

ISM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 2480 OF 2022

**VIJAYKUMAR SURESHRAO PANDIT
AND OTHERS**

....PETITIONERS

V/s.

IMAMSO MOHODDIN SHETSANDI AND ANR

.....RESPONDENTS

**Mr. Nikhil Wadikar a/w Komal Bhoir, Faiza Shaikh and Malhar Pawar
Advocate for Petitioners**

Mr. Sarang S. Aradhye Advocate for Respondent nos. 1 & 2

CORAM : NITIN W. SAMBRE, J.

DATE: MAY 2, 2022.

P.C.:

1) This Petition is by Defendants to R.C.S. No. 620/2021 which is for injunction based on title questioning the order passed by District Judge in exercise of powers under Order XLIII Rule 1 (r) of Code of Civil Procedure, 1908 (Hereinafter referred to as 'CPC' for the sake of brevity) thereby granting temporary injunction against Petitioner, restraining them from using dyke between block no. 95 and 100 except pathway and from creating any new road by breaking the said

dyke till final decision of the Suit.

2) Facts necessary for deciding the Petition are as under.

3) Respondent-Plaintiffs claimed to have acquired the title to the property referred above in 1975 by virtue of a sale deed executed in their favour by erstwhile owners. It is claimed that small pathway of 3 ft width passes from South to North which is used by the Petitioner-Defendant for ingress and outgress to the field. Alleging that Petitioner tried to enter the said pathway by using a tractor on 03/03/2021 based on title, aforesaid Suit for injunction came to be initiated.

4) Trial Court vide its order dated 01/10/2021 was pleased to dismiss the prayer for grant of temporary injunction. However, vide order impugned passed in an Appeal at the behest of Respondent, temporary injunction came to be allowed. Hence, this Petition.

5) Heard Mr. Wadikar, learned counsel for the Petitioners and Mr. Aradhya for Respondent nos. 1 & 2. The contentions of learned counsel for Petitioner-Defendants are, order impugned is contrary to record. He would invite attention of this Court to order passed by Mamlatdar based on report of Talathi while dealing with the claim

put forth by the rival parties under provisions of Mamlatdars' Courts Act. According to him, already there exist an order dated 14/07/2021 whereby directions are issued to Respondents to open pathway of around 10 ft. width. He would further claim that Decree which is relied on by the Appellate Court while passing the order of injunction arising out of Suit being R.C.S. No. 2083/1921 does not provide for exact width of the road. According to him, Appellate Court interpreted said Decree contrary to declaration therein without looking into the detailed Judgment. Further contentions are, Appellate Court has granted production of documents at the behest of Respondent-Plaintiff which were not available for appreciation in the Trial Court. According to him, as such, Appellate Court committed an error of law thereby accepting said documents. As such, according to him, if not permitted to use the pathway of around 10 ft. width, Petitioner will suffer irreparable loss as he will not be able to cultivate the land with the aid of mechanised farming equipment.

6) Mr. Aradhye, learned counsel for Respondent would oppose the claim and supports the order impugned. According to him, if the

claim put forth in R.C.S. No. 2083/1921 is appreciated, Petitioner was not granted relief of using said pathway for entry of bullock-cart, though same was prayed. As such, according to him, already Appellate Court has considered the said issue. He would further claim that production of document granted by the Appellate Court is allowed in the interest of justice and for proper adjudication of the prayer for grant of temporary injunction. Apart from above, according to him, Appellate Court has considered all facets of the matter including that of provisions of Section 26 of Mamlatdars' Courts Act. He would as such claim that order impugned does not warrant any interference.

7) Considered rival submissions.

8) Claim of Respondent-Plaintiff is that of having ownership over land Gat No. 95 area 3Hector 43R and land Gat No. 100 area 3Hector 3R. As such, total holding of Respondent-Plaintiff is around 6Hector 46R. Whereas holding of the Petitioner appears to be around 50 Acres.

