

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.6362 OF 2015

SMT. MINABAI @ MINIBAI W/O MUNIRAJ ADHAYE

VS

NAIB TAHASILDAR, KATOL, DISTT. NAGPUR AND ANOTHER

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri P. S. Tiwari, Advocate for the petitioner.
Shri K. L. Dharmadhikari, Asstt. Government Pleader for respondent no.1.
Shri k. V. Deshmukh, Advocate for the respondent no.2.

CORAM : A.S. CHANDURKAR, J.

DATED : JULY 15, 2016.

The challenge in the present writ petition is to the order dated 30-10-2015 passed by the Naib Tahasildar thereby rejecting the objection raised by the present petitioner to the maintainability of the proceedings initiated by the respondent no.2.

According to the petitioner, the respondent no.2 had filed proceedings before the Tahasildar in July, 2013 praying therein that the petitioner be restrained from obstructing the right of way of the respondent no.2. In those proceedings the Tahasildar on 14-2-2014 allowed the said application and restrained the petitioner from causing any obstruction to the right of way of the respondent no.2. The petitioner being aggrieved had challenged the said order and the same was set aside by this Court in Writ Petition No.2767/2014. The proceedings were, however, remanded for fresh consideration to the Tahasildar. After the

proceedings were so remanded, the respondent no.2 moved an application for withdrawing the said proceedings and the same were permitted to be withdrawn by order dated 20-7-2015. It appears that before the said proceedings were actually withdrawn, fresh proceedings were initiated by the respondent no.2 against the petitioner for clearing the way on the Dhura to enable the respondent no.2 to approach his field. On 7-7-2015, an application was moved by the respondent no.2 and his wife praying therein that the field of the petitioner be measured and the Dhura be directed to be cleared. In these proceedings, the petitioner moved an application raising a preliminary objection that the said proceedings were tenable. The respondent no.2 filed his reply and by the impugned order, the Tahasildar held that the said proceedings were maintainable and hence, rejected the objection. Being aggrieved, the present writ petition has been filed.

Shri P. S. Tiwari, the learned Counsel for the petitioner submitted that the earlier order passed by the Tahasildar was set aside in Writ Petition No.2767/2014 and the Tahasildar was directed to consider the matter afresh on the basis of the material on record. The respondent no.2 instead of prosecuting the said proceedings withdrew the same and filed fresh proceedings for removal of obstruction on the Shiv Dhura. The earlier proceedings were not withdrawn without grant of any liberty and, therefore, the fresh proceedings were not maintainable before the Tahasildar. He submitted that there was sufficient material on record that was placed in the earlier proceedings which was in favour of the petitioner and therefore, the respondent no.2 withdrew the said proceedings. In absence of any liberty being granted, the subsequent proceedings were not

maintainable. According to him, the rights accrued in favour of the petitioner by virtue of the earlier proceedings would be defeated and therefore, the preliminary objection had been rightly raised by the petitioner. He, therefore, submitted that the said objection ought to have been allowed by the Tahasildar and the subsequent proceedings ought to have been dismissed. He placed reliance on the judgment of the learned Single Judge in *Babybai W/o Skharam Pardeshi and anr. vs. Ganesh S/o Asaram Sawant* 2013(6) Mh.L.J. 328 as well the Judgment of the Hon'ble Supreme Court in *Sarguja Transport Service v. State Transport Appellate Tribunal* AIR 1987 SC 88 and *Thiagarajan G. Alias Rajan Gopal, Gopalasamy Vanniar vs j. B. Engineering Works* 2002-EQ(BOM)-0-202.

Shri K. V. Deshmukh, learned Counsel for the respondent no.2 supported the impugned order. According to him, the earlier proceedings filed by the respondent no.2 were under provisions of Section 5 of the Mamalatdar Courts Act 1906 (for short, the Act of 19060). The said proceedings had no bearing whatsoever with the subsequent proceedings wherein prayer for removal of encroachment on the Shiv Dhura had been made. The subsequent proceedings were under Section 50 of the Maharashtra Land Revenue Code, 1966 (for short, the Code) for seeking removal of encroachment of Government land. According to him, the question of obtaining any liberty while withdrawing the earlier proceedings was not relevant as the nature and scope of both the proceedings were different. He placed reliance upon the judgment of learned Single Judge in *Rajendra Popat Waghmare & Ors. Vs. The State of Maharashtra* 2016(3) ALL MR 562.

Shri K. L. Dharmadhikari, the learned Assistant

Government Pleader appearing for the respondent no.1 supported the impugned order.

Perusal of the initial application moved by the respondent no.2 indicates that the same was for seeking injunction so as to restrain the petitioner from obstructing the right of way of the respondent no.2. Said application was supported by an affidavit. These proceedings were, therefore, under Section 5 of the Act of 1906 and were also treated as such by the Tahasildar. It is not in dispute that the said proceedings were withdrawn unconditionally and hence, there was no question of any liberty being granted to the respondent no.2 in that regard. The subsequent proceedings filed were for removal of alleged encroachment at the instance of the petitioner on the Shiv Dhura. In paras 6 and 7 of the said application dated 7-7-2015, there is a clear reference to the Shiv Dhura vesting in the State and on that basis, these proceedings were treated to be under Section 50 of the Code. The provisions of Section 50 of the Code relate to removal of encroachment on Government land. It is, therefore, clear that the subsequent proceedings initiated by the respondent no.2 for removing the encroachment on the Shiv Dhura were distinct from the earlier proceedings filed under Section 5 of the Act of 1906.

Once it is found that the reliefs sought in both the proceedings were distinct, the question of the subsequent proceedings being barred by principles of *res judicata* would therefore, not apply. In fact, there was no reason whatsoever for the respondent no.2 to have sought any liberty while withdrawing the proceedings that were filed under Section 5 of the Act of 1906. The judgments relied upon in that regard by the learned Counsel for the petitioner cannot be made applicable to the facts of the present case in such situation.

As regards the submission that pursuant to the order of remand in Writ Petition No.2767/2014, the respondent no.2 ought not to have withdrawn the said proceedings, the same cannot be accepted. There was no justifiable ground so as to prevent respondent no.2 from withdrawing the said proceedings. In so far as the earlier report dated 30-12-2013 by the Circle Inspector is concerned, it is always open for either of the parties to rely upon the said report in support of the respective submissions. Moreover, the proceedings before the Naib Tahasildar are yet to be adjudicated on merits. Hence, there is no case made out to interfere in writ jurisdiction. For the aforesaid reasons, the writ petition is dismissed with no order as to costs.

JUDGE

/MULEY/

C E R T I F I C A T E

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