

RAJASTHAN HIGH COURT

Dana Ram

Vs.

Civil Judge (J.D.)

Civil Writ Petn. No. 7099 of 2003

(Sunil Kumar Garg, J.)

27.04.2004

ORDER

Sunil Kumar Garg, J.

1. This writ petition under Article 226/227 of the Constitution of India has been filed by the petitioners on 24-11-2003 against the respondents with a prayer that by an appropriate writ, order or direction, judgment dated. 16-10-2003 (Annex. 13) passed by the learned Additional Dist. Judge, Parbatsar (respondent No. 2) in civil Misc. Appeal No. 47/99 by which the learned Additional Dist. Judge upheld the order dated 29-9-1999 (Annex. 6) passed by the learned Civil Judge (J. D.), Makrana (respondent No.1) by which the learned Civil Judge (respondent No.1) by which application of the plaintiffs (respondents No. 3 to 10) was allowed against the defendants - petitioners and the plaintiffs (respondents Nos. 3 to 10) were allowed to use 8 ft. wide way which crosses Khasra No. 401/2 and 401/3 and goes ahead to Khasra No. 409/3, be quashed and set aside.

2. The facts of the case as put forward by the petitioner are as under:

(i) That the respondents Nos. 3 to 10 (plaintiffs) filed a suit (Annex. 1) on 24-9-1998 before the respondent No. 1 (Civil Judge) for declaration of rights, permanent injunction and declaration of easementary rights. Along with the suit, an application (Annex. 2) for temporary injunction under Section 39 Rule 1 and 2 Civil Procedure Code was also filed. In the application (Annex. 2), the respondents Nos.3 to 10 (plaintiffs) alleged that they are residing in Jhajharon Ki Dhani in SarhadManana and Khasra No. 398 is gairmumkin pasture land. The respondents Nos.3 to 10 (plaintiffs) also pleaded in their suit (Annex. 1) that towards north-east corner, there is an ancient way which crosses Khasra

No. 401 in the south-east corner and touches the boundary of Khasra No. 401/3 and it goes ahead to the south boundary of Khasra No. 409/3 and ultimately, the aforesaid way joins the KataniAbadiDhani. It was further pleaded by the plaintiffs (respondents No.3 to 10) in their application (Annex. 2) that the Khasras Nos. 401/2 and 401/3 belonged to the defendants and alleged way has not been entered in the Revenue Record.

(ii) Further case of the petitioners is that during pendency of application (Annex. 2), the respondent No. 1 (Civil Judge) appointed a Commissioner to prepare a report and site plan of the disputed way and the Commissioner submitted its report on 26-9-1998 (Annex. 3).

(iii) Further case of the petitioners is that report dated 7-7-1999 (Annex. 4) of another Commissioner was also obtained.

(iv) Further case of the petitioners is that defendants (petitioners) filed reply (Annex. 5) to the application (Annex. 2) stating that the plaintiffs (respondents Nos.3 to 10) are residing in Khasra No. 409/1 and 411/1 and all the respondents Nos.3 to 17 are members of one family and they have got their separate Katan (way) in Khasra No. 419 and they were using the said way and thus, they are not entitled to use the way as claimed by the plaintiffs in their plaint (Annex.1) as well as in the application for temporary injunction (respondent No. 2)

(iv) That the respondent No. 1 (Civil Judge) after hearing both the parties through order dated 29-9-1999 (Annex. 6) allowed the application (Annex. 2) filed by the respondents Nos.3 to 10 (plaintiffs) after discussing all the three necessary ingredients for issuing temporary injunction *inter alia* holding:

(i) That the first report of the Commissioner dated 26-9-1998 (Annex. 3) is of Laxman Singh, Advocate in which there is specific mention that there is 12 ft. wide way and similarly way has been shown by another Commissioner (Mohd. Umar) in his report dated 7-7-1999 (Annex. 4)

(ii) there is no dispute on the point that Khasra No. 398 is GairMumkinNadi and there is also a way in Khasra No. 409/3, but the dispute is only whether there is way in khasra No. 401/2 and 401/3 belonging to the defendants (petitioners) or not and for that respondent No. 1 (civil Judge) came to the conclusion that since the way has been shown in both the reports (Annex. 3 and 4) of the Commissioner and thus, he found a *prima facie* case in favor of the plaintiffs -

respondents Nos.3 to 10 and also found another two conditions for issuing temporary injunction in favor of the plaintiffs, and issued temporary injunction in favor of the plaintiffs (respondents Nos.3 to 10), but width of the way was restricted to 8 ft. instead of 12 ft.

