



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1450 OF 2020
WITH
CIVIL APPLICATION NO. 817 OF 2025
IN
WRIT PETITION NO. 1450 OF 2020

- 1] Subhedarkha S/o Dulhekha Pathan
Age-61 years, Occ-Agril,
R/o. Balanagar, Tq. Paithan, Dist. Aurangabad
- 2] Sayarabee W/o Subhedarkha Pathan
Age- 56 years, Occu- Agril,
R/o. As Above.

...PETITIONERS

VERSUS

- 1] Pravin S/o Laxman Gorde
Age- 30 years, Occ- Agril,
R/o. Balanagar, Tq. Paithan, Dist. Aurangabad
- 2] Neharu S/o Shamrao Gorde
Age- 57 years, Occ- Agril
R/o. As above.
- 3] The Additional Collector,
Collector Office, Aurangabad.
- 4] The Tahsildar
Tahsil Office Paithan
Tq. Paithan, Dist. Aurangabad.

...RESPONDENTS

Mr. Shaikh Faruk V. Patel, Advocate for petitioners
Mr. Deelip Patil Bankar, Senior Advocate i/b. Mr. S.M. Kshirsagar,
Advocate for respondents No. 1 and 2
Mrs. A.S. Mantri, AGP for respondent No. 3 and 4-State

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CORAM : MANJUSHA DESHPANDE, J.
RESERVED ON : 20th JANUARY, 2025
PRONOUNCED ON: 4th FEBRUARY, 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.
2. Petitioners are challenging the judgment and order passed 11.09.2019 passed by Additional Collector, Aurangabad in Case No. 2017/Revision/Mamlatdar/CR-20(204), whereby revision petition filed by petitioners has been rejected and order dated 10.11.2017 passed by Tahsildar, Paithan has been confirmed.
3. It is the case of petitioners that respondents No. 1 and 2 had filed application before Respondent No. 4, under Section 5 of Mamlatdars' Courts Act, 1906 (for short 'Act of 1906'), seeking direction to open vahivat road and pass necessary order in favour of respondent No. 1 and 2. Respondent No. 1 and 2 are the owners and possessors of land Gut No. 226 while petitioners are owners and possessors of land Gut No. 225 situated at village Balanagar, Taluka- Paithan, Dist. Aurangabad. Pursuant to the application of respondents No. 1 and 2, Circle Officer submitted his report dated 13.11.2014 to Respondent No. 4-Tahsildar, reporting that petitioners have obstructed the internal way which falls within the boundary of

lands of petitioners and respondents No. 1 and 2, by using sticks and twigs. In the report it was further stated that the road is not capable of being open until the demarcation of boundary of petitioners land is made. It was stated by him that Tahsildar may visit the spot by issuing notices to the concerned parties. On 23.02.2025, Talathi and Circle Officer visited the spot and submitted a report to Tahsildar, Paithan. In that report, Talathi had stated that petitioner No. 1 had informed them that there is shiv rasta from the boundary of land Gut No. 225 and 226 which belongs to respondent No. 1 and 2 to approach land Gut No. 226. The shiv rasta has been constructed from the public contribution. It is further stated in the report that respondents No. 1 and 2 have refused to use the shiv rasta.

4. According to learned advocate for the petitioners in this report also Talathi had recommended that Tahsildar should visit the spot personally. The second report was prepared by the Circle Officer and Talathi on 23.02.2015. According to petitioners, in spite of recommendation of Circle Officer and Talathi once again Talathi, Balanagar visited the spot and prepared panchnama in which it is stated that there is Tanda (Bk) Balanagar shiv rasta, which is in existence from Gut No.

224, 225 till the boundary of Gut No. 226. It is also stated that cart track is found between Gut No. 225 and 226 which exists up to the centre of land Gut No. 225 and that road has been blocked by sticks and twigs. The learned advocate for the petitioners has laid emphasis on the part of report wherein the concerned officer has stated that there is no encroachment on the shiv rasta by petitioners. Learned advocate for the petitioners further contended that on 10.11.2017, respondent No. 4 Tahsildar passed order on the basis of report and panchnama dated 13.11.2014, 23.02.2015 and 11.12.2015. According to learned advocate for the petitioners, order passed by Tahsildar is erroneous since it was passed without taking into consideration the existence of shiv rasta which is mentioned in all the three reports. Therefore, he had challenged the judgment and order passed by respondent No. 4- Tahsildar before the Additional Collector, Aurangabad. The Additional Collector, Aurangabad after hearing the parties has been pleased to reject the revision filed by petitioners by judgment and order dated 11.09.2019, confirming the judgment and order passed by Tahsildar. According to him, though the observations made in para 3 of the order of Additional Collector, Aurangabad favours him, however, while passing the final order, the Additional

Collector, Aurangabad has passed the order which is contrary to his observations in para 3. Hence, this reflects non application of mind by the Additional Collector, Aurangabad.

