

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 435 OF 1994

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| 1. | Hirachand s/o Surajmal Pincha,
Age 39 years, occupation :
Agriculture, R/o Himayatnagar,
Taluka Hadgaon, District Nanded | |
| 2. | Bhagchand Surajmal Pincha,
Age 33 years, occupation :
Agriculture, r/o as above | |
| 3. | Nawalchand Surajmal Pincha,
Age 32 years, occupation :
Agriculture, r/o as above | .. Appellants/Orig.
Defendants No.2,4,5
and 6 respectively. |
| 4. | Gautamchand Surajmal Pincha,
Age: 29 years, occupation :
Agriculture, r/o as above | [Note: Orig. Deft. No. 1
Surajmal Chandrabhan
Pincha died on 15-10-92] |

versus

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| 1. | Wamanrao Tribakrao Pande,
since deceased, per Legal
Representatives :- |
| 1A. | Vishwas Wamanrao Pande,
Age 54 yers, occup. Agriculture,
R/o Khadki Bazar, Tal. Himayat
nagar, District Nanded. |
| 1B. | Deepak Wamanrao Pande,
Age 38 years, occup. Agriculture,
R/o As above |
| 1C. | Alka Eknathrao Pande,
Age 68 years, occup. Household,
R/o as above |
| 1D. | Sunita Nagorao Patil,
Age 63 yers, occup. Household,
R/o as above |
| 1E. | Mangala Vinayrao Rahatkar,
Age 45 years, occup. Household,
R/o as above |

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| 1F. | Promodini Ramdas Deshpande,
Age 44 years, occup. Household,
R/o as above | |
| 2. | Mulchand Surajmal Pincha,
Age 43 yers, occup. Agriculture,
R/o Khadki, Taluka Hadgaon,
Dist. Nanded. | .. Respondents/Orig.
Plaintiff and
Defendant no. 3
Respectively |

Mr. Satyajeet S. Bora, Advocate for appellants
Mr. G. N. Chincholkar, Advocate for respondents no. 1A to 1F

CORAM : SUNIL P. DESHMUKH, J.
3RD DECEMBER, 2015

ORAL JUDGMENT:

1. This is second appeal by defendants against decree passed by trial court and confirmed by appellate court declaring that the defendants have no right of way to reach to their field bearing erstwhile survey No.100, now consolidated into block No.299, through lands survey No.101/1, 101/2 and 101/3, now consolidated into block No.202 of village Sawana, taluka Hadgaon, district Nanded and granting perpetual injunction restraining them from entering into the lands bearing surveys no. 101/1, /101/2 and 101/3 for passage to their land bearing block No.100 [block No.299] and for egress and ingress to the same.

2. The plaintiff had moved civil court, seeking afore-stated declaration and injunction referring to that there is no dispute about ownership of plaintiff over block No.202 and about

ownership of the defendant over block No.399. It was the case of the plaintiff that the defendants have way to go to their field through common *bandh* of land bearing survey No.103, 104 up to nala, which is to the north of lands of the plaintiff and defendants. The Zilla Parishad, Nanded has constructed road by the side of *Pandan* to the *Nala* and that the defendants have right of way to their land from said *Pandan* up to *Nala* and from *Nala* to their land directly and that they have been so using it from times immemorial and the defendants had put wire fencing to their land from all sides and have also kept a gate opening from north and are using it for twenty years and more. Despite that, the defendants purport to have way through the field of the plaintiff to their land and had accordingly applied to the Tahsildar, Hadgaon around 1978. Said application had been granted. Appeal therefrom, and further appeal, at the instance of the plaintiff had failed. However, in revision before Commissioner, the matter was remanded to Tahsildar for reconsideration afresh. It was during pendency of said proceedings, aforesaid suit had been filed by the plaintiff seeking declaration and injunction. Along with the plaint, the plaintiff had also given a sketch map of the fields.

3. The defendants on appearance admitted ownership of plaintiff and the defendants over respective lands, however, they

denied that they can reach their land from *Pandan* to *Nala* and then directly to their land. They have also denied existence of gate on the north. They have denied the correctness of sketch map drawn by the plaintiff. According to them, the *Pandan* or Zilla Parishad road does not lead directly to their land. They have no way or road to reach their lands except from the lands survey No.101/1, 101/2 and 101/3. According to them, they have been using the *bandhs* of said lands from times immemorial. They claimed, their way to survey No.100 passes through center of entire survey No.101 from east to the west and they had further claimed that user of the same is essential to reach to their lands. According to them, existence of way has been recorded and shown in the old map of the revenue authorities.

