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

WRIT PETITION NO.4534 OF 2023

Arun Narayan Patil & Ors.

...Petitioners

Versus

Vishnu Bhimrao Gudulkar & Ors.

...Respondents

Mr. Manoj A. Patil, for the Petitioners.

Mr. Pradeep D. Dalvi, for Respondent Nos.1 and 2.

Mr. P. G. Sawant, AGP, for the State/Respondent Nos.3 to 5.

CORAM : MADHAV J. JAMDAR, J.

DATED : 27th OCTOBER 2023

JUDGMENT:

1. Heard Mr. Patil, learned counsel appearing for the Petitioners, Mr. Dalvi, learned counsel appearing for Respondent Nos.1 and 2 and Mr. Sawant, learned AGP appearing for the Respondent Nos.3 to 5-State.

2. The Petitioners are impugning the order dated 16th June 2021 passed by the Tahsildar, Ajara in proceedings bearing Land Case No.242 of 2021 filed under Section 5 of the Mamlatdars' Courts Act, 1906 (hereinafter referred to as "**the said Act**") as well as order dated 15th December 2022 passed by the Sub-Divisional Officer, Ajara-

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Bhudargad Sub-Division, Gargoti in Appeal No.85 of 2021. By the said order dated 16th June 2021, Tahsildar directed the Public Works Department-Ajara (“PWD”) to verify whether any encroachment exists on 16 feet road and if any encroachment is found then, the same be removed immediately. Aggrieved by the said order dated 16th June 2021 passed by the Tahsildar, the Petitioners filed Appeal No.85 of 2021 before the Sub-Divisional Officer, Ajara-Bhudargad, Sub-Division, Gargoti (hereinafter referred to as “the SDO”). The SDO by order dated 15th December 2022 dismissed the Revision on the ground that the Petitioners are having road of 10 feet which passes through Gat No.431 and therefore, their demand of 16 feet road is not proper.

3. The factual position on record shows that the Petitioners have earlier filed Case No.1636 of 2009 under the provisions of the said Act. The said case has been allowed by the Mamlatdar on 14th September 2010 by passing the following operative order:-

“१. वादी क्र. २ ते ३८ यांचा अर्ज व वादी क्र. १ यांची मागणी मंजूर करणेत येत आहे. किणे ते पोश्चातवाडीपर्यंत पारंपारीक व सार्वजनिक वापरात असलेल्या पाणंदीच्या सुमारे १६ फुट रुंदीच्या रस्त्यामध्ये प्रतिवादी क्र. १ ते ५ यांनी माती, दगड व लाकडाचे ओंडके टाकून केलेला अडथळा दूर करणेचा आदेश करणेत येत आहे.

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२. दि. २१/०९/२०१० रोजी मी समक्ष जागेवर येवून सदरचा अडथळा दूर करित आहे.

३. अडथळा दूर करून रस्ता पूर्ववत खुला करणेच्या कार्यवाहीस पोलीस निरीक्षक, आजरा पोलीस स्टेशन यांनी योग्य बंदोबस्त घेवून दि. २१/०९/२०१० रोजी सकाळी १०.०० वाजता हजर राहणेचे आहे. त्याचप्रमाणे पोलीस पाटील व गा. का. तलाठी, किणे व पोश्नातवाडी आणि मंडल अधिकारी भाग मलिग्रे यांनी उपरोक्त तारखेस सकाळी १०.०० वाजता समक्ष जागेवर हजर राहणेचा आदेश करणेत येतो.

४. वादी क्र. १ उपविभागीय अभियंता, वर्ग-१ सार्वजनिक बांधकाम उपविभाग, आजरा यांनी आपले आवश्यक ते कर्मचारी व अडथळा दूर करणेसाठी लागणारे साहित्य/वाहन घेवून उपरोक्त तारखेस सकाळी १०.०० वाजता समक्ष जागेवर हजर राहणेचे आहे.