9) This Court is required to be sensitive to the fact that Respondent-Plaintiff's holding appears to be around 15 Acres

whereas Petitioner-Defendant's holding is around Rs. 50 Acres. In view of holding of large track of land, the claim of Petitioner of having adopted mechanised farming can be accepted.

10) Parties are agitating their claim for the use of pathway which the Petitioner is claiming 10-12 Ft. whereas Respondents are claiming existence of pathway only to the extent of width of 3 Ft.

11) Revenue record does not speak of width of the pathway, however, it is an admitted position on record that there exist a pathway by virtue of Decree passed by the Court in Suit No. 2083/1921.

12) If the document viz. report of Talathi addressed to Tahsildar in Mamlatdar proceedings is appreciated, it is noticed therein that said report specifically speaks of existence of 10 Ft. road.

13) Neither Respondent-Plaintiff has sought cross-examination of said Talathi nor he has applied for appointment of Court Commissioner while seeking injunction. In this background, at this stage, report of Talathi being public document will prevail and can be accepted in evidence for deciding the Application for injunction.

14) Apart from above, Exh. 14, Respondent-Plaintiffs' Application

for production of document is allowed by the Appellate Court without there being any reason. Such decision on the part of the Appellate Court while granting injunction is contrary to the settled position of law. So as to substantiate the aforesaid finding, reliance can be placed on decision of this Court in the matter of **Orange City Mobile Collection, Nagpur V/s. City Collection, Nagpur and Others.**¹

15) A view is expressed in the matter of **Orange City Mobile Collection, Nagpur** [cited supra] that unless permission is sought under Order XLI Rule 27 (1) of CPC, a document cannot be permitted to be placed on record of Appellate Court while entertaining the Appeal under Order XLIII Rule 1 of CPC. This Court is required to be sensitive to the fact that while deciding the Application by the Trial Court for granting temporary injunction, parties get an opportunity to meet rival pleadings and the evidence. If the prayer as is allowed by the Appellate Court while entertaining the Appeal under Order XLIII Rule 1 of CPC permitting production of documents which were not part of the record of the Trial Court while deciding the Application Exh. 5, aggrieved party loses one chance of questioning said documents. Even otherwise, there has to be sufficient reason to grant

¹ [2017 (3) Mh.L.J. 180]

such prayer for production of document as contemplated under Order XLI Rule 27 of the CPC which is not recorded in the case in hand.

16) On the other hand, it has to be observed that Application for permission to produce file at Exh. 15 moved by the Petitioner was rejected whereas similar prayer of Respondent-Plaintiff was allowed in same proceedings on unreasonable ground.

17) Though the Respondent-Plaintiffs have claimed that there exist an alternate way which passes through Gat No. 84 & 85, so also Gat No. 136 of Tanda village or any another alternate road from the Southern side of Gat No. 104, no evidence to that effect is brought on record to substantiate the said claim but for pleadings without any basis.

18) Such claim of the Respondent/Plaintiff go contrary to the existing record as right of way to the Petitioner-Defendant from the land of Respondent appears to have been granted by virtue of Decree passed in 1921 referred above.

19) Decree passed in R.C.S. No. 2083/1921 does not provide for width of the road, however, what is permitted is, use of road for ingress and outgress with bullocks and persons. As such, vide said

Judicial verdict there exist right to use such road/pathway if not for not less than 100 years in favour of Petitioner. Apart from above, it is claimed by Respondent-Plaintiff that Bund which is referred to in the Suit is covered by various trees and said trees will be damaged in case if the Petitioner is permitted to use the tractor or such other machines through said road for cultivating his field. The fact that Respondent-Plaintiff has not produced any documentary evidence in the form of Revenue record or otherwise to substantiate said claim needs to be appreciated. Apart from above, Respondent-Plaintiff is using the same way for entering his field upto the boundary of the field of Petitioner-Defendant.

20) In the aforesaid background, in my opinion, order granting injunction is not sustainable. That being so, order impugned dated 23/12/2021 is hereby quashed and set aside. Prayer of the Respondent-Plaintiff for grant of temporary injunction stands rejected.

[NITIN W. SAMBRE, J.]