4. The defendants have vehemently opposed the maintainability of the suit on the ground of *res-judicata* referring to that during pendency of the suit, the proceedings which were already pending before Tahsildar came to be decided in favour of the defendants and as such, decision of Tahsildar would operate as *res-judicata* in the suit.

5. The trial court, based upon pleadings of the parties, had framed several issues viz., whether the plaintiff proves that the defendant has no right of way ?, whether the defendants prove

that they have right of way” and amongst other whether decision of the Tahsildar would operate as *res-judicata* ?

6. The trial court found that the plaintiff had proved that the defendants cannot claim right of way towards survey No.100 through survey No.101/1/2/3. It further has been found that the defendants had failed to prove their right of way to survey No.100 from survey No.101 and it was held that decision by the Tahsildar would not operate as *rej-udicata*. The trial court in the course of its judgment had discussed about defendants having no easementary right either by way of necessity or for that matter by prescription.

7. The appellate court had framed points for determination about defendants' right of way through gut No.202 to reach gut No.399 and about entitlement of the plaintiff to declaration and injunction and has answered the same in favour of the plaintiff. The appellate court considered that there was no occasion for the trial court to discuss about easementary right of the defendants, since their case was not based on easementary right, but it was pursuant to section 143 of the Maharashtra Land Revenue Code. (“The MLR Code”).

8. The appellate court considered that having claimed right of way pursuant to section 143 of the MLR Code, it would not be a

case for decision upon easementary right about which there is lot of discussion by the trial court in the judgment. It ought to have been considered that since section 143 of the MLR Code has been invoked, a new right of way has been claimed by the defendants. The appellate court has also considered that though the written statement mentions right of way from times immemorial, yet defendants could not bring any documentary evidence to show that there was existence of road from plaintiff's field. Having regard to that the matter was being considered with reference to section 143 of the MLR Code, the inquiry would not have been with regard to existing road or any easementary right. It had been considered that the claim before Tahsildar under section 143 of the MLR Code was for new approach road. Under the circumstances, the appellate court considered that the defendants had taken dithering stand in respect of right of way. The appellate court has also considered that the decision by Tahsildar although not being challenged, having regard to that provision of section 143 of the MLR Code itself gives a way for redressal by institution of a suit against decision of Tahsidlar, absence of challenge to Tahsildar's order would not come in the way of the civil court in deciding the matter. The appellate court considered that the trial court had, on appreciation of evidence, properly considered that there is no

right of way in existence from block No.202 to reach to the defendants' land block no. 299. In the circumstances, the appeal was dismissed.

9. Mr. Bora, learned advocate for the defendants contends that the decision of the Tahsildar is in the nature of a decision by a court of limited jurisdiction or, for that matter, a tribunal and the decision being in respect of right of way, the controversy precisely the subject matter of the suit would operate as *res-judicata* and the civil court would not have been able to decide on the controversy raised by the plaintiff.

10. For said purpose, he has cited a decision of the Supreme Court in the case of *Sulochana Amma vs. Narayanan Nair*, reported in *MANU/SC/0047/1994 = AIR 1994 SC 152* by producing a copy of the decision from on line reporter *manupatra*, laying stress on paragraph No.6 thereof and urges to consider that the decision of the Tahsilar would operate as *res-judicata*. He further submits that the appellate court has absolutely not referred to that the *nala* is up to chest high, which creates host of difficulties for the defendants to go through *nala* to their field. He also presses into service a decision of said Manupatra reporter in *Karbhari and others vs. Mr. Devidas, Mr. Kishor, Sau Meerabai and Mr. Harichdanra*, [*MANU/MH/0273/2014 = 2014 (6) ALL MR 859*] to

assert that a right of way can be claimed by field owner over the boundaries of survey numbers with special reference to the rights in this respect.

