

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12873 OF 2023

Pratap Pandharinath Salunke & Ors.

Petitioners

•• (Org. Plaintiffs)

Versus

Santosh Baban Dalvi & Ors.

Respondents

•• (Org. Defendants)

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- Mr. N.S. Pawar for Petitioners

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 05, 2024

P. C.:

1. Heard Mr. Pawar, learned Advocate for Petitioners.
2. Present Writ Petition impugns twin orders passed in Application below Exh. 5 i.e. Order dated 21.05.2021 passed by learned Trial Court in RCS Suit No. 746/2021 and judgment & order dated 15.09.2022 passed by learned District Court in Misc. Civil Appeal (MCA) No. 145/2021. Being aggrieved thereby, Petitioners (Org. Plaintiffs) have filed the present Writ Petition. Parties shall be referred to as Plaintiffs and Defendants.
3. Mr. Pawar would submit that Plaintiffs are the owners in respect of Gat No. 279 whereas Defendant No. 1 is the owner of Gat No. 280/2/B-3 adjacent to the Plaintiffs' suit land and Defendant Nos. 2 to 9 are the owners of the other adjacent Gat Nos. 273/1, 273/2, 274/1, 274/2, 275/1, 275/2, 275/3 and 275/4. Dispute raised in the suit

property pertains to a right of way admeasuring 12 feet in width and approximately 500 meters in length passing through rather passing in between Gat Nos. 279 and 280 ultimately leading to the properties belonging to Defendant No. 1 and Defendant Nos. 2 to 9. Precursor to the filing of the Suit is Rasta Case No. Rasta/143/SR/9/2021 being statutory proceedings invoked by Defendant Nos. 2 to 9 before the Competent Authority i.e. Tahsildar. In that case, it was pleaded by Defendant Nos. 2 to 9 that there existed right of way through Gat Nos. 279 and 280 leading upto their properties. Those proceedings were contested by the present Plaintiffs. They filed their say in the said proceedings. On 23.03.2021, learned Tahsildar and Competent Authority, Shirur passed an order directing both the parties namely Plaintiffs and Defendant Nos. 2 to 9 not to restrain each other from using the disputed right of way and adjourned the proceedings thereafter to a future date. While doing so, learned Tahsildar was seized with the panchnama drawn by a Circle Inspector who had made a report on the basis of documents which were considered by him. This panchnama made by the Circle Inspector showed the existence of way from the boundary claimed by the Defendant Nos. 2 to 9 through Gat Nos. 279 and 280. Though there is a dispute between the parties with respect to the width of the road as to whether it should be 12 feet as claimed by Defendants and / or whether it should be 6 feet as

claimed by Plaintiffs. Be that as it may, both the parties raised charges and claims against each other based upon the sale deeds in respect of purchase of land and properties in respect of Gat numbers belonging to them which were registered sale deeds in the names of the wives of some of the Defendants and other family members.

4. One of the submissions made by Defendant Nos. 2 to 9 and which was upheld in the Rasta Case by the learned Tahsildar was that the said road rather right of way was being used perpetually by the parties. Plaintiffs being aggrieved file RCS No. 746/2021 in the Civil Court seeking a declaration that the suit property is their property exclusively. The Plaintiffs are also aggrieved with the order passed by the Tahsildar under the provisions of Section 143 of the Maharashtra Land Revenue Code, 1966 when the proceedings initiated by the Defendants were pending before the Mamlatdar under Section 5 of the Mamlatdar's Court Act. It is contended by the Plaintiffs that both the proceedings and cause of action are different and therefore passing of the order under Section 143 was not permissible. However once the Plaintiffs have approached the Civil Court with a substantive relief seeking declaration that Plaintiffs are entitled to the entire property in Gat No. 279 essentially meaning that the Plaintiffs would deny the right of way passing through Gat Nos. 279 and 280, the jurisdiction of

the proceedings before the Mamlatdar Court stood ousted and now the Civil Court was seized with the substantive proceedings.

5. In the Civil Court, Plaintiffs filed Application below Exh. 5 seeking temporary injunction under O. XXXIX, R. 1 of the CPC. Both the parties i.e. Plaintiffs on one hand and Defendants on the other hand placed substantive documentary evidence in respect of their entitlement in respect of their respective properties including the maps and the Gat Map of the suit property. The bone of contention is that during the then time, Plaintiffs started construction of a structure / house on the right of way which was objected to by the Defendants at the time of hearing of Application below Exh. 5. At this time, Mr. Pawar interjects me and would submit that this fact is not true. He would submit that there was already a dilapidated house in existence on the right of way which the Plaintiffs desired to renovate, fortify and reconstruct its walls. Learned Trial Court while considering the objections raised by the Defendants held that allowing the Plaintiffs to construct rather reconstruct or repair the existing suit structure would necessarily obstruct their right of way leading to their fields, and the respective Gat numbers. In that view of the matter, the question as to whether there was an easementary right through Gat No. 279 by way of any prescription provided or governed under the provisions of Section 15 of the Easement Act or whether that right did exist since a

