

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO.2823 OF 2023**

|                          |     |            |
|--------------------------|-----|------------|
| Mahadev Narayan Mahabale | ... | Petitioner |
| <i><u>Versus</u></i>     |     |            |
| Manohar Ambaji Mahabale  | ... | Respondent |

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Mr. Ashok B. Tajane i/by Ms. Kavita Shinde for the Petitioner.  
Mr. Sujay Gangal with Mr.Ritvik Joshi for the Respondent.

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : June 22, 2023.

**P. C. :**

1. The petition challenges the concurrent findings of the Trial Court and the Appellate Court directing the Petitioner to make open the access road of the respondent's land claimed to be in prior use by the Respondent and for the said purpose a mandatory injunction has been granted which according to the Petitioner will lead to the demolition of the compound wall constructed by the Petitioner.

2. The factual matrix is that the Regular Civil Suit No.7 of 2021 came to be instituted by the Respondent against the Petitioner

seeking declaration of right of way through 3 feet road on the “*bandh*” existing between Gut No 214 and Gut No 215 and mandatory injunction to direct the Petitioner to make open the access way by demolishing the compound wall built by the Petitioner.

3. The Respondent’s case in the plaint is that the Respondent has a right of way to his property i.e.gut No.213 through the road of 3 feet on the *bandh* existing between Gut No.214 and Gut No.215, of which the Petitioner is the owner of gut no.214 and gut No.215 belongs to one Kamble family. It is averred that the road over this *bandh* was used by the Respondent with the permission of the Petitioner’s predecessor in title to whom sum of Rs 22,000/- was paid. The cause of action arose on 28<sup>th</sup> December, 2020 upon commencement of construction of compound wall over the road on the “*bandh*” creating obstruction to right of way of the Respondent. It is further the case of the respondent-plaintiff that while carrying out the construction of the compound wall, the Petitioner has encroached upon the property of the adjacent property being gut no.215 and that by doing so, the Respondent’s access way to his plot is completely blocked. Armed with these averments, the Regular Civil Suit No.7 of 2021 came to be instituted.

4. The plaint was resisted by the Petitioner by filing his written statement claiming that the Respondent had a right of way through gut no.215, as also the claim of the respondent-plaintiff that for using the way, the predecessor-in-title of the Petitioner had been paid a sum of Rs.22,000/- was denied. The application for mandatory injunction filed by the respondent-plaintiff came to be allowed by the trial Court. Based on the material on record, the trial Court held that *prima facie*, the respondent-plaintiff had a right of way through the *bandh* existing between gut no.214 and gut no.215 and that the right of way had been admitted by the Petitioner's predecessor-in-title. The trial Court observed that 7/12 extracts do not show any date in the revenue records of the gut no.214 but relied upon the proceedings of the meeting of the *Tanta Mukti* Committee, that the Petitioner having accepted that while the constructing the compound wall, pedestrian road for use of the adjacent agriculturists will be provided, held it to be a *prima facie*, admission on the part of the Petitioner. The Appellate Court took into consideration the fact that the only way available to the plaintiff for use of the property has been blocked by the defendant and as such, refused to interfere with the judicial discretion exercised by the lower Court.

5. Heard Mr. Ashok B. Tajane, learned counsel for the Petitioner and Mr. Sujay Gangal, learned counsel for the Respondent.

6. Mr. Tajane, submits that contradictory stands have been taken by the Petitioner in his plaint, inasmuch as, alongwith the claim of easementary right of way, it is stated that a sum of Rs.22,000/- has been paid indicating a purchase. He would further submit that the right of way is claimed through the *bandh* which is existing between gut nos.214 and 215, however, the owners of the gut no.215 and gram panchayat have not been joined as party. He would further claim that the case of the Respondent-plaintiff about the encroachment by the Petitioner in gut no.215 cannot be accepted for the reason that there is no complaint by the owner of gut no.215. To deny the claim of the respondent-plaintiff of right of way, he invited the attention of this Court to the registered sale deed which was executed in the year 2009 and would contend that sale deed does not record any right of way and in fact, the respondent-plaintiff was a witness to the said sale deed.