5. Learned advocate for the petitioners submits that in fact from the panchnama and the report submitted by Circle Officer and Talathi dated 13.11.2014, 23.02.2015 and 11.12.2015 clearly record that there is shiv rasta adjoining the lands of petitioners as well as respondents No. 1 and 2 in Gut No. 225 and 226. Therefore, though, the approach road is available to respondents No. 1 and 2, which is very much in existence as has been recorded in all the three reports, Respondents No. 1 and 2 are adamant and have refused to use the alternate road. According to learned advocate for petitioners in fact the prayer of respondents No. 1 and 2 itself was for removal of obstructions from shiv rasta/vahivat rasta, therefore, considering that all the three reports did not disclose that there is any obstruction on the shiv rasta as can be seen from the map and report, which is placed on record, both the authorities have committed an error in passing the order, thereby directing him to remove the encroachment from the bandh, which is in existence between Gut No. 225 and 226 belonging to petitioners and

respondent No. 1 and 2 respectively.

6. The respondents No. 1 and 2 who are represented by Senior Advocate Shri. Deelip Patil Bankar opposes the prayer made in the writ petition. According to him, there exists vahivat rasta, which is in existence since their forefathers and it is being used by respondents No. 1 and 2 for approaching their lands. However, petitioners have closed the customary way with sticks and twigs. Since their approach was obstructed, they have filed application under Section 5 of Act of 1906, seeking direction to remove the obstruction created by petitioners in their vahivat rasta.

7. According to him, there is specific mention in all the panchnama that there exists a cart track between Gut No. 225 and 226 and it has been obstructed with sticks and twigs. This itself indicates existence of vahivat rasta. Only after taking into consideration the reports of Circle Officer and Talathi, wherein existence of vahivat rasta has been mentioned, the order has been passed by the Mamlatdar.

8. Respective parties are relying on the report of Court Commissioner, which is submitted and placed on record pursuant to the order dated 21.11.2022 passed by this Court. Learned

Bhagyawant Punde

Senior Advocate has drawn my attention to the order dated 23.08.2023, wherein this Court has observed that "*the learned counsel appearing for the petitioners submits that there is alternate access to the respondents land from the shivrasta and the respondents are using the same.*" and petitioners were permitted to place on record photographs of the alternate road.

9. According to learned Senior Advocate this order itself makes it clear that customary road which was being used is the road which is between two gut numbers and petitioners are claiming that respondents should use the alternate access instead of customary road, which is obstructed by them.

10. He further relies on the part of report of Court Commissioner, wherein it is stated that when they proceeded from the side of Gut No. 226 from its boundary a Nala exists and it was brought to the notice of Court Commissioner that land Gut No. 226 is shared by respondents in between brotherhood *inter se*. It was demonstrated to him that it is shared by Amol Gorde, Shrikant Gorde, Neharu Gorde, Machindra Gorde, Pravin Gorde and Sachin Gorde. The respective holders of the land have stated that there is mutual understanding, accordingly, they are using the temporary arranged boundary way. It is the contention

of respondents No. 1 and 2 that Gut No. 226 is held by various persons and on the boundary between Gut No. 225 and 226, petitioners have created obstruction. Therefore, their approach to their field through vahivat rasta is blocked. The field of respondents No. 1 and 2 is situated in Gut No. 226 in such a way, that they cannot approach shiv rasta, which is recently constructed. The shiv rasta runs from east to west. Even shiv rasta is existing up to starting point of Gut No. 226 only and no further. It is further observed in the Court Commissioner's report that from the beginning point of Gut No. 225, Tanda shiv rasta was not seen to be in use.

