

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 360 OF 2023

Sumanbai Santram Sathe

.. Petitioner

Versus

Nivurtti Bajirao Sathe

Since deceased through L.Rs.

Indira Nivrutti Sathe and others

.. Respondents

Shri S. B. Bhapkar, Advocate for the Petitioner.

Shri Vishweshwar H. Pathade, Advocat for the Respondent No.
1-B.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 10TH JANUARY, 2023.

FINAL ORDER :

. Heard learned counsel appearing for the parties.

2. The petitioner is aggrieved by the order of the Appellate Court dated 05th December, 2022 passed in Misc. Civil Appeal No. 34 of 2022, allowing the appeal and setting aside the order of the Trial Court below Exhibit 05 in R.C.S. No. 365 of 2021. R.C.S. No. 365 of 2021 was instituted by the petitioner seeking declaration that the order of the Tahsildar dated 30th July, 2021 U/Sec. 5 of the Mamlatdars Court Act, 1906 (for short “Act”) in respect of disputed road as regards Gut No 107/1 is illegal and not binding on the petitioner. It was case of the petitioner that U/Sec. 5 of the Act inspite of the respondents having an alternate access road to their lands bearing Gat No 101 and 103, it has been directed that the previous access road through the nallah/stream for approaching the Gat No 103 and 101 of the

respondents should be cleared. The Petitioner was not made party to the said application, nor any notice was given to the petitioner of the hearing of the application before the Tahsildar. An application below Exhibit 05 was made by the petitioner seeking restraining order against the respondents from creating new way by removing bandh on the land of the petitioner pursuant to the order dated 30th July, 2021. By order dated 19th September, 2022, the Trial Court was pleased to grant interim injunction restraining the respondents from creating any way from the suit land i.e. gut No. 107/1. As against the said order, the respondent Nos. 1 to 14 preferred Misc. Civil Appeal No. 34 of 2022, which came to be allowed by the impugned decision.

3. Learned counsel for the petitioner submits that as per the spot panchanama dated 17.06.2021, it is clear that there is an alternate way available to the respondents to access their lands and it is not necessary for a way to be made through gut No. 107/1, which is owned by the petitioner. He would further urge that the finding of the Trial Court has been erroneously reversed by the Appellate Court in Misc. Civil Appeal No. 34 of 2022.

4. Per contra, learned counsel for the respondents supports the impugned order and would urge that as per the spot inspection dated 25.06.2021, it is clear that there is no alternate way and, therefore, the order dated 30th July, 2021 directing the Petitioner to clear the way to enable the Respondents to access their lands ought not to be interfered with and no injunction can be granted as against the respondents. He would also submit that the suit itself is not maintainable.

5. I have considered rival submissions of the parties.

6. As far as contention of the learned counsel for the respondents regarding maintainability of the suit is concerned, the Appellate Court has dealt with the same by holding appeal as maintainable which has not been challenged. The Trial Court , while allowing the application below Exhibit “5” has taken into consideration the spot panchnama dated 17th June, 2021 and panchnama dated 25th June, 2021 and held that the panchnama records that the Respondents have an alternate access road. The Appellate Court has held that the order of 30th July, 2021 does not speak about grant of way through any portion of Petitioners land bearing Gat No 107/1 and that the order of 30th July, 2021 directs removal of impediments in the existing way through south- north brooklet to approach land Gut No 103 and 101.

7. The Trial Court in granting an order of temporary injunction has taken into consideration the two panchnama's dated 17.06.2021 and 25.06.2021 and the Court Commissioner's map and observed that in both these panchnamas, the Respondent No 15 has not come to a finding about existence and use of road as sought by the Respondents. The Appellate Court has observed that as the Court Commissioner was appointed to inspect the 61 R land of the Petitioner, the map will not reflect existence of report.

8. Both parties are ad-idem that the Appellate Court has not considered the two panchnama's and it is also necessary to reconcile the two panchnama's dated 17.06.2021 and 25.06.2021

and appropriate decision has to be arrived at by considering findings recorded in both panchanamas.

09. Learned counsel for the petitioner submits that the execution of the order of the Appellate Court is kept on 11.01.2023. Considering the fact that the conflicting panchnama's have not been reconciled by the Trial Court or the Appellate Court, it is in the interest of justice that the order of the Appellate Court dated 05.12.2022 is set aside and the matter is remanded to the Trial Court for consideration of the application for interim injunction afresh. All contentions of the parties are kept open. The Trial Court shall make an endeavour to decide Exhibit "5" application, expeditiously and preferably within a period of four (04) weeks from today.

10. Writ petition is allowed in above terms. Learned A. G. P. to communicate this order to the Mamlatdar. There shall be no order as to costs.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23