

` IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7134 OF 2023

Gurudas Bhimandas Sakhrani and Anr. ... Petitioners

Versus

Srichand Bhimandas Sakhrani and Ors. ... Respondents

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Mr.R.S.Apte, Senior Advocate i/by Ms. Ketan A. Dhavle for the
Petitioners.

Ms. Sapna Krishnappa, for the Respondent Nos.1 and 2.

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : June 20, 2023.

P. C. :

1. The challenge in the petition is to the order of the Appellate Court dated 4th February, 2023 passed in Misc.Civil Appeal No.317 of 2022, dismissing the appeal of the Petitioners thereby confirming the order of the trial court below Exh. 5.

2. Heard Mr. Apte, learned Senior Counsel appearing for the Petitioners and Ms. Sapna Krishnappa, learned counsel appearing for the Respondent Nos.1 and 2.

3. Mr.Apte, would urge that the admitted position is that the common passage between the plots belonging to the Petitioners and

the Respondents were in common use and enjoyment from the last 35 years. He would further urge that considering the long user, the Respondents' proposed construction of a compound wall in the open space will result in obstructing the access to the Petitioners premises. He has invited the attention of the Court to the pleadings in paragraph 1 (c) of the suit, which enumerates the common facilities which are situated in the common passage. He would urge that irrespective of Section 15 of the Easement Act providing for right of way by prescription, the undisputed position is that for last 35 years, the common passage is used as common entrance gate for the plot Nos.16 and 17 of the Petitioners and the Respondents and for approaching the respective houses as well as accessing the common facilities situated in the common passage.

4. Per contra, Ms. Krishnappa, learned counsel appearing for the Respondent Nos.1 and 2 submits that this Court ought not to exercise the discretion considering the concurrent findings of the Trial Court as well as the Appellate Court. She would point out the concurrent findings that there is no amalgamation of the plots and, as such, the Respondents are well within their rights to construct a compound wall over their own property. She would further submit that due to

disputes and differences between the parties, the construction of compound wall is necessitated. She would urge that the Petitioners can install their separate entrance gate as also the facilities which were used in common can be installed in their individual plots.

5. Considered the submissions of the parties.

6. The impugned order records that there is no amalgamation of the plots and the enjoyment of the Petitioners of the common passage was a permissive enjoyment and as such there is no right of way by prescription. After observing the long user of 35 years of the common passage which includes the common entrance gate, the common facilities situated in the common passage such as drainage, parking etc, the injunction is refused by holding that the Petitioner can modify the entrance and install separate gate and separate drainage line. Whilst considering the Appeal, the Appellate Court has considered the Affidavit of the Architect of the Society which spoke of mutual understanding as to the common approach road to hold that no right of way by prescription was acquired.

7. It is to be noted that by Regular Civil Suit No.1809 of 2022, the Petitioners seek declaration that the common passage

between the plots is the common property of all holders of all residential units and that the Petitioners are entitled to use, enjoy and possess the common facilities as prescribed in clause (1) of the plaint. It is an admitted position that there is common entrance gate installed in the common passage and for past 35 years the said entrance was being used by the Petitioners. There are also certain common facilities which are available in the common passage as enumerated in the plaint. The photographs on record demonstrates that the passage between the plots are used as common passage by the plot holders with the common entrance gate to the plots being installed at the start of the common passage as well as the use of common passage for parking of vehicles. This position is sought to be disputed by the learned counsel for the Petitioners by pointing out that the access to their respective houses are separate. However, in the present case, the facts on record *prima facie* demonstrate the long user of 35 years of the common passage being used for common entrance as well as use of the common facilities situated in the common passage. The Petitioners seek a declaration as to common ownership which is a matter of trial. In my opinion, for the purpose of considering the interim relief apart from the *prima facie*, the balance

of convenience and irreparable loss is also required to be considered. The undisputed position is that the common open space was being used by the Petitioners and Respondents jointly for last 35 years. At the stage of interim relief to permit the Respondents to construct the compound wall will result in impeding the long user of 35 years and as such the balance of convenience is in favour of the Petitioners. If at the interim stage the Petitioners are made to install separate gates and to separate the common facilities, irreparable loss will be caused to the Petitioners. Even if it is accepted that there is no amalgamation of the plots, it cannot be denied that the common passage was in use by the parties for last 35 years. In my opinion, the Petitioners have made out a prima facie case by demonstrating the long user of the common passage for 35 years. Whether there is acquisition of right of way by prescription or easement of necessity will be a matter of trial.

8. The question is whether at the interim stage the facilities which were admittedly being enjoyed by the Petitioner for last 35 years can be obstructed. In my opinion, the answer is “No”. The interim relief can be granted in aid of and ancillary to main relief available to a party on final determination of his right. The object behind granting the interim relief is to maintain status quo ante. The

construction of the compound wall pending the hearing and final disposal of the suit will render the suit infructuous.

9. In light of the above, in my opinion, the impugned order is unsustainable and as such, the same deserves to be quashed and set aside. As such the writ petition stands allowed.

10. As the impugned order stands quashed, the interim relief sought by the Petitioners under Exhibit “5” stands allowed in terms of prayer clauses “b”, “c” and “d”, which read thus:

“b. that pending the hearing and final disposal of the present petition, the Hon'ble Court may be pleased to restrain the Respondent Nos.1 and 2 from carrying on construction activity, damaging, destroying and otherwise altering the subject property i.e.vacant land/passage in the middle of the Plot Nos.16 and 17;

c. that pending the hearing and final disposal of the present petition, the Hon'ble Court may be pleased to restrain the Respondent Nos. 1 and 2 from disturbing the Plaintiffs, their family members etc from enjoying and using all the common facilities described in clause 1 (c) of the Regular Civil Suit No. 1809 of 2022.

d. That pending the hearing and final disposal of the present petition, the Hon'ble Court may be pleased to restrain the Respondent Nos. 1 and 2 from damaging existing water line, entrance gate, drainage line running beneath the subject property i.e. vacant land/passage in the middle of the Plot Nos.16 and 17;"

(Sharmila U. Deshmukh, J.)