

Mr. S. S. Sathaye i/b. Mr. Sachin Gite for Petitioners.
Mr. Sachin Kankal, AGP for Respondents No.1 and 2.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 06, 2017

Heard Mr. Sathaye, learned Counsel for petitioners and Mr. Kankal, learned AGP for respondents No.1 and 2 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'plaintiffs', have challenged the judgment and order dated 04.01.2016 passed by the learned Civil Judge, Senior Division, Malegaon below exhibit-5 in Regular Civil Suit No.47 of 2015 as also the judgment and order dated 31.03.2016 passed by the learned Ad-hoc District Judge-2, Malegaon in Miscellaneous Civil Appeal No.1 of 2016. By these orders, the Courts below dismissed the application taken out by the plaintiffs for injunction restraining defendants No.2 and 3 from implementing and / or acting on the basis of the order dated 28.02.2014 and communications dated 30.05.2014 and 11.07.2014.

3. Respondents No.4 to 7 herein initiated proceedings being Vahivat Case No.5 of 2013 against the plaintiffs under Section 5 of the Mamlatdars' Courts Act, 1906 (for short 'Act'). By order dated 28.02.2014, Tahsildar, Baglan partly decreed the Suit. Tahsildar directed

to remove the encroachment made by the agriculturists, who are having their fields adjacent to the concerned Nallah so as to ensure that the Nallah / stream is brought to its original position. In pursuance thereof, on 30.05.2014, Tahsildar called upon the Circle Officer, Baglan to remove the encroachment. This is followed by communication dated 11.07.2014. Plaintiffs herein have instituted the Suit inter alia challenging Tahsildar's order dated 28.02.2014 as also communications dated 30.05.2014 and 11.07.2014 and for perpetual injunction restraining defendants No.2 and 3 from implementing the order dated 28.02.2014.

4. During the pendency of the Suit, plaintiffs took out application for injunction which was rejected by the learned trial Judge and confirmed by the appellate Court. While rejecting the application in paragraphs 11 and 12, the learned trial Judge has referred to the inspection made by the Circle Officer as regards encroachment of Nallah. The learned trial Judge noted that prima facie within the portion of Nallah, plaintiffs have planted pomegranate and trees of drum-sticks. The Panchnama on record also shows that there is an encroachment of plaintiffs within the portion of Nallah. In paragraph 12, the learned trial Judge discarded the submissions advanced on behalf of the plaintiffs that Nallah is not in existence but there is only Nallah bunding. Unless and until there is existence of Nallah, no Nallah bunding could be built up. The learned trial Judge also prima facie observed that plaintiffs themselves have encroached upon the portion of Nallah and wiped out the entire portion of Nallah and brought the said land under their cultivation. The learned trial Judge also observed that plaintiffs did not come to the Court with clean hands as they did not initially implead respondents No.4 to 7 in the Suit. As the plaintiffs have not approached the Court with clean hands, they are not entitled to any suitable relief.

5. As far as the learned District Judge is concerned, in paragraph 13, the learned District Judge also concurred with the view of the learned trial Judge that plaintiffs have not impleaded respondents No.4 to 7, who were parties in Vahivat Case No.5 of 2013. As the plaintiffs have challenged the order dated 28.02.2014 passed by the Tahsildar in Vahivat Case No.5 of 2013, certainly respondents No.4 to 7 are the necessary parties.

6. In support of this Petition, Mr. Sathaye strenuously contended that the order of the Tahsildar dated 28.02.2014, on the face of it, is illegal. He submitted that the Suit is not instituted within 6 months and the claim of the plaintiffs therein is clearly time barred. Despite that, Tahsildar issued general directions for removal of encroachments in the Nallah which was wholly impermissible. He further submitted that in pursuance of the order dated 28.02.2014, Tahsildar issued letter dated 30.05.2014 to the Circle Officer for removal of encroachment over the Nallah and subsequently issued letter dated 11.07.2014 to that effect. He invited my attention to item No.3 in the reference which refers to report bearing outward No.89 of 2014 dated 14.07.2014. He submitted that the said communication is ante-dated in as much as in the reference at item No.3, report dated 14.07.2014 is referred. He submitted that the Tahsildar had directed to create road adjacent to Shiv Nallah. He further submitted that though Tahsildar had issued general directions for removal of encroachments over the Nallah, plaintiffs are singled out and action is proposed only against them. He, therefore, submitted that the Courts below committed serious error in rejecting the application.

7. On the other hand, Mr. Kankal supported the impugned orders. He submitted that the Courts below prima facie have held that plaintiffs have made encroachment in the Nallah and that they did not approach

the Court with clean hands by not impleading respondents No.4 to 7. He, therefore, submitted that this is not a fit case for interfering with the impugned orders.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, respondents No.4 to 7 have instituted proceedings under Section 5 of the Act against the present petitioners, who were defendants. Tahsildar partly decreed the Suit on the basis of the spot inspection, Panchnama as also report made on 10.09.2013. Tahsildar found that the Nallah was encroached by the agriculturists, who are having their fields adjacent to Nallah. Clause 3 of the operative part of the order shows that Tahsildar directed removal of encroachments by agriculturists having their fields adjacent to Nallah.

9. Though respondents No.4 to 7 were plaintiffs in that Suit, present plaintiffs have instituted the Suit without impleading them as defendants. In my opinion, plaintiffs ought to have initially impleaded respondents No.4 to 7 as order dated 28.02.2014 and consequent actions based thereon were challenged by the plaintiffs. While rejecting the application, in paragraph 11, the learned trial Judge also found prima facie that plaintiffs have planted pomegranate and trees of drumsticks within the portion of Nallah. The learned trial Judge also referred to Panchnama on record which shows that there is encroachment of plaintiffs within the portion of Nallah. In paragraph 12, the learned trial Judge discarded the submission of plaintiffs that Nallah is not in existence and there is only Nallah bunding. The learned trial Judge also found that plaintiffs did not approach the Courts with clean hands by not impleading respondents No.4 to 7 at whose behest proceedings under Section 5 of the Act were decided. In paragraph 13, the learned trial

Judge also held that plaintiffs have encroached upon the portion of Nallah. The learned District Judge found that this was not a fit case