५. प्रतिवादी क्र. १ ते ५ अगर त्यांच्या तर्फे कोणीही व्यक्ती, नातेवाईक, एजंट, नोकर यांनी किणे-पोश्नातवाडी सार्वजनिक वापराचे रस्त्यावर पुन्हा केंव्हाही कोणत्याही प्रकारचा अडथळा करू नये व त्या रस्त्याच्या वापरास वादी अगर अन्य कोणालाही कोणत्याही प्रकारे हरकत करू नये अशी कायमची मनाई ताकीद करणेत येत आहे. असा प्रकार केल्यास तो भारतीय दंडविधान संहिता कलम १८८(२) अन्वये शास्तीस पात्र राहील.

६. निर्णय वादी क्र. १ ते ३८ व प्रतिवादी क्र. १ ते ५ तसेच पोलीस निरीक्षक, आजरा यांना कळविणेत यावा.”

(Emphasis added)

The English translation of said operative order dated 14th September 2010 reads as under:-

“1) Application made by Plaintiffs No. 2 to 38 and the prayer of Plaintiff No.1 is allowed. **Directions are**

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given to remove the obstacle that has been created by putting soil, stones and logs by Defendants No.1 to 5 on the approximately 16-foot wide Panand (i.e. a lane through a Village) – road from Kine to Poshrat Wadi being used traditionally and for public purpose.

2) I will personally visit the site on the date 21.09.2010 and will remove the obstacle.

3) Inspector of Police, Aajra Police Station shall, together with an appropriate escort, remain present on the date 21.09.2010, at 10:00 hrs. in the morning for taking the action of removing the obstacle and opening the road as it was earlier. Similarly, Police Patil and Village Kamgar Talathi, Kine and Poshrat Wadi and Circle Officer, Part – Maligre are directed to personally remain present at the site at 10:00 hrs. in the morning on the aforesaid date.

4) Plaintiff No.1 – Sub Divisional Engineer, Class-1, Public Works Sub-Division, Aajra shall personally remain present at the site at 10:00 hrs. in the morning on the aforesaid date by taking along with him required employees and the material/vehicle required for removing the obstacle.

5) **Defendants. No. 1 to 5 or any person, relative, agent, servant acting on their behalf are prohibited by this permanent injunction order from creating any obstacle of whatsoever nature again at any time on the**

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Kine-Poshrat Wadi Road being used for public purpose and from taking any objection of whatsoever nature in any manner whatsoever either to the Plaintiff or to any other persons for using the said road. In case of committing any such act, they shall be liable for fine as provided under Section 188(2) of the Indian Penal Code.

6) This decision shall be intimated to the Plaintiffs No. 1 to 38, Defendants No.1 to 5 and also to the Inspector of Police, Aajra.”

4. The Respondents challenged said order dated 14th September 2010 passed by the Tahsildar by filing revision and the SDO by order dated 3rd September 2012, set aside the said order dated 14th September 2010 of Tahsildar. Said order dated 3rd September 2012 was challenged by the present Petitioners by filing Writ Petition No.2295 of 2013 and a learned Single Judge allowed the said Writ Petition on 12th August 2014 by passing the following operative order:-

“...The impugned order is accordingly quashed and set aside and the following directions are issued:

(i) The impugned order is set aside and the **matter is relegated back to the SDO for a denovo consideration of the Revision Application. The SDO would consider the**

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Revision Application in terms of the observations made in the instant order and especially on the basis whether there was an existing road since last many years which the Petitioners were using.

(ii) The SDO would not lay emphasis on the fact that the application for impleadment filed by the Petitioners has been rejected in the Suit filed by the Respondent Nos.1 to 4, as the same is not a relevant consideration in an application filed under Section 5.

(iii) The SDO to pass a speaking order dealing with the contentions that would be raised by the parties before him.

(iv) The parties to appear before the SDO on 27th August, 2014. The SDO to thereafter to decide the matter latest by 30th September 2014.

4. With the aforesaid directions, the Writ Petition is disposed of.

(Emphasis added)

5. The SDO passed the following operative order on 27th November 2014:-

“1) रिक्हीजन अर्ज मंजुर करणेत येत आहे.

2) किणे गट नं 431 मधील पूर्व—पश्चिम असा किणे—पोश्रातवाडी जाणारा १६ फुट रुंदीचा रस्ता रस्त्यात केलेले सर्व अडथळे दूर करून पूर्वापार वहिवाटीस खुला करून दयावा असा रिक्हीजन जाबदार यांना आदेश करित आहे.

