

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

WRIT PETITION NO. 5508 OF 2021

1. Baliram Pundlik Bodade :
Aged about 60 years, Occ: Agriculture
2. Smt. Sulochana Wasudev Bodade :
Aged about 50 years, Occ: Agriculture
3. Sadashiv Tukaram Bodade, :
Aged about 70 years, Occ: Agriculture
4. Ramdas Tukaram Bodade, : **PETITIONERS**
Aged about 65 years, Occ.: Agriculture
5. Rameshwar Tukaram Bodade :
Aged about 55 years, Occ: Agriculture
6. Santosh Rambhau Boade, :
Aged about 40 years, Occ: Agriculture
7. Ananta Rambhau Bodade, :
Aged about 33 years, Occ: Agriculture
8. Anil Trayambak Bodade, :
Aged about 45 years, Occ: Agriculture
9. Manohar Jagdev Bodade :
Aged about 60 years, Occ: Agriculture
All R/o Karegaon, Bk, Tq. Khamgaon,
District : Buldana.

VS.

Laxman Shivram Bodade,
Aged about 45 years, Occ: Agriculture : **RESPONDENT**
R/o Karegaon Bk, Tq. Khamgaon,
District : Buldana.

Mr. K.S. Narwade, Advocate with Mr. V.B.Bhise, Advocate for
Petitioners
Mr. R.L. Khapre, Senior Advocate with Mr. M.V. Amale, Advocate
for Respondent

CORAM : MANISH PITALE, J.

DATE : 1st APRIL, 2022

ORAL JUDGMENT :

By this writ petition, the petitioners i.e. the original defendants have challenged judgment and order dated 09/12/2021, passed by the Court of Adhoc District Judge-1, Khamgaon (hereinafter referred to as the Appellate Court), whereby appeal filed by the petitioners was dismissed, only with minor relief granted to the petitioners in the form of a foot-way being provided to them through field Gat No.9 for accessing their agricultural fields, till the final decision of the suit.

2. The respondent herein i.e. the original plaintiff has filed a suit for declaration and injunction before the Trial Court, which is pending. In the said suit the respondent had filed an application for temporary injunction, seeking to restrain the petitioners from disturbing his possession in the suit property. The background to this litigation is that owner of a field in the same Gat No.9 had initially opposed the use of way. She is the sister of the respondent. But, in the proceedings initiated before the Mamlatdar under the

provisions of the Mamlatdars' Courts Act, 1906, in such proceedings, the said complainant entered into a compromise and conceded that the petitioners and others would be entitled to use the way through Gat No.9 for bullock-carts and tractors, in order to access their respective agricultural fields. It is not in dispute that the parties are related to each other and they have their agricultural fields adjacent to one another.

3. The Trial Court granted temporary injunction, as sought by the respondent holding that he had made out a strong *prima facie* case in his favour and that other parameters for grant of temporary injunction were also satisfied. Accordingly, the petitioners were restrained from causing interference and obstruction to the peaceful possession of the respondent in the suit property.

4. Aggrieved by the same, the petitioners approached the Appellate Court, contending that the agricultural fields belonging to them were landlocked and that if the order of the temporary injunction was not interfered with, grave prejudice would be caused to the petitioners, as access to their fields would be completely blocked. The Appellate Court, as noted above, dismissed the appeal and confirmed the order of the Trial Court, only with an exception that the petitioners were permitted to use a foot way through Gat No.9, as an easementary right, till the final decision of the suit.

5. Aggrieved by the same, the petitioners filed the present Writ

Petition, wherein notice was issued and the respondent entered appearance through counsel. On 14/01/2022, considering the contentions raised on behalf of the rival parties, this Court found that there was lack of clarity on whether the petitioners had an alternate way to access their agricultural fields. In this backdrop, this Court found it fit to appoint a Commissioner. The relevant portion of the order dated 14/01/2022, reads as follows :

“5. In my considered view, there is lack of clarity on whether the petitioners have an alternate way and whether the way through the nullah which the respondent-plaintiff claims to be an alternate way, is on a practical note, an alternate way to the agricultural fields of the petitioners.

6. Considering the controversy, it would be appropriate if a Court Commissioner is appointed to visit the site and to submit a report.

7. I have requested both the learned Counsel to agree on the name of the Court Commissioner and the suggestion is that Counsel Mr. C.J. Dhumane be appointed as the Court Commissioner.

8. The learned Counsel Mr. C.J. Dhumane is appointed as the Court Commissioner to visit the site and to ascertain whether the petitioners have an alternate way to their agricultural fields.”

