

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

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**APPEAL FROM ORDER No. 459 OF 2021
WITH
INTERIM APPLICATION No. 3513 OF 2021
IN
APPEAL FROM ORDER No.459 OF 2021**

Maruti Gabaji Thopate

...Appellant

Vs.

Kailash Gabaji Thopate & Ors.

...Respondents

* * * *

Mr. Rohan Prakash Surve for Appellant

Mr. Prasad B. Kulkarni for Respondent Nos.1 to 3

Mr. S.S. Kanetkar for Respondent No.4

Coram : Sandeep K. Shinde, J.

Dated: 25th APRIL, 2022.

P.C. :

1. Respondent Nos. 1,2 and 3 instituted Special Civil Suit No. 474 of 2019, for partition of the properties described in Schedule-I, II and III of the plaint. Appellant is defendant no.1 in the said suit. Pending suit, plaintiff nos.1 to 3 created right of easement by grant in favour of M/s. Shiv Associates and M/s. V Properties over Suit Property Survey Nos.69/3/2, 69/3/3 and 69/3/5. Appellant/Defendant No.1 in counter-claim sought several reliefs. Amongst which, two reliefs were;

(i) Deed of easement executed by plaintiff nos.1, 2 and 3 in favour of Shiv Associates and M/s. V Properties is not binding on him.

(ii) M/s. Shiv Associates and M/s. V Properties be restrained from acting in furtherance to deed of easement by constructing the road through the land Survey Nos.69/3/2, 69/3/3 and 69/3/5.

. M/s. Shiv Associates and M/s. V Properties have been impleaded as Respondent Nos.4 and 5 in the counter-claim.

2 Pending counter-claim, appellant sought interim relief to restrain Shiv Associates and M/s. V Properties from acting in furtherance to deed of easement dated 18th July, 2018.

3 Learned trial Court though restrained the plaintiffs from creating third party rights in the Suit Property, refused to restrain M/s. Shiv Associates and M/s. V Properties from constructing the road through land Survey Nos.69/3/2, 69/3/3 and 69/3/5.

4 Feeling aggrieved by that order, this Appeal is preferred.

5 Question that falls for consideration is, whether creation of right of easement by grant vide deed of easement dated 18th July, 2018, causes creation of interest in the Suit Property.

6. Section 6 of the Transfer of Property Act reads as under;

“6. What may be transferred-Property of any kind may be transferred, except as provided by this Act or by any other law for the time-being in force;

a.---

b.----

c. An easement cannot be transferred apart from the dominant heritage.”

In the case of **Musunoori Satyanarayana Murti v. Chekka Lakshmayya and Ors. AIR 1929 Madras 79**, it was held that ‘the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by Section 54 of the Transfer of Property Act, 1882 and, therefore, provisions of the Transfer of Property Act has no application to the creation of easement. Section 6(c) of the Transfer of Property Act

contemplates that existing easement cannot transferred apart from dominant heritage. Therefore, prima-facie, the deed of easement is a creation of easement and not a transfer of existing easement.

7 Thus, in my view, the order impugned requires no interference. However, in consideration of the facts of the case, learned Civil Judge, Senior Division, Pune, shall make an endeavour to dispose of Special Civil Suit No.474 of 2019 expeditiously.

8 Appeal is dismissed along with application therein.

(Sandeep K. Shinde, J.)