

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

CIVIL WRIT PETITION NO. 2972 OF 2022

Kondaji Hari Kale

..Petitioner

Versus

Ramkrushna Arjun Gaikar & Ors.

..Respondents

Mr. Sugandh Deshmukh a/w. Irvin D'Souza for Petitioner.
Mr. Shailesh Kharat for Respondent Nos.1 to 6.

CORAM : SARANG V. KOTWAL, J.

DATE : 24 MARCH 2023

PC :

1. By this petition, the Petitioner is seeking quashing of the order dated 09/10/2021 passed in Miscellaneous Civil Appeal No.12 of 2018 by learned District Judge, Nashik, thereby confirming the order passed by 2nd Jt. C.J.J.D., Nashik Road, Nashik below Exhibit-5 in Regular Civil Suit No.104 of 2017, dated 19/12/2017.

2. Heard Shri. Sugandh Deshmukh, learned counsel for the Petitioner and Shri. Shailesh Kharat, learned counsel for the Respondent Nos.1 to 6.

3. The Petitioner is the original Defendant No.1 in R.C.S.No.104 of 2017. The Respondent Nos.1 to 6 herein are the original Plaintiffs. For the sake of convenience the parties are described by their status in the suit wherever necessary.

4. The Petitioner had initially approached the Tahsildar under the Mamlatdars' Courts Act 1906 for access to his field at Gat No.65/1+2 at Lahvit, Taluka and District Nashik. During those proceedings, a panchanama was conducted by the Talathi on 23/04/2017. It was mentioned in the panchanama that the Petitioner did not have any access road to approach his agricultural field and that he was using the land Gat No.64 for that purpose. The panchanama further mentions that, if the owners of the Gat No.65/4 and Gat No.65/3 permit him, then he could use the road which was in existence between Gat No.65/3 and 65/4. The owners of the Gat No.65/4 and 65/3 are the plaintiffs in the suit.

5. The Tahsildar vide his order dated 31/07/2017 allowed the Petitioner's application and issued directions that the Petitioner

was entitled for removal of the obstruction on the road leading to his land between Gat No.65/4 and 65/3. The said order was confirmed by the S.D.O. on 20/04/2018 passed in Revision No.300 of 2017. The order of the Tahsildar was confirmed. In between, the Plaintiffs i.e. the Respondent Nos.1 to 6 herein filed the above mentioned suit for declaration that the Petitioner herein i.e. the Defendant No.1 does not have any right to access his land except a common *bandh* between two gat numbers mentioned earlier. The other prayer was for perpetual injunction against using that particular road.

6. The Plaintiffs had also filed an application for interim relief vide Exhibit-5 in the said suit, which was allowed in their favour vide order dated 19/12/2017 passed by the trial Court. It was observed in that order that, if the relief was granted to the plaintiffs, no hardship would be caused to the Defendants, as they were already using the common access way to their property and, therefore, the balance of convenience was in favour of the Plaintiffs. The said order was confirmed by the learned District Judge, Nashik in M.C.A.No.12 of 2018 vide order dated

08/10/2021. The suit was expedited.

7. Learned counsel for the Petitioner submitted that the Petitioner did have a prima facie case at least for grant of interim injunction because there was an order passed by the Tahsildar in his favour; which was confirmed by the S.D.O. He had adopted legal remedies before the competent authority and the order was passed in his favour. Those two orders were completely ignored by the learned Trial Judge, as well as, by the Appellate Judge. He submitted that, though the stay is operating against him, since the year 2017, every passing year is causing irreparable loss to him. He submitted that, since the monsoon is approaching very fast, he needs to cultivate his land, so that, he can have sufficient crop during monsoon season. He, therefore, submitted that, in this situation, he is pressing for interim protection in his favour by setting aside both the impugned orders. He submitted that the Tahsildar's order clearly shows that, there was no way available to him except one through the land at Gat No.64, but that land is also used by its owner for taking crop in the monsoon season and, therefore, it will not be possible for him to access his land at all.