11. In order to facilitate this Court the Court Commissioner has drawn certain pointwise conclusions about about the location of shiv rasta and vahivat rasta. It is categorically noted in point no. 1 i.e. there is Nala between Gut No. 225 and 226 and from boundary line of Gut No. 225, petitioners have closed the portion of Nala with stones, straws, thorny bushes etc. There is no problem for the petitioners to reach their field in Gut No. 225 from Tanda shiv road. Old vahivat i.e. customary way exists up to starting point of Gut No. 225. The respondents No. 1 and 2 are using the way from the

boundary line abutting to Nala in Gut No. 226 as a temporary arrangement. He has further recommended that the natural course of Nala, which appears between the two Guts, is likely to be closed at the instance of petitioners and respondents No. 1 and 2, should be kept open and clear, for easy flow of natural rain water and that can be conveniently used for approaching holders of Gut No. 226 and 225. The Court Commissioner has also placed on record photographs of shiv rasta. The map which is annexed along with Court Commissioner's report shows that there is old road of village Balanagar, which is a tar road approximately 500 mtrs and Gut No. 225 is abutting to that road. So far as Gut No. 226 is concerned, according to map Shiv rasta has been closed at the point where it reaches the Gut No. 226.

12. I have heard the parties and perused the record along with original record of Tahsildar. Both the parties have relied on inspection conducted by Circle Officer and Talathi on three occasions. It is categorically stated by the petitioners that there is alternate road and respondents No. 1 and 2 should use the same, thereby opposing the use of existing road which was used by forefathers of respondents No. 1 and 2. It also reflects

that shiv rasta has been recently constructed from the contribution of villagers. Therefore, based on said reports, Tahsildar has passed a order observing that petitioners have obstructed the customary road between Gut No. 225 and 226 which is a approach road for the respondents No. 1 and 2. The Additional Collector has also refused to interfere with the said order on the ground that there exists three reports which categorically state that petitioners have caused obstruction to the passage of respondents No. 1 and 2.

13. Other objection which is raised by learned advocate for the petitioners is that Mamlatdar has not followed due procedure of law while conducting proceeding filed under Section 5(2) of Act of 1906. According to him, Tahsildar has failed to follow procedure as provided under Section 9 of Act of 1906. Section 9 of Act of 1906 reads thus:

"9. Examination of plaintiff on oath.- Where the plaint does not contain the particulars specified in section 7 or is unnecessarily prolix, the Mamlatdar shall forthwith examine the plaintiff upon oath and ascertain from him such of the particulars specified in section 7 as are not clearly and correctly stated in the plaint and shall reduce the examination to writing in the form of an endorsement on or annexure to the plaint which shall thereupon be deemed to be part of the plaint. Where the plaintiff requires time to obtain any of the particulars

specified in section 7, the Mamlatdar shall grant him such time as may under all the circumstances appear reasonable."

14. Section 7 of Act of 1906 reads thus;

"7. Suits commenced by plaintiff: Contents of plaintiff:
All suits under this Act shall be commenced by a plaintiff, which shall be presented to the Mamlatdar in open Court by the plaintiff and which shall contain the following particulars:-

(a) the name, age, religion, caste, profession and place of abode of the plaintiff;

(b) the name, age, religion, caste, profession and place of abode of the defendant;

(bb) the nature and situation of the impediment erected and the situation of the lands which are adjacent to each other and the nature of the relief sought;

(c) the nature and situation of the property of which possession for use is sought, or the nature of the injunction to be granted, as the case may be;

(d) the date on which the cause of action arose;

(e) the circumstances out of which the cause of action arose; and

(f) a list of the plaintiff's documents, if any, and of his witnesses, if any, showing what evidence is required from each witness, and whether such witnesses are to be summoned to attend, or whether the plaintiff will produce them on the day and at the place to be fixed under section 14."