(v) Aggrieved from the order dated 29-9-1999 (Annex. 6), the petitioners - defendants preferred an appeal (Annex. 7) before the respondent No. 2 (Additional Dist. Judge).

(vi) That the respondent No. 2 (Additional Dist. Judge) also appointed a Commissioner to prepare the report of disputed way.

(vii) Further case of the petitioners - defendants is that 3rd Commissioner submitted its report on 27-10-1999 (Annex. 8).

(viii) That the learned Additional Dist. Judge through judgment dated 16-10-2003 (Annex. 13) dismissed the appeal filed by the petitioners - defendants and upheld the order dated 29-9-1999 (Annex. 6) passed by the learned Civil Judge (respondent No.1) *inter alia* holding :

(i) That the Commissioner was appointed on the application of the defendants - petitioners and the Commissioner submitted its report on 27-10-1999 (Annex. 8) in which also existence of way as claimed by the plaintiffs (respondents Nos.3 to 10) was found, but towards south and west, the width of way is only 8 ft.

(ii) That as per the Commissioner report dated 27-10-1999 (Annex. 8) no other alternative way was found.

(ix) Being aggrieved by the order dated 29-9-1999 (Annex. 6) and judgment dated 16-10-2003 (Annex. 13), this writ petition has been preferred by the petitioners.

3. In this writ petition following submissions have been raised by the learned counsel for the petitioners:

(i) That it is admitted fact that the alleged disputed land is not katani/way in the revenue record and the disputed land belongs to the defendants- petitioners, therefore, the impugned order dated 29-9-1999 (Annex.6) and judgment dated 16-10-2003 (Annex.13) are beyond jurisdiction and should be set aside.

(ii) That there is alternative way available to the plaintiffs (respondents Nos.3 to 10) through Khasra No. 419 and it is settled proposition of law that if an alternative passage is available easementary right of necessity cannot be claimed and hence from the point of view also, the findings recorded by both the Courts below are erroneous one and should be set aside.

4. Reply to the writ petition was filed by the respondents and their case is that the disputed way was being used from immemorial time by the respondents and their ancestors through khasra No. 401/2 and 401/3 for the purpose of reaching their Dhani situated in khasra No. 409/3 and apart from this, the findings recorded by the learned Courts below are based on documentary evidence available on record and proper appreciation of evidence available on record and therefore, this Court under Article 227 of the Constitution of India should not interfere with the findings of the Courts below and hence no case is made out and the present writ petition should be dismissed.

5. Before proceeding further legal position for issuing temporary injunction as well as scope of Article 227 of the Constitution of India may be seen.

6. A stay order or an ad interim injunction is issued to maintain and preserve the status quo existing at the time of the institution of the proceedings. The real point, which has to be decided when an application for stay or for a temporary injunction is made, is not how the question ought to be investigated; but it is whether the matter should not be preserved in status quo until the question can be finally disposed of. A stay order or an order of injunction is not granted to disturb the status quo.

7. Before issuing a temporary injunction pending disposal of a suit, the plaintiff has to make out, first, that he has got a *prima facie* title to the properties. Secondly, the plaintiff must establish that he will suffer irreparable injury which is a material one which cannot be adequately compensated for by damages. Thirdly, he must prove that the balance of convenience is in favor of the plaintiffs, who are likely to suffer substantial mischief if the injunction is refused when compared to the mischief which might be caused to the defendants if the injunction is granted. Fourthly, the status quo must be maintained. The Court has to take into consideration all these points before granting a temporary injunction.

8. Injunction is a prevention relief and is generally granted taking note of the equities of the case and to protect the plaintiff's right to peacefully enjoy the property in his possession.

