and the owner cannot be termed to have rumbling right over the property.

15] As such, right of way created in favour of the Respondent can also be permitted to be enjoyed by such parties who are lawfully claiming such right through the Respondent herein in whose favour, admittedly, title is created by the Petitioner.

16] As regards validity of construction/sanction order dated 25/07/2016 and the corrected NA order dated 02/06/2020 is concerned, unless such orders are set aside, it cannot be said that Respondent is not entitled to use 9 meters of road. In case, if suit of the Petitioner/Plaintiff is decreed, as has been observed hereinabove about non-vesting of title in the Respondent for 9 meters of road, Respondent can always be directed to restrict its use of road to the extent of 6 meters. It is always open for the Trial Court to look into niceties of the orders which are impugned in the Plaint in the backdrop of the appreciation of pleadings and evidence brought on record.

17] What can be noticed is, Petitioner has failed to demonstrate that he will suffer any irreparable loss in case if temporary injunction is not granted.

18] In the aforesaid backdrop, order impugned cannot be faulted with. That being so, Petition fails and same stands dismissed.

(NITIN W. SAMBRE, J.)