6. Thereafter, the Commissioner so appointed undertook inspection of the suit property and upon inspection of the site / spot in the presence of the rival parties, found that the alternate way of Nala, as claimed by the respondent being an alternate access way to

the fields of the petitioners, was impractical for use.

7. The relevant portion of the Report of the Commissioner dated 21/01/2022, reads as follows :

“4. Thereafter I have inspected the way from Nullah shown by the Parties, said Nullah is located towards Northern side of the Field Gut No. 11, 12, 13 & 14, before these fields there are 3 other fields owned by other owners alongside the Nullah. One can get down in Nullah from the main road but the depth of the Nullah is around 15 to 20 feet from the fields of Petitioners. I have measured the depth of the Nullah from the boundary of the fields of the petitioners. As there was muddy water in the Nullah, it was not possible for me to inspect the boundaries of fields Gut No. 11, 12, 13 & 14 hence respondent arranged Tractor to inspect the entire boundary of fields Gut No. 11, 12, 13 & 14. I have seen the boundaries by getting in the Tractor in the Nullah of all the above fields and found that, the depth of Nullah from surface of all above fields is around 15 to 20 feet and I have not found any approach way to climb over the bank of the Nullah to the fields of the Petitioners. The Nullah contains mud mixed sand. It is submitted that Tractor or Bullock cart can pass through the Nullah but Tractor or Bullock cart cannot be taken to the fields of the Petitioners from the Nullah because of the depth of the Nullah.

5. That after inspecting the site/spot, I am of the opinion that, it is impractical to use the Nullah as an alternative way to the fields Gut No.11,12, 13 & 14.”

8. Thereupon, this Court took into consideration the aforesaid

Report of the Commissioner and by order dated 14/02/2022, granted Rule in the present Writ Petition, directing that the petition be listed for final hearing on 07/03/2022. The order dated 14/02/2022, passed by this Court reads as follows :

“Heard.

2. Rule.

3. List for final hearing on 7.3.2022.

4. Considering the report of the Court Commissioner Advocate Charan J. Dhumane, there shall be stay to the orders impugned.

5. However, the petitioners are cautioned that the way which may be used through the agricultural fields of the respondent shall not exceed 8(eight) ft. in width and the way shall be from the boundary of the field Survey 9. If any damage is caused to the standing crop of the respondent due to contravention of this direction to use the way in a particular manner, the petitioners shall be responsible for the same.

6. Sole respondent waives service.”

9. Accordingly, the petitioners have been using 8 feet width access way from the boundary of field Gat No.9, as directed by this Court.

10. Mr. K.S. Narwade, learned Advocate appearing for the petitioners invited attention of this Court to earlier proceedings before the Mamlatdar under the provisions of the said Act and submitted that although the respondent was not party to the said

proceeding, the owner from field Gat No.9 was very much party to the proceedings. The said person had also objected to use of access way through Gat No.9 and eventually in both the proceedings initiated before the Mamlatdar, the objector from field Gat No.9 had settled the matter, in pursuance of which the petitioners and others have been using the said access way through field Gat No.9 for bullock carts and tractors. It was submitted that this clearly indicated that at least a strong *prima facie* case existed in favour of the petitioners, which the Courts below failed to appreciate. It was further submitted that even on the parameters of balance of convenience and grave and irreparable loss that would be caused in the absence of use of access way, the Courts below erred in holding against the petitioners. The learned Advocate placed much reliance on the contents of the Report of the Commissioner appointed by this Court to submit that the Nala in question certainly did not provide an alternate way and that, therefore, the order dated 14/02/2022, passed by this Court providing access way of 8 ft. width to the petitioners may be continued till the decision of the suit and the proceedings in the pending suit may be expedited.

11. Shri R.L. Khapre, learned Senior Advocate appearing for the respondent vehemently opposed the aforesaid contentions of the petitioners. He submitted that the aforesaid Commissioner was appointed by this Court in writ jurisdiction and the Report that has come on record cannot necessarily accrue the benefit of the petitioners and that the findings rendered in the said Report of the

Commissioner are certainly open to challenge on behalf of the respondent. It was submitted that the situation on the spot observed by the Commissioner was created by the petitioners, so as to give an impression that the Nala was impractical for use as an alternate way and that, therefore, this Court may not rely on the Report of the Commissioner at all. As regards the earlier proceedings before the Mamlatdar, it was submitted that, admittedly, the respondent was not party to the said proceedings and therefore, the petitioners cannot rely upon the same in the present proceedings. It was further submitted that both the Courts below had concurrently held on all the three parameters concerning grant of temporary injunction in favour of the respondent and the petitioners had failed to make out any case for interference. It was submitted that if use of 8 feet width access way is permitted, there is every possibility of damage to the crops standing in the field belonging to respondent and that this aspect ought to be taken into consideration by this Court while deciding the present writ petition.

