

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 29 OF 2015

Anita Raosaheb Aher and Anr.

....Applicants

Versus

Sahebrao Jaywant Aher and Ors.

....Respondents.

Mr. A.B. Kale, Advocate for applicants.

Mr. Amol S. Gandhi, Advocate for respondent Nos. 1 to 8.

CORAM : T.V. NALAWADE, J.

DATED : 29th July, 2015.

ORDER :

1. The proceeding is filed to challenge the order made by the learned Civil Judge, Junior Division, Rahata on Exhs. 44 and 1 in R.C.S. No. 55/2014. Both the sides are heard.

2. The aforesaid suit is filed by present respondents against the applicants in respect of their so called right of way which passes on the common bandh of Gat No. 148. Initially the suit was filed only for injunction, but subsequently, the relief of declaration in respect of aforesaid right was added. By filing application at Exh. 41 the present applicants, defendants of the suit requested the trial Court to frame preliminary issue regarding the jurisdiction of Civil Court to entertain the suit. It

was contended that the proceeding was filed under the provisions of Mamlatdars' Courts Act, 1906 (hereinafter referred to as the 'Act' for short) by the plaintiffs for similar relief and the prayer is refused by Mamlatdar's Court under the Act and so, there is bar of provision of section 26 of the said Act to the suit. Such issue was framed and after hearing both the sides, the trial Court has decided that it has jurisdiction and there is no bar of provision of section 26 of the Act to the suit.

3. It is the case of plaintiffs that they are owners of lands Gat Nos. 165 and 166 from village Loni, Tahsil Rahata, District Ahmednagar and they have the right of way over common bandhs of Gat Nos. 183, 184, 163, 489 etc. and since long they are using these common bandhs for more than 50 years. They have contended that the defendants are trying to obstruct them from using this portion as the way by digging on the way which is situated by the side of Gat No. 148. It is their case that they have no other alternate access for their lands. In the suit, they have requested for relief of injunction to prevent the defendants from creating obstruction to this way and relief of declaration that they have such easementary right.

4. Before Mamlatdar, under the Act proceeding was

filed and prayer was made to give directions to remove impediments created on this way by the defendants. A relief of injunction was also claimed. After hearing both the sides, Mamlatdar rejected the application. He has observed that no such road was found in existence on the bandh situated on south north direction of Gat No. 148 and it was also not noticed that some digging was done or the portion was dugged to create obstruction.

5. The learned counsel for the applicants placed reliance on a judgment delivered by learned Single Judge of **Gujrat High Court at Ahmedbad in Second Appeal No. 374/1983 [Shamji Shivji Vs. Devji Valji] dated 31.8.2010.** In the judgment the learned Single Judge has considered the provisions of the aforesaid Act and has held that there will be bar of res-judicata to civil suit, if under the Special Enactment relief is refused of aforesaid nature to the plaintiff.

6. As against the aforesaid case of Gujrat High Court, the learned counsel for the plaintiffs placed reliance on the case reported as **1986 (0) BCI 51 Nagpur Bench [Pundlik Balkrishna Patil & Ors. Vs. Arun Shankar Patil and Ors.].** This Court has laid down that the remedy available under the Act

and Maharashtra Land Revenue Code are of summary nature and the decision given under those Acts are subject to decision of Civil Court. The learned Presiding Officer of the trial Court has referred one case reported as **2013 (6) Mh.L.J. 820 [Harichandra Pundlik Ughde Vs. State of Maharashtra]**. In that case, it is observed that the decisions given by such authorities are not conclusive so far as the rights of the parties are concerned and the orders are made to make some provisional arrangement until the real controversy between the parties is decided by the competent Civil Court.

7. This Court has gone through the provisions of section 5 and 22 of the Act. These provisions show that in sections 5 and 22, it is made clear that the orders made by Mamlatdar under this Special Enactment are not conclusive and the parties can approach the Civil Court for getting the decision on their rights. These provisions show that the orders are subject to the decision which can be given by the Civil Court.

8. The provision of section 26 of the Act does not show that the jurisdiction of the Civil Court is expressly barred as required under section 9 of Civil Procedure Code. This provision shows that proceeding cannot lie against the Government Officer

in respect of any act done under the Act and in respect of any removal of impediment etc. done under the Act. Thus, the purpose behind section 26 of the Act is altogether different and it cannot be said that section 26 has created bar to the jurisdiction of the Civil Court if the matter of aforesaid nature is decided by Malmatdar under the Act.

9. The pleadings of the present matter show that it is the case of plaintiffs that they have easementary right to use the common bandhs of aforesaid agricultural lands belonging to defendants and easement is acquired by plaintiff by prescription. The common bandhs are kept as per the provisions made in Maharashtra Land Revenue Code and Rules framed thereunder. These provisions and further provisions with regard to easementary right also need to be considered and they can be considered by the Civil Court for deciding the rights claimed by the plaintiffs in the present matter. Thus, no error can be found in the order made by the learned Judge of the Trial Court.

10. In the result, the revision stands dismissed. The learned counsel for the applicants requested for giving stay to this order and the order of the trial Court. In view of the aforesaid discussion, this Court holds that it is not a fit case to

grant stay to the proceedings and stay is refused.

[T.V. NALAWADE, J.]

ssc/