9. Injunction is an equitable remedy which is granted at the discretion of the Court and not as a matter of course. Circumstances under which such a relief is granted is no longer *res integra*.

10. The parties who seek the aid of the Court for injunction must show that the act complained of is in violation of his right and whether there is a fair and substantial question to be decided between the parties, and there is a *bona fide* contention between the parties. If such conditions are available, the relief may be granted. It is then the duty of the Court to consider the materials placed on record in the matter of granting or refusing to grant temporary injunction and considering the documents, such an order can be passed. Considering a document does not mean the mere reference to it, but there must be some discussion regarding the document before coming to a conclusion.

11. At the stage where the Court has to consider the application made by the appellant for grant of interim relief, it need not to adjudicate on the merits of the matter finally. It is a stage where the Court, after considering the material on the record has to decide the application filed for interim relief. Whatever orders are passed on such application are interlocutory orders, meaning thereby, by those orders, the proceedings are not finally disposed of.

12. In my opinion, the Court can direct status quo to be maintained in respect of disputed property and further can appoint a Commissioner to visit the site and to report with regard to actual use of the property and if the report is submitted by the Commissioner, that report should be taken into account at the stage of granting temporary injunction and if that report is prepared in presence of both the parties, its importance becomes more and even in a case where the Commissioner visits the site in defendants absence and even without giving any notice to them, that report can be looked into if the Court feels that the said report gives picture of the site in correct manner. Thus, the report of the Commissioner forms acceptable basis for passing ad interim injunction or direction though such report is not an absolute evidence at that stage and has to be scrutinized with greater care and effectiveness at the stage of trial.

INTERFERENCE OF HIGH COURT WHEN THERE IS CONCURRENT FINDINGS OF BOTH THE COURTS BELOW IN RESPECT OF ISSUING TEMPORARY INJUNCTION

13. The High Court does not as a rule interfere with an interlocutory order, namely, an interim injunction, except under exceptional circumstances.

14. The High Court would not ordinarily interfere with the exercise of discretion in the matter of grant of temporary injunction by the High Court and the trial Court and substitute its own discretion, therefore except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the order of the Court under scrutiny ignores the settled principles of law regulating grant or refusal of interlocutory injunction, the High Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below solely on the ground that if it had considered the matter at trial stage, it would have come to a contrary conclusion.

ON EASEMENT

15. Easement exists for the beneficial enjoyment of the dominant heritage. It cannot be detached from it and made a right in gross. This principle has been recognized in India by Section 6 of the Transfer of property Act which enacts that an easement cannot be transferred apart from the dominant heritage.

16. An easement, in respect of dominant heritage, is an addition to the rights of ownership while in respect of the servantheritage; it is a definite right of user subtracted from the full rights of ownership of the servant owner.

17. It may further be stated here that easement exists for the benefit of dominant heritage alone and easements are restriction on ordinary right of property.

18. When the impugned order dated. 29-9-1999 (Annex. 6) is scrutinized, the learned Civil Judge (respondent No.1) has considered all the three ingredients for grant of temporary injunction in the impugned order dated 29-9-1999 (Annex. 6) and he has based his finding on the basis of two reports of the Commissioner dated 26-9-1998 (Annex. 3) and 7-7-1999 (Annex. 4) and though in the report dated 26-9-1998 (Annex.3), the width of way has been shown as 12 ft., the learned civil Judge in his wisdom restricted the width to be 8 ft. from 12 ft. and has come to the conclusion that there is way in Khasra No. 401/2 and 401/3 and it goes ahead to Khasra No. 409/3 and since findings of the learned Civil Judge (respondent No.1) are based on documentary evidence available on record particularly three Commissioner Reports dated 26-9-1998, 7-7-1999 and 27-10-1999 (Annex. 3, 4 and 8), therefore, they cannot be termed as perverse or erroneous.