15. According to him, there is no affidavit filed by plaintiff in support of the issues which have been raised. The

issues were not framed by the Mamlatdar as provided under Section 19 of Act of 1906, which reads thus;

"19. Points to be decided by Mamlatdar at hearing:

(1) On the day fixed, or on any day to which the proceedings may have been adjourned, the Mamlatdar shall, subject to the provisions of Section 16, proceed to hear all the evidence that is then and there before him, and to try the following issues, namely:

(aa) If the plaintiff avers that the natural flow of surface water from his land has been impeded by any erection raised by the defendant causing damage or likelihood of damage to plaintiff's land or to any grazing, trees or crops thereon-

(1) whether surface water flowed in a defined channel or otherwise, naturally from plaintiff's land on to defendant's land;

(2) Whether the defendant erected any impediment to such flow, otherwise than under due authority of law;

(3) whether such erection impeded such natural flow of water within six months before the suit was filed;

(4) whether such impediment has caused or is likely to cause damage to plaintiff's land or to any grazing, trees or crops thereon;]

(a) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use,

(1) whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed;

(2) whether the defendant is in possession at the time of the suit, and, if so, whether he obtained possession otherwise than by due course of law;

(b) if the plaintiff avers that he is entitled to possession of any property or restoration of any use by reason of the determination of any tenure or other right of the

defendant in respect thereof -

(1) whether the defendant is in possession of the property or in the enjoyment of the use by a right derived from the plaintiff or from any person through whom he claims;

(2) whether such right has determined at any time within six months before the suit was filed;

(3) whether the defendant is other than a person who has been a former owner or part-owner within a period of twelve years before the institution of the suit of the property or use claimed, and other than the legal representative of such former owner or part-owner;

(c) if the plaintiff avers that he is still in possession of the property or in the enjoyment of the use, but that the defendant disturbs or obstructs or has attempted to disturb or obstruct him in his possession or use,

(1) whether the plaintiff or any person in his behalf is actually in possession or enjoyment of the property or use claimed;

(2) whether the defendant is disturbing or obstructing, or has attempted to disturb or obstruct him, in such possession or enjoyment;

(3) whether such disturbance or obstruction, or such attempted disturbance or obstruction, first commenced within six months before the suit was filed.

(2) Power of Mamlatdar to examine other witnesses and inspect property in dispute: The Mamlatdar may, after due notice to, and in the presence of, the parties summon and examine as a witness any person who has not been summoned or produced, and may call for and cause to be proved any document which has not been applied for or produced, by either of the parties, where he considers it expedient in the interests of justice so to do, and may, if he thinks fit, make a personal inspection of the property in dispute in the presence of, or after due notice to, the parties.

He shall without unnecessary delay record a memorandum after hearing the parties on the spot, if present, of any relevant facts observed at such inspection. The memorandum shall form part of the record of the case.

(3) Record of proceedings by Mamlatdar: The Mamlatdar shall with his own hand make or sign a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds, and briefly record his reasons for his finding.

(4) Orders to be passed by Mamlatdar upon decisions in favour of plaintiff and defendant: Where the Mamlatdars' finding upon the issues is in favour of the plaintiff, he shall make such order, not being in excess of the powers vested in him by Section 5, as the circumstances of the case appear to him to require; and where his finding is in favour of the defendant, he shall dismiss the suit. In either case the costs of the suit, including the costs of execution, shall follow the decision."

16. In support of contentions, learned advocate for the petitioners places reliance on following judgments;

- i) ***Popat Mohan Koli vs. Patel Jasraj Dharamshi***, 1995(1) GuJLH 449
- ii) ***Sudhir Yashwant Dhangade vs. Asnkush Kashiram Bole and others***, 2019(1) ALL MR 825
- (iii) ***Gaurakshan Sansthan, Murtizapur Through Arvind Marotiramji Mohod vs. State of Maharashtra and Others***, 2019 (3) ALL MR 849.

17. In Popat Koli (supra), the order of Mamlatdar was

quashed on the ground that procedure prescribed under Section 14 and 5 was not followed.

18. In Sudhir Dhangade (supra), on failure to examine witnesses, the order of Mamalatdar has been set aside.

19. Learned advocate for the petitioners has placed reliance on Gaurakshan Sansthan (supra) in support of his contention that application is not supported by affidavit as required under Section 7 of the Act of 1906.

So far as decision in Gaurakshan Sansthan (supra) is concerned, relying on Section 7, the judgment has been passed by this Court.

20. In response to the submission of learned advocate for the petitioners, learned Senior Advocate for respondents No. 1 and 2 has drawn my attention to the copy of amendment application which is filed by respondents No. 1 and 2 in compliance of Section 5 and 7 of Act of 1906. All the necessary details as contemplated under Section 7 of Act of 1906 have been stated in the plaint which is filed by way of amendment application and same is also sworn by the parties on 01.09.2015. Hence, objections raised by petitioners as regards non compliance of Section 5 do not survive.