12. This Court has perused the material on record and heard the contentions raised on behalf of the rival parties. Since the suit filed by the respondent is pending and in the present Writ Petition, this Court is concerned with the arrangement that can be directed during the pendency of the suit, it would be necessary to appreciate the material on record, only in the said backdrop.

13. There is no dispute about the fact that the respondent was

never party to the proceedings initiated before the Mamlatdar by other field owner from Gat No.9. Nonetheless, a perusal of the material on record shows that for reaching *prima facie* findings such material would be relevant. The owner of agricultural fields from the same Gat No.9 had raised an identical objection against the petitioners and others as regards the access way from Gat No.9. It was claimed that the petitioners and others did not have any right to use the access way. In these proceedings, on both occasions, there was a settlement between the parties and the petitioners were indeed using the access way for bullock carts and tractors. This is evident from no objection given by such other owner from Gat No.9 for use of the access way by the petitioners.

14. Such material placed on record at least *prima facie* indicates that the objection raised by the respondent herein was earlier raised by an owner from Gat No.9 and it had resulted in the aforesaid orders passed by the Mamlatdar. If nothing else, such material at least *prima facie* shows that the petitioners had been using the access way through Gat No.9 to access their agricultural fields.

15. It was strongly submitted on behalf of the respondent that for appreciating whether a strong *prima facie* case is made out by the respondent for temporary injunction, the aspect of availability of alternate way ought to be appreciated by this Court. It is in the backdrop of such contentions raised on behalf of the respondent that this Court appointed the Commissioner, in pursuance of which

Report of the Commissioner dated 27/01/2022, came on record. Relevant contents of the Report are already quoted above. The objection to the contents of the said Report and further contentions raised on behalf of the respondent that a situation was deliberately created by the petitioners at the spot to influence the Report of the Commissioner, are aspects that can certainly be gone into in the pending suit. The Report of the Commissioner is not obviously being accepted as gospel truth by this Court and it would be subject to the test of cross-examination of the Commissioner by the respondent, if found necessary. Yet, the Report that has come on record can be looked into by this Court for arriving at a *prima facie* conclusion as regards the contentions raised by the rival parties.

16. In fact, while granting stay to the impugned order, by order dated 14/02/2022, this Court specifically took into consideration the Report of the Commissioner.

17. This Court is of the opinion that considering the material available on record as of now, the Courts below ought not to have granted the application for temporary injunction in favour of the respondent on the well-known parameters for grant of temporary injunction. Even the Appellate Court drew an exception while dismissing the appeal, which was only a limited relief to the petitioners, without appreciating the entire material on record. In the present writ petition, the Report of the Commissioner has further clarified the matter at least to reach *prima facie* conclusions

during pendency of the suit.

18. In this backdrop, this Court is of the opinion that it would be in the interest of justice to continue the direction given in the order dated 14/02/2022, passed by this Court, permitting the petitioners to access their agricultural fields through the agricultural fields along the boundary of field Gat No.9 to the extent of 8 feet. The caution indicated in the said order to ensure that there is no damage to the standing crops of the respondent would also operate, in the interest of justice. It would be appropriate that the Trial Court decides the suit at the earliest so that the controversy will be finally put to rest.

19. It is also made clear that the Report of the Commissioner dated 27/01/2022, would be placed before the Trial Court along with its accompaniments. The parties would be at liberty to take appropriate steps in the matter, including liberty to cross-examine the Commissioner, if so advised. After giving such opportunity to the parties and further upon granting appropriate opportunity to the parties to lead further evidence in the matter, if so required, the Trial Court shall finally decide the suit expeditiously.

20. In view of the above, the Writ Petition is allowed. The impugned orders are quashed and set aside. The respondent is directed to permit the petitioners to use access way to the extent of 8 feet along the boundary of field Gat No.9 to access their field during the pendency of the suit.

21. The Trial Court is directed to grant liberty to the parties to take appropriate steps in respect of the Report of the Commissioner, including opportunity to cross-examine the Commissioner, if so requested by the parties. The Trial Court shall ensure that the suit is decided expeditiously and in any case within six months from today. The parties shall co-operate with the Court for expeditious disposal of the suit.

22. It is made clear that the Trial Court shall not be influenced by the observations made in the order passed by this Court while allowing the writ petition and it shall proceed with the matter on merits. No costs.

Rule is made absolute in above terms.

JUDGE

MP Deshpande