7. He would further submit that the trial Court erred in granting the mandatory injunction after holding that neither the sale

deed nor 7/12 extract shows the right of way through the *bandh* existing between gut nos.214 and 215. He seeks to rely on the decisions of the Apex Court in the case of ***Dorab Cawasji Warden vs. Coomi Sorab Warden and Ors. [(1990) 2 SCC 117]***, to contend that for seeking relief of mandatory injunction something more than a *prima facie*, is required to be made out. He submits that without a strong case being made out, mandatory injunction has been granted which causes irreparable loss to the Petitioner, inasmuch as, the compound wall is constructed. He would further submit that demolition of the compound wall at this stage would severely burden to the Petitioner and caused irreparable harms and prejudice.

8. As regards the easementary rights claimed by the Petitioner, he seeks to rely on the decision of the Apex Court in the case of ***Bhan Justiniano Antao & others vs. Bernadette B. Pereira [2005 (3) Bom.C.R. 302]*** and in particular paragraphs 7 and 9 of the said petition. He would further point out the provisions of Section 15 of the Indian Easements Act, 1882, which provides, the right by way of prescription subject to the user for a period of 20 years and urges that no such case is made out.

9. Mr. Gangal appearing for the Respondent has pointed out the averments in the plaint, wherein it is stated that to access the respondent-plaintiff's property, there is no other way except through the *bandh* of the gut nos.214 and 215. He would further submit that this fact was taken into consideration by the Trial Court as well as the Appellate Court and there is no cause for interference in the concurrent findings in exercise of the jurisdiction of this Court under Article 227 of the Constitution of India.

10. Considered the submissions of the learned counsel for the parties.

11. The respondent-plaintiff in Regular Civil Suit No.7 of 2021 has come with a case that to access his plots, the right of way exists through road over the *bandh* of gut nos.214 and 215 and the same is being used by them since considerable time. The pleading is that this right of way was with the permission of the pre-decessor in title of the Petitioner and a sum of Rs.22,000/- was being paid to him. From perusal of the averments in the plaint, *prima facie* it appears that the right of way by prescription under Section 15 of the Easements Act, 1882 would not be available in the absence of

necessary pleadings as to the period of use as well as by reason of reference to permissive user. Apart from claim under Section 15 of Easements Act, 1882, there is aspect of easement of necessity. It is specifically averred that to access the Respondent's plot i.e. gut no.213, there is no other way and by construction of the compound wall, the petitioner's right of access is completely closed. The cause of action arose on 28<sup>th</sup> December, 2020, when the Petitioner started the construction of the compound wall and as such, the respondent-plaintiff was constrained to approach the Court.

12. As regards the contention of the Petitioner that the owner of gut no.215 has not been joined as party, the pleading as regards the encroachment on gut no.215 is to demonstrate that the construction of the compound wall is not on the property of Petitioner i.e. Gut No.214 but has encroached on gut no.215 thereby leading of complete blocking of the Respondent's right of way. It is not the case of the respondent-plaintiff that there is any obstruction to his right of way by the owner of gut no.215 and on the contrary in the written statement, it is claimed by the Petitioner that the Respondent is accessing his property through gut no.215. This submission in my opinion supports the case of the Respondent that the right of way was

used by the Respondent through the road over the *bandh* existing between Gut Nos.214 and 215.

13. The sketch map which has been annexed at page 57 of the petition fortifies this observation, inasmuch as, it appears that there is no other way to access the property of Respondent i.e. gut no.213. As regards the submission of the learned counsel for the Petitioner that there is no such recital found in the sale deed to which the respondent-plaintiff is the witness, the Respondent claims right of way through a road on the *bandh* existing between Gut Nos.214 and 215 and not through the Gut No.214. The Respondent has by way of Affidavit of witnesses *prima facie* established the existence of right of way through the road on the *bandh* existing between Gut Nos.214 and 215. In addition there are proceedings of the Tanta Mukti Committee placed on record wherein the Petitioner had accepted that while constructing the compound wall the access road will be left open.

14. One of the contentions of the learned counsel for the Petitioner is that the prayer in Regular Civil Suit No.7 of 2021 seeks easementary rights and the demolition of the compound wall. As

such, he would contend that by grant of the interim relief, final relief has been granted. The interim relief is granted in aid of and ancillary to the final relief, the purpose being to maintain status quo ante. By way of suit the Respondent sought declaration of right of way over 3 feet road on the *bandh* and for demolition of the compound wall. The Trial Court by order dated 18<sup>th</sup> March, 2021 has directed the Petitioner to make open the 3 feet road on the *bandh* existing between Gut No.214 and Gut No. 215. If the petitioner's contention is seen it is his case that the compound wall is built on Gut No.214 and not on *bandh* and as such, there appears to be no question of demolition of the compound wall. Thus, it directed to make open the 3 feet road. As such it cannot be said that the final relief of demolition of compound wall is granted to the Respondent. In view thereof, there is no force in the contention raised by the learned counsel for the Petitioner.