21. As regards non compliance of Section 19 is concerned, it pertains to points to be decided by Mamlatdar at hearing which contemplates fixing the date of hearing and issues to be decided. According to him, Mamlatdar has not visited the disputed property in person, which is contemplated under Section 19(2) of the Act of 1906. Therefore, he could not have passed the order impugned. Section 19(2) of the Act of 1906 reads thus;

"19. Points to be decided by Mamlatdar at hearing:

(1)-----

(2) Power of Mamlatdar to examine other witnesses and inspect property in dispute: The Mamlatdar may, after due notice to, and in the presence of, the parties summon and examine as a witness any person who has not been summoned or produced, and may call for and cause to be proved any document which has not been applied for or produced, by either of the parties, where he considers it expedient in the interests of justice so to do, and may, if he thinks fit, make a personal inspection of the property in dispute in the presence of, or after due notice to, the parties.

He shall without necessary delay record a memorandum after hearing the parties on the spot, if present, of any relevant facts observed at such inspection. The memorandum shall form part of the record of the case."

22. The terminology used in Section 19(2) of the Act of 1906 grants discretionary powers to the Mamlatdar and the procedure prescribed is not mandatory. The powers are to be

exercised only in certain contingencies. Therefore, the order passed by Mamlatdar does not suffer from any infirmity, since he has passed order on the basis of report of the revenue officer who were deputed by him to conduct the panchnama.

23. Learned Senior Advocate for respondents has also relied on the judgment of Hon'ble Supreme Court in ***Ajay Singh vs. Khacheru & Others***, (Special Leave Petition (Civil) Nos. 34407-34408 of 2013). He places reliance on the observation of Supreme Court wherein it is stated that, "*it is a well-established principle that the High Court, while exercising its jurisdiction under Article 226 of the Constitution of India, cannot reappreciate the evidence and arrive at a finding of facts unless the authorities below had either exceeded its jurisdiction or acted perversely.*"

It is further observed that "*the High Court has committed an error of law and facts in setting aside the concurrent findings in both the impugned judgment and order. There was no basis for the High Court to ignore the findings of the authorities and come to its own conclusion by appreciating the evidence on record.*"

24. Therefore, in the present case it would not be proper

for this Court to reappreciate the evidence and interfere with the concurrent findings recorded by both the authorities. The petitioners as well as respondents No. 1 and 2 have made their submissions based on fact finding reports on which the authorities have decided the proceedings.

25. The orders passed by the Tahsildar and the Additional Collector are based on the three panchnamas conducted on 13.11.2014, 23.02.2015 and 11.12.2015 respectively. All the three panchnamas disclose that, the customary way 'Vahivat Rasta' between the Gut No. 225 and 226 has been obstructed with thorny bushes and twigs. The statement of petitioner recorded during the panchnama discloses that, the petitioner is insisting the respondent to use the alternate shiv road, which is constructed a year before and even that road is not fully constructed, it ends in the midst of boundary of Gut No. 226. In panchnama dated 11.12.2015, conducted by Naib Tahsildar, it is observed by him that, there appears a cart track between Gut No. 225 and 226, however it is obstructed in the midst with thorny bushes and twigs, however, the road further leads from Gut No. 225 and 226, Gut No. 222 and 237 is open and in use, which further leads from bandh of Gut No. 220, 221 and 219 and

join the Balanagar Khargaon road.

26. Both the subordinate Authorities have rightly held that, there is a customary road, in existence, between the lands of the petitioners and respondents, obstructed by petitioners. The petitioners are insisting the respondents to use the alternate road, which is not fully developed upto the land of respondents. Hence, there is no error committed by the authorities in recording the findings. The order passed by both the authorities is just, legal and proper and in accordance with law.

27. The power of this Court under Article 227 of the Constitution of India is restricted only to the extent of deciding legality and correctness of the orders of subordinate Revenue Authorities. Upon going through both the orders which are well reasoned and based on fact finding reports and applying relevant provisions of law, I do not find that there is any case for interference made out by petitioners. Hence, the writ petition deserves to be dismissed and is accordingly dismissed. In view of disposal of writ petition, pending civil application stands disposed of.

Rule stands discharged.

(MANJUSHA DESHPANDE, J.)

Bhagyawant Punde