11. Mr. Chincholkar, learned advocate for the plaintiff contends that competence of the civil court to decide on the rights claimed by the parties cannot be questioned and the decisions of revenue authorities would not be able to bind the civil courts. He submits that while in the civil courts there is adjudication of rights, it need not be so when it comes to revenue authorities where the decision at the most may be with regard to claims being made by the parties.

12. Relying on a judgment in *Harichandra Pundlik Ughade vs. State of Maharashtra*, reported in 2013 (6) ALL MR 598, Mr. Chincholkar contends that in any case, decision of Tahsidar would be of provisional nature until rights are decided by the civil courts. He submits that in the present matter, rights of the parties have been fully adjudicated upon by civil court and such a decree/decision rather than order of the Tahsildar would bind the parties. In the present case, as a matter of fact, the Tahsildar ought not to have proceeded with the proceedings, for, the civil court had seizin over the matter. He refers to provisions of section 143 of the MLR Code and stresses upon that even the

decision of the Tahsildar has been made amenable to the examination by the civil court. In such a case, superiority of the civil court cannot be questioned. He as such, submits that there is no substance in the contentions that Tahsildar's decision would operate as *res-judicata* to debar the trial by the civil court.

13. During the course of hearing, learned advocates on either side have referred to various sketch maps and certified copies of tonch maps at Exhibits - 8, 10 and 14 along with sketch map with the plaint. The trial court has considered that there is no documentary evidence on record of the government showing existence of the alleged road through surveys no. 101, 101/2 and 101/3 to reach survey no. 100. Although it is being stated by witness of the defendant that there is government map, the same had not been produced before the court. The trial court, with reference to oral evidence adduced, had considered that the same shows that there is Zilla Parishad road running north-south in survey no. 104 reaching nala and that from there, survey number 100 can be accessed. The trial court then discussed about easementary rights and found that the defendants could not prove that there was existence of any of the easementary rights as claimed.

14. During the course of discussion, the trial court had observed that taking into account width of nala the steep deep as contended on behalf of the defendants would not be amenable to be considered as prohibitory entrance for access to their land. This, of course, had been a consideration without accepting the correctness or otherwise.

15. Taking into account the submissions advanced on behalf of the parties, to consider the thrust of the contention about the decision of the tahsildar being *res-judicata* which, in fact, is a point framed for decision in the second appeal, one may have to refer to the provisions under section 143 of the MLR Code and section 11 of the Code of Civil Procedure, 1908 which respectively read:

“ 143. Right of way over boundaries.

(1) *The Tahsildar may inquire into and decide claims by persons holding land in a survey number to a right of way over the boundaries of other survey numbers.*

(2) *In deciding such claims, the Tahsildar shall have regard to the needs of cultivators for reasonable access to their field.*

(3) *The Tahsildar's decision under this Section shall, subject to the provisions of sub-sections (4) and (5), be subject to appeal and revision in accordance with the provisions of this Code.*

(4) *Any person who is aggrieved by a decision of the Tahsildar under this Section may, within a period of one year from the date of such decision, institute a civil suit to have it set aside or modified.*

(5) *Where a civil suit has been instituted under sub-section (4) against the Tahsildar's decision, such decision shall not be subject to appeal or revision.* “

“ 11. Res judicata. :- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.- The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such

subsequent suit or the suit in which such issue has been subsequently raised. "

16. Learned counsel for the appellants with reference to the decision of the supreme court referred to hereinabove, purports to persuade this court to consider that the authority referred to under section 143 of the MLR Code in such a case ought to be considered either as court or tribunal and a decision has already been rendered accordingly whereas, learned counsel for other side has contended that such a decision would be amenable to challenge before the civil court and further that the learned single judge of this court has already ruled that such a decision by revenue officer would be provisional in nature and, therefore, doctrine of *res-judicata*, in such a case, would not be applicable and cannot be invoked.

17. Learned counsel for the appellants refers to two more decisions, one in the case of *Pandurang Chandrabhan Bauche and anr. vs. Jalimdhar Sarandhar Tupe and others*, reported in *2008 B.C.I. 48*, in which learned single judge has held that right under section 143 of the MLC Code is independent of easementary right and that the decision of the tahsildar to provide right of way was based upon need of the cultivators for reasonable access to their field. There can hardly be any dispute over the propositions which have been considered by the court.