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- 3) रिक्कीजन जाबदार पूर्वापार वहीवाटीस असलेला रस्ता खुला करून न दिलेस भारतीय दंड संहिता (IPC) मधील 188(2) चे शास्तीस पात्र राहतील.
- 4) निर्णयाची समज संबंधीताना, गावकामगार तलाठी किणे/पोश्रातवाडी, सरपंच किणे/पोश्रातवाडी, पोलिस निरीक्षक आजरा व तहसिलदार आजरा यांना देणेत यावी. तसेच याचा अहवाल मा. उच्च न्यायालय मुंबई यांना रिट पिटीशन क्र.2295/2013 चे निर्णय कामी सादर करावा.”

(Emphasis added)

The English translation of the said operative order dated 27th November 2014 reads as under:-

- “1) Revision Application is allowed.
- 2) **The Respondents in the Revision Application are directed to remove all the obstacles that have been created in the East – West, 16-foot wide road going from Kine to Poshrat Wadi, through the land bearing Gat No. 431 in Village - Kine and to open the same for easement as being used since long.**
- 3) If the Respondents in the Revision Application fail to open the road for easement as being used since long, they shall be liable for fine as provided under Section 188(2) of the Indian Penal Code.
- 4) Intimation about this decision shall be given to the persons concerned, Village Kamgar Talathi, Kine / Poshrat Wadi, Sarpanch, Kine / Poshratwadi, Inspector of

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Police, Aajra and Tahasildar of Aajra. Further, a report in respect of this decision shall be submitted to the Hon'ble Bombay High Court, Mumbai, for the purpose of decision in Writ Petition No. 2295/2013.”

6. The said order dated 27th November 2014 of the SDO has been challenged by the present Respondents by filing Writ Petition No.28 of 2015 and by order dated 15th April 2015 passed by the learned Single Judge, the said Writ Petition has been dismissed. Thus, in effect, the order dated 14th September 2010 passed by the Tahsildar as confirmed by order dated 27th November 2014 passed by the SDO is confirmed by this Court. Accordingly, the direction given by said order dated 14th September 2010 that the obstruction on the 16 feet road passing through Gat No.431 is to be removed and there shall not be any further obstruction is confirmed upto this Court.

7. It appears that again Respondent Nos.1 and 2 have encroached on the said road and therefore, the fresh proceedings are filed. In the above background, it is significant to note the observations made by the SDO in order dated 15th December 2022. The relevant observations are on page 91 which reads as under:-

“किणे गावाच्या दिशेपासून गट नं. 431 मधून सदयस्थितीमध्ये 10 फूट रस्ता

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असून यामधून वाहनांची ये—जा होत आहे. गट नं 431 मधील सदयस्थितीमध्ये असणारा रस्ता व पुनरिक्षण अर्जदार यांचा गट नं. 339 चा सरबांध हा सर्वसाधारणपणे 3-4 फूट रूंद असून यामध्ये झाडे असलेचे दिसून येत आहे. तसेच गट नं. 431 च्या शेवटी गट नं. 345 (चंद्रकांत पाटील वै.) च्या आसपास बांबुचे बेट व ओढा/नाला आहे. सदरचे बेट हे पूर्णपणे रस्त्यामध्ये आलेले दिसून येत आहे.

याबाबत पुनरिक्षण अर्जदार यांची मागणी पाहता सदयस्थितीमध्ये फक्त गट नं ४३१ च्या संपूर्ण हद्दीमधून १० फूट रूंद या प्रमाणे रस्ता असतानाही, प्रस्तुत पुनरिक्षण अर्जदार यांनी फक्त गट नं ४३१ मधून संपूर्ण १६ फूट रस्त्याची केलेली मागणी ही अयोग्य आहे. याबाबत पुनरिक्षण अर्जदार यांचेकडून मागणी करणेत आलेला रस्ता हा वहीवाटीकरीता मोठा करणेकरीता गट नं. ३३९, ३४० व ३४१ च्या सरबांधाची असणारी रूंदी कमी करणे आवश्यक आहे. तसेच गट नं ३४५ मध्ये सदयस्थितीमधील वहीवाटीच्या रस्त्यावर आलेले बांबुचे बेट कमी केलेस किंवा काढून टाकलेस सदरचा रस्ता हा पूर्णपणे योग्यरित्या वहीवाटीकरीता वापरात येऊ शकतो.”