19. Similarly so far as findings of the learned Additional Dist. Judge, Parbatsar (respondent No. 2) are concerned, it is submitted that on the request of the defendants

- petitioners, the learned Additional Dist. Judge appointed a Commissioner who submitted his report on 27-10-1999 (Annex. 8) and the learned Additional Dist. Judge came to the conclusion that even in the report dated 27-10-1999 (Annex. 8) which was prepared after about one year of the earlier report dated 24-9-1998 (Annex. 3) existence of way through Khasra No. 401/2 and 401/3 belonging to the defendants-petitioners was found which goes ahead to Khasra No. 409/3. The learned Additional Dist. Judge further observed that there is no alternative way existing and therefore, the findings of the learned Additional Dist. Judge are based on the report of the Commissioner dated 27-10-1999 (Annex. 8) and if the Commissioner reports dated. 26-9-1998, 7-7-1999 and 27-10-1999 (Annex. 3, 4 and 8) are seen, it appears that in para 4 of the report dated 26-9-1998 (Annex. 3), there is clear mention of the fact that the same was prepared in presence of parties as well as their advocates and the same is supported by a map. Similarly the report dated 7-7-1999 (Annex. 4) which was prepared by Advocate Mohd. Umar was also prepared in the presence of lawyers of both the parties and the same is supported by a map.

20. So far as the Commissioner report dated 27-10-1999 (Annex. 8) is concerned, it may be stated that the learned Additional Dist. Judge appointed the Commissioner on the request of the defendants - petitioners and it was also prepared in presence of counsel of both the parties which is supported by the map and thus, the findings of the Courts below are based on the Commissioner reports dated 26-9-1998, 7-7-1999 and 27-10-1999 (Annex. 3, 4, and 8) and hence the same cannot be said to be perverse and erroneous because from the reports (Annex. 3, 4 and 8), existence of way through Khasra No. 401/2 and 401/3 which goes ahead to Khasra No. 409/3 was *prima facie* established at this stage. It may be stated here that at the stage of interim injunction only *prima facie* case has to be seen and the Court is not supposed to decide the dispute finally and since *prima facie* case existed in favor of the respondents - defendants for right of way, hence, the temporary injunction was rightly issued in favour of plaintiffs- respondents.

21. Since the impugned order dated. 29-9-1999 (Annex. 6) passed by the learned Civil Judge (respondent No.1) is based on Commissioner reports dated 26-9- 1998, 7-7-1999 (Annex. 3 and 4) and impugned judgment dated 16-10-2003 (Annex. 13) passed by the learned Additional Dist. Judge (respondent No. 2) is based on Commissioner report dated 27-10-1999 (Annex. 8), therefore, forming of opinion regarding *prima facie* case of right of way in favor of the plaintiffs (respondents Nos.3 to 10) cannot be said to be illegal and perverse.

22. The argument of the learned counsel for the petitioners that Khasra No. 398 is GairMumkinNadi and there is way in Khasra No. 409/3, would not be helpful to the learned counsel for the petitioners defendants as both the Courts below have found the way through Khasra Nos. 401/2 and 401/3 belonging to the petitioners - defendants.

23. The discretion exercised by the learned Civil Judge (respondent No.1) in allowing the application (Annex. 2) filed by the plaintiffs (respondents Nos.3 to 10) is just and proper and does not require any interference by this Court under Article 226/227 of the Constitution of India.

24. Under Article 227 of the Constitution of India, the High Court cannot interfere with the exercise of a discretionary power vested in the inferior Court or Tribunal, unless its finding or order is clearly perverse or patently unreasonable.

25. It may be stated that High Court's power under Article 226/227 of the Constitution of India should be exercised only when there is dereliction of duty and flagrant violation of law and should be exercised most sparingly in a case where grave injustice would be done unless the Court interferes. It cannot be used as appellate or revisional forum. Apart from this power under Article 226 is exercised by the Court in its discretion and cannot be claimed as of right by any party.

26. Thus, the impugned order dated 29-9-1999 (Annex.6) passed by the learned Civil Judge (respondent No.1) and judgment dated 16-10-2003 (Annex. 13) passed by the learned Additional Dist. Judge (respondent No. 2) cannot be said to have been suffered from the basic infirmity and illegality and the same does not require any interference by this Court under Article 226/227 of the Constitution of India and this writ petition deserves to be dismissed.

For the reasons mentioned above, the present writ petition is dismissed.

Petition dismissed.