long period of time was the question before the Court. One of the submissions advanced by Plaintiffs was that there was an alternative right of way available to the Defendants to reach their respective Gat numbers and therefore there should not be any embargo on the Plaintiffs reconstructing and fortifying their existing house / structures in Gat No. 279 and the learned Trial Court should therefore pass an order of injunction restraining the Defendants from their easementary right to use the ancestral way claimed by them. Issues raised by both the parties on the basis of the documentary evidence were considered by the learned Trial Court and the learned Trial Court returned *prima facie* finding that the location of the house / structure of which renovation / repairs / reconstruction and fortification was undertaken by the Plaintiffs was located at the boundary of Gat No. 279 and specifically within the right of way through Gat Nos. 279 & 280. In that view of the matter, the learned Trial Court considered the panchnama effected by the Circle Inspector which was exhibited below Exh. 3/14 which clearly showed that there was existence of a right of way from the boundary of Gat No. 279 as claimed by the Defendants which necessarily corroborated with the claim of the Defendants. Once this was *prima facie* proved, the learned Trial Court considering the documentary evidence filed by Defendants namely interim order passed by the Mamlatdar Court in the proceedings i.e. Rasta Case No.

Rasta/143/SR/9/2021, Gat map of the suit property, Application filed by Defendants to the Mamlatdar for opening of road and the property extracts of the house of Defendants and the documentary evidence filed by the Plaintiffs which was similar in nature, returned a finding that the opening of road passing through Gat Nos. 279 and 280 was essential to enable the Defendants to cultivate their respective fields. It was also opined by the learned Trial Court that the proceedings were not decided on absolute merits of the matter at that stage and the proceedings in fact will be decided on the merits after the trial when the final decision will be available. However, considering the balance of convenience and the irreparable loss that would be accounted for by the Defendants, the learned Trial Court rejected the Application below Exh. 5. In MCA, learned District Court upheld the said order and dismissed the Appeal against the said order passed by the learned Trial Court in Application below Exh. 5 with costs. What is noted by the learned District Court in its order is the fact that while carrying out repairs / renovation / reconstruction of the house / structure of the Plaintiffs standing on the right of way, it was revealed from the record that Plaintiffs had started construction and put material over the entire way and therefore the Application filed by Defendant No. 10A to remove the obstruction was considered and interim order was passed against the Plaintiffs.

6. The reasons which have been returned by the learned District Court and the learned Trial Court are strictly on merits rather I must say that though they are *prima facie* in nature, they however are interpreting the documents which have been delineated in the Exh. 5 order passed by the learned Trial Court and which has been considered by the learned Appellate Court. In that view of the matter, I do not wish and desire to substitute my reasons in place the reasons returned by the Courts below as I find them to be correctly passed. Hence I am inclined to uphold the said reasons as also both orders passed below Exh. 5. Needless to state that the grievance of the Plaintiffs that there is an alternative way or there is a pending Application filed by Defendants for seeking a new way, shall all be subject to the Plaintiffs succeeding in the declaratory relief in the Suit proceedings in so far as the status of Gat No. 280 is concerned. This Court by passing the present order is not shutting out the Plaintiffs' case at all, rather it is keeping all contentions of the Plaintiffs open in law as well as on facts so as to enable the Plaintiffs to enter the witness box and prove the same strictly in accordance with law.

7. In view of the fact that the Suit is filed in the year 2021 and the proceedings having been agitated before the learned Tahsildar much prior thereto, learned Trial Court is requested by this Court to determine and dispose of RCS No. 746/2021 as expeditiously as

possible and in any event within a period of one year from today. Parties shall co-operate with the Trial Court and shall not seek adjournments unless absolutely necessary due to certain emergency or exigency. All contentions of the Plaintiffs in respect to their declaration in respect of the suit property are expressly kept open.

8. Mr. Pawar would inform the Court that Defendants have not filed their written statements or even reply to the present Petition. In the wake of the pleadings and the orders passed by the learned Trial Court and the Appellate Court, reply is not necessary in the present Petition.

9. With the above directions, both the impugned orders are sustained and upheld.

10. It is clarified that the learned Trial Court shall not be influenced by any of the observations and findings returned in the impugned orders while determining the Suit proceedings which shall be determined strictly on the basis of the evidence led by the parties and strictly in accordance with law.

11. With the above directions, Writ Petition is dismissed.

12. After the order is dictated in open Court, Mr. Pawar would submit that the present order would affect the substantive rights of the Plaintiffs and therefore this order should be stayed.

12.1. I have considered the request of Mr. Pawar, however in view of the reasoned twin orders dated 21.05.2021 and 15.09.2022, I am not inclined to accede to the request made by Mr. Pawar. Hence, the request made by Mr. Pawar for stay of this order is declined and rejected.

Amberkar

[MILIND N. JADHAV, J.]

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2024.04.05
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