15. The decision relied upon by the learned counsel for the Petitioner in the case of *Dorab Cawasji Warden (supra)*, holds in paragraph 16 as under:

*“16. The relief of interlocutory mandatory injunctions*

*are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against who it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:*

*(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.*

*(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.*

*(3) The balance of convenience is in favour of the one seeking such relief.”*

16. The Apex Court has held that the relief of mandatory injunction are thus granted generally to preserve or restore the status

quo ante of the last non contested status which preceded the pending controversy until the final hearing or to compel the undoing of those acts that have been illegally done subject to the stated guidelines, one of which is higher standard of a *prima facie* case. The proceedings were instituted as the Petitioner commenced construction of the compound wall on 28<sup>th</sup> December, 2020. The specific case of the Respondent is right of way through the road existing on the *bandh* situated between Gut No.214 and Gut No.215. Perusal of the reply of the Petitioner to the interim relief application reveals that the defence of the Petitioner is that the Respondent has no right of way through Gut No.214 and right of way exists through Gut No.215. It is the defence that the compound wall was being constructed on the Petitioner's own property i.e. Gut No.214. The Respondent claims right of way not through Gut No.214 but through the road existing on the *bandh* between Gut No.214 and Gut No.215 which is now being obstructed by construction of compound wall by encroaching upon Gut No.215. It was expected of the Petitioner to bring on record the material to demonstrate the boundaries of Gut No.241 and Gut No.215 and to substantiate that the construction was in Gut No.214, there is no encroachment on Gut No.215, and, that there is access

way to Gut No.213. There is no such material to *prima facie* establish this position.

17. As regards the requirements of higher standard than a *prima case* as laid down by the Apex Court is concerned, there are necessary pleadings to that effect in the plaint supported by the affidavit of witnesses as well as the proceedings of Tanta Mukti Committee. The material on record coupled with the absence of necessary material to demonstrate that the compound wall is being constructed in Gut No.214, in my opinion, establishes a strong case for grant of interlocutory mandatory injunction. It needs to be noted that not granting the same would cause great injustice and irreparable loss to the Respondent who claims to have no right of way to his property except through the road on the *bandh*. Learned counsel appearing for the Petitioner has not been able to demonstrate from the material on record, that there is any other way to access the property and as such, the Respondent has established a strong case for grant of mandatory injunction.

18. As far as the decision in the case of ***Bhan Justiniano Antao*** (*supra*), is concerned, the observations of the Apex Court

which assumes importance in the present case is that in that case the Apex Court has held and observed that if the plaintiff had no access to his house except through that of the property of the defendants then perhaps we would have considered appreciating as easement of necessity.

19. In the present case, this is precisely the case put forward by the respondent-plaintiff claiming that there is no access to their property except through the *bandh* of gut nos.214 and 215. Considering the same the doctrine of easement of necessity comes into play and in the absence of any material on record to demonstrate otherwise, in my opinion, there is no warrant for interference in with the concurrent findings.

20. In this regard, it will also be necessary to be mindful of the fact that this Court is being called upon to exercise the jurisdiction under Article 227 of the Constitution of India, which is supervisory in nature and is to be exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though

available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. However the jurisdiction is not available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

21. Considering the material which is available on record which demonstrates that there is no access to the property of the Respondent and as such by invoking the easement of necessity, the balance of convenience is in favour of the respondent-plaintiff. In event the interim relief as such is not being granted, great prejudice would be caused to the Respondent. As such I am not inclined to interfere in the concurrent findings of the Trial Court and Appellate Court.

22. In light of the above, there is no merit in the petition. Writ Petition stands dismissed.

23. Needless to clarify that the observations made herein are only for the purpose of deciding the validity of the impugned order and as such, the Trial Court to directed to decide the matter on its own merits and uninfluenced by the observations made herein.

**( Sharmila U. Deshmukh, J. )**

24. At this stage, the request is made for stay of the order for a period of four weeks. The said request is opposed by the learned counsel appearing for the respondent-plaintiff. In the interest of justice, the present order is stayed for a period of four weeks from date of uploading of the order.

**( Sharmila U. Deshmukh, J. )**