(Emphasis added)

The English translation of above observations reads as under:-

“Presently, there is a 10-foot wide road passing through the land bearing Gat No. 431 from the direction of Village Kine and vehicles are passing by the said road. It is seen that the embankment of the existing road passing through the land bearing Gat No.431 and of the land bearing Gat No.339 of the Applicant in the Revision Application is generally 3 to 4 feet wide and trees are standing therein. Further, at the end of the land bearing Gat No.431, there is a babmboo thicket and a rivulet/nullah nearby the land bearing Gat No. 345

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(Chandrakant Patil and others) and it is seen that this thicket has totally grown in the road.

In this connection, considering the demand of the Applicant in the Revision Application, presently, despite there being a 10-foot wide road passing through the entire boundary of only the land bearing Gat No. 431, the demand by the present Applicant in the Revision Application for entire 16-foot road through only the land bearing Gat No.431 is improper. In this regard, in order to widen the road for easement as demanded by the Applicant in the Revision Application, it is necessary to reduce the width of the embankment of the land bearing Gat Nos. 339, 340 and 341. Further, if the bamboo thicket that has grown on the existing easement-road in Gat No. 345 is reduced or removed, then the said road can fully and properly be used for easement.”

8. Thus, it is clear that the order passed by the SDO dated 15th December 2022 is contrary to the orders passed in earlier round of litigation as confirmed by this Court by order dated 15th April 2015 passed in Writ Petition No.28 of 2015. The relevant discussion is found in paragraph No.8 of the said order dated 15th April 2015 passed by the learned Single Judge, which reads as under:-

“8 Now coming to Section 5(2) of the said Act. The said

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power can be exercised by the Tahasildar in the eventualities which have been mentioned in the said provision. **The Tahasildar as mentioned in the earlier part of this order made a site visit and on such site visit factually found that there was obstruction and on consideration of the material on record by way of photographs also came to a conclusion that there was a existing customary road used by the villagers and the said road was blocked by the Petitioners and therefore exercise of powers under Section 5(2) of the said Act was warranted.** It is required to be noted that the endeavour of the Petitioners seems to be to stall the said villagers from using the said road probably because the part of it passes through the lands of the Petitioners. The said reason could only be said to be the reason as to why the Petitioners saw to it that the appointment of Court Commissioner does not fructify in the suit filed by the Petitioners against the State Government in the Public Works Department as otherwise the Petitioners if they were so sure about nonexistence of the road ought to have willingly acceded to the Court Commissioner's carrying out the work of commission. The said fact therefore leads to a conclusion that the Petitioners are interested in some-how seeing to it that the road is not made available for the use of the villagers, hence in so far as exercise of the powers under Section 5(2) of the

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said Act is concerned, it cannot be said that the said order suffers from any error of jurisdiction on the part of the Tahasildar.”

(Emphasis added)

9. Thus, it is clear that the said 16 feet road was existing for several years. The obstruction was put up by the Respondents and therefore, the said case No.1636 of 2009 has been filed under the provisions of the said Act. Orders are passed in said case providing that obstruction on said 16 feet road be removed and the said order has been confirmed by learned Single Judge by order dated 15th April 2015. Thus, it is clear that the observations in the impugned order dated 15th December 2022 are contrary to the orders passed in earlier round of litigation, as confirmed by this Court. Order dated 16th June 2021 passed by the Tahsildar is also illegal, as duty has been cast on the Mamlatdar under Section 5 of the said Act to remove any obstruction and Tahsildar has directed PWD to verify about the existence of any encroachment and then take appropriate action. The said direction is contrary to the mandate of Section 5 of the said Act.

10. Accordingly, order dated 16th June 2021 passed by the Tahsildar, Ajara as well as order dated 15th December 2022 passed by

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the SDO, Ajara-Bhudargad, Sub-Division, Gargoti are quashed and set aside and the reliefs sought in Land Case No.242 of 2021 are granted.

11. The Respondent No.4 to take immediate steps for removal of obstruction/encroachment on 16 feet road on said Gat No.431 within a period of one month from today.

12. The Writ Petition is allowed in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]