18. Learned counsel for the appellants further relied on decision in the case of *Keshav Vithoba Khatdeo and others vs. Gopal Sakharam Mundare*, reported in 2014 (4) Bom.C.R. 662, wherein, the parties had not made any approach under section 143 of the MLR Code. It appears, in said case the plaintiffs had sought a declaration that the defendants would have no right of way over the *dhura*. The trial court as well as the first appellate court appear to have held in said case against the plaintiffs, criticizing the relief of negative injunction claimed by them. In the facts of that case, the courts on the basis of village map and the commissioner's report, considered that the plaintiff would not be entitled to the reliefs claimed. At the second appellate stage, however, the high court considered that a lawyer-commissioner's report could not substitute the authentic proof of right of way and further observed that the courts below felt sympathy with defendants that they were required to have approach to their lands through long alternate way suggested by the plaintiffs and that no cause for easementary right in defence had been set up and merely for convenience, it appears, that courts had considered that plaintiffs would not be entitled to the reliefs claimed.

19. While deciding said matter, it appears that the court had considered that it should have been left to expert like tahsildar under section 143 of MLR code and that civil court should not have entertained the matter, further observing that the period of one year was given for challenging revenue officer's decision, in the suit. In present case, scenario is that there is already adjudication of rights by civil court. The case cited was in somewhat reverse circumstances wherein civil court had declined to grant relief of declaration in different set of facts. Said decision may not hold present case.

20. As far as present case is concerned, the position is that there had been an earlier round of proceedings before revenue authorities culminating into an order of remand of the matter to tahsildar and during pendency of the same, suit had been filed seeking declaration and injunction as aforesaid and both the courts have granted and maintained the relief claimed by the plaintiff. Thus, matter in hand is not a case similar to the one relied on by appellants referred to above wherein civil courts had not granted injunction against the defendants to have right of way but in second appeal the suit was decreed by high court. In present matter, both the courts, on appreciation of evidence, have considered that the defendants have not been able to

establish existence of right or, for that matter, could bring any evidence with regard to existence of *bandh* in respect of surveys number 101/1, 102/2 or 103/3. The revenue record which was stated to be available by the witness had not been produced before the court. Besides oral evidence, there is no other evidence brought on record by defendants to support their claim nor, as stated hereinabove, any documentary evidence was made available in respect of easement through surveys number 101/1, 101/2 or, for that matter survey no. 101/3 nor could they demonstrate continuous subsistence of such way even after consolidation scheme had been applied.

21. It appears that the order of the revenue authority, even if it is to be considered, the same cannot be said to have been passed on merits and further that it is only by the authority of first rank in hierarchy against which the provision itself creates an opening. Apart from the order of the tahsildar, defendants have not been able to show subsistence of any way or, for that matter, any right of way or any easementary right. It was with reference to statements of three witnesses and the report of revenue inspector filed in earlier round before the remand of matter by the commissioner when finally, the revisional authority had remanded the matter with a direction for consideration of matter afresh. The report would hardly take shape of evidence

and could not be relied on. In such a case, it was incumbent to have the matter addressed accordingly.

22. Having regard to the factual scenario that there were attempts on behalf of the defendants to interfere with uninterrupted peaceful possession of the plaintiff over the suit land by claiming right of way which is amply borne out from attempted activities through approach to revenue authorities, the suit had ensued and thus the contention being now raised in second appeal that it cannot be said that there was any cause of action for institution of suit stands razed to the ground.

23. Further, having regard to the observations as have been made hereinbefore, the contention of the defendants with regard to decision of the tahsildar assuming character of it to be by a court of the same peer and operating as *res-judicata* in the present matter would hardly be acceptable. Said decision in the face of findings on facts by the courts stands relegated to background. Under the provisions of law itself the decision of the tahsildar has been made amenable to a suit. In the circumstances, the finding recorded by trial court of decision by tahsildar not operating as *res-judcata*, appears to be proper and the contention in that respect of the defendants does not hold any water.

24. The courts below have on appreciation considered the matter accordingly which can hardly be said to be not in consonance with evidence on record in order to be liable to be re-appreciated at this stage.

25. The second appeal, therefore, fails and stands dismissed.

SUNIL P. DESHMUKH, J.

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