

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8927 OF 2012

Rababbi Asif Khan

..PETITIONER

VERSUS

The Sub-Divisional Officer and Others

..RESPONDENTS

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Mr. N.V. Gaware, Advocate for petitioner.

Mr. R.B. Basarkar, A.G.P. for Respondent Nos.1 and 2.

Mr. V.P. Latange, Advocate for Respondent No.3.

Mr. S.D. Munde, Advocate h/f Mr. R.R. Karpe, Advocate for Respondent Nos. 7 and 8.

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CORAM : T.V. NALAWADE, J.

DATED : 01st DECEMBER, 2016

ORDER :

1. The petition is filed to challenge the decision given by the Tahsidar, Ahmednagar in Rasta Case No. 33 of 2010 and the decision given by the Sub-Divisional Officer, Ahmednagar in R.T.S. Appeal No. 92 of 2010. Both sides are heard.

2. The proceeding before the Tahasildar was filed by respondent – Dhananjay Patil for removal of encroachment made on a road approved in development / lay out plan of Survey No. 33 from Darewadi, Tahsil

Ahmednagar. The width of this road as per the lay out plan is 9 meters and it is the case of Dhananjay that he has been using the said road for approaching his land and house. According to him due to the obstruction created by making wire fencing, he is not in a position to use that road.

3. The proceeding was treated as one under Section 5(2) of the Mamlatdars' Courts Act, 1906. Notice was issued to present petitioner who had prepared lay out plan as owner. The petitioner appeared in the proceeding and filed reply. Tahildar made enquiry and during the enquiry panchanama was prepared through Revenue Officers and map of location of road was prepared. The Revenue Officer / Circle Officer gave report that wire fencing was created on the road and also at other place and due to that the road was closed. On the basis of this record, order was made of removal of encroachment by Tahsildar. This decision was challenged by filing appeal before the Sub-Divisional Officer, Ahmednagar by present petitioner and others. The Appellate Authority has held that the provision of Section 143 of the Maharashtra land Revenue Code, 1966 cannot be used but by using power under Section 5 of the aforesaid Act, the encroachment can be removed. The Appellate Authority has further observed that in breach of the order made by the authority in the

proceeding, some construction was made by the appellants and that activity was also objectionable. There was no permission for making such construction of any authority. The S.D.O. noticed that the development itself was not as per the Town Planning Rules. The Appellate Authority has further held that in any case if there was road shown in the development plan and order was obtained from the authority to use the land for non agricultural purpose, it was not open to the appellant to create obstruction on the road shown to be kept in development plan.

4. The other owners of Survey No. 33 did not challenge the decision and only one owner has filed the present proceeding. Learned Counsel for petitioner submitted that procedure which is required to be followed for starting proceeding under Section 5 of the aforesaid Act was not followed and the application which was filed could not have been treated as plaint under the provisions of the said Act. Though it is true that there was no verification to the application but cognisance of the matter was taken by the Tahsildar and enquiry was made. On this point, observations made by this Court in the order made in Writ Petition No. 8934 of 2012 (Appasaheb Ganpat Kolhe and Another Vs. State of Maharashtra and Others) can be used. The relevant provisions like Section 7 of the Act are considered and it is observed that it can be

presumed that the procedure is directory in nature as and when the Mamlatdar takes cognisance of the matter, the irregularities in the proceeding can be ignored.

5. Another submission was made by learned Counsel for petitioner and that is about the jurisdiction of the Sub-Divisional Officer to entertain and decide the appeal against the order made by the Tahsildar. Reliance was placed on the decision of the case reported as ***2015(1) Mh.L.J. 282 (Nagpur Bench) (Bija Maroti Hatwar Vs. Kisan Chirkut Padole and Another)***. In that case it was observed that the Collector needs to delegate the power to the subordinate officer and there was nothing to show that power was delegated to the Sub-Divisional Officer. This Court is avoiding to discuss the point raised in that matter as in Maharashtra Land Revenue Code, there are provisions showing the Appellate Authority in the hierarchic of revenue officers and as per those provisions, order can be challenged before the Collector and the power can be exercised by the Sub-Divisional Officer. This point was not raised in the appeal itself and the appeal was filed by present petitioner before the Sub-Divisional Officer and that can be seen from the record. If that contention of the petitioner is accepted, it can be said that the order made by Mamlatdar / Tahsildar was not challenged as per the provisions of

Section 23 of the aforesaid Act and on that ground, this Court can refuse to entertain the writ petition.

6. So far as merits are concerned, there is virtually no case to the petitioner. Though land Survey No. 33 is converted to N.A., there are observations of aforesaid nature with regard to lay out plan which is approved in respect of this land. Even if that illegality is ignored, it can be said that the owner of Survey No.33 is bound to keep open the road shown to be kept in Survey No.33 for development of this land. However, it can be said that the original plaintiff – Dhananjay can use only the road shown in the layout plan as relief is given in respect of that road and he cannot insist for using other portion of Survey No. 33 or 33/1. When the layout plan is prepared and development is shown, the roads which are approved need to be kept open for the use of public at large. In the present matter also the road is shown to be kept for having access of two sides of Survey No. 33 and on those sides there are main roads.

7. Learned Counsel for petitioner placed reliance on case reported as *AIR 1995 SC 430 (Pt. Chet Ram Vashist Vs. Municipal corporation of Delhi)*. In this case the facts were different. An open space which was kept open in the layout was attempted to be used by the

local body for its own use. The Apex Court held that if corporation wanted to use that space for other purpose, then it was necessary for corporation to pay compensation for that. This Court holds that observations were in different context and they cannot be used in present matter as in the present matter the road which was kept open in the layout plan will be normally used by public at large. Such observations can be found at paragraph no.6 of the said judgment. Reliance was placed on another case of this Court reported as **2003 (4) Bom.C.R. 724 (Vrajlal Jinabhai Patel since deceased through his L.Rs. And Another Vs. State of Maharashtra and Others)**. The facts were different and in that case also use of open space was in dispute. The facts of one more case of this Court reported as **2003(2) Bom.C.R. 177 (Union of India and Others Vs. Maruti Madhav Kerulkar and Others)** were also different and in that case there was question of right to use some portion as customary route. The observations made in this case are also of no use in the present matter.

8. The Appellate Authority has found that development plan itself was illegal and it was not in accordance with the rules made in that regard. It will be open to the authority to take appropriate action as constructions are made in breach of the rules. The order made by

Mamlatdar or this Court will not come in the way of authority to take appropriate steps in that regard. It is also to be kept in mind by persons who can use the so called road shown in the development plan that they can use only that portion and they cannot use any other portion which is lying between that road and their own property like Survey No.32. With these observations, this Court passes following order:-

Writ petition stands dismissed.

(T.V. NALAWADE, J.)

SSD