8. Learned counsel for the original Plaintiffs submitted that the impugned orders need not be interfered with. Stay is operating since 2017 and, therefore, it is not necessary to vacate that stay. He relied on the observations of the Hon'ble Supreme Court in the case of *Bachhaj Nahar Versus Nilima Mandal and another*¹. He relied on paragraph-19 of the said Judgment wherein it was observed that, a dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. Learned counsel for the Plaintiffs submitted that, there are no such pleadings by the present Petitioners. Therefore, they have no case. He further submitted that, the action brought out by the Petitioners before the Mamlatdars' Court was barred by limitation and, therefore, that order was not binding. He further submitted that, in any case, that order is under challenge in the civil suit.

9. I have considered these submissions. It is made clear

1 (2008) 17 Supreme Court Cases 491

that, today I am only considering the question of interim relief. All the questions raised by both the sides will obviously be dealt with and decided by the civil court at the final stage of the suit. The suit is at the stage of recording of evidence on behalf of the Plaintiffs. All these questions, will have to be finally decided when both parties lead their evidence and both of them are given sufficient opportunity for the same. Today I am only considering whether the Petitioner's claim is frivolous or whether they deserve some protection till the decision of the suit.

10. The Trial Court while deciding the interim application has observed in paragraph-8 that the Petitioner i.e. Defendant No.1 in the suit want to have access to his property through the property of the Plaintiffs by using common way situated on the property of the Plaintiffs. It was observed that the Defendants were claiming way for certain area where there was no way seen and as such, it required creation of way for the defendants through Survey No.65/3. Learned counsel for the plaintiff relied on this particular observation.

11. Learned counsel for the Petitioner, on the other hand, referred to the observation made in paragraph-10 wherein, it was observed that, from the factual aspect of the case it appeared that the Defendant (present Petitioner) wanted to create way to their property which may deprive the Plaintiff of the portion of their property because that portion of the property which may be used as access way could not be brought under cultivation.

12. Learned counsel for the Petitioner submitted that, this particular observation is erroneous. At no stage the Petitioner had claimed creation of a new way. There was no question of the plaintiffs suffering from any loss by creation of way depriving them of their land from cultivation.

13. In this context, it is necessary to refer to the operative part of the Tahsildar's order, wherein, it was mentioned that the obstructions which were placed in the way were to be removed. It nowhere states that, a new way was to be created. To that extent, submissions of learned counsel for the original Plaintiffs is not acceptable. The Appellate Court has merely confirmed the

observation of the Trial Court.

14. Considering all these aspects, it does appear that the Defendant No.1 i.e. the present Petitioner did have an order of the Tahsildar in his favour. It is obvious that, ultimately, all the issues will have to be decided by the Trial Court, but at this stage, order of the Tahsildar cannot be totally ignored. Both the learned Judges, in the Trial Court, as well as, in the Appellate Court have not given due consideration to the order passed by the Tahsildar, which was confirmed by the S.D.O., in arriving at their conclusion in the interim application and the Appeal respectively. In this view of the matter, I am of the opinion that, till the suit is decided, operation of the Tahsildar's order can continue.

15. Hence, the following order:

ORDER

- i) The order passed by the District Judge, Nashik in M.C.A.No.12 of 2018 on 09/10/2021 confirming the order passed by 2nd Jt. C.J.J.D., Nashik Road, Nashik below Exhibit-5 in Regular Civil Suit

No.104 of 2017, dated 19/12/2017, is set aside.

- ii) The hearing of the suit is expedited. The Trial Court is directed to conclude and decide the suit within two months from today. Both the parties shall co-operate with early disposal of the suit.
- iii) Till then, the order passed by the Tahsildar on 31/07/2017 in case No.7 of 2016 on his file shall continue to operate.
- iv) With these observations the petition is disposed of.
- v) The Trial Court shall not be influenced by any of the observations made in this order while deciding the suit.

(SARANG V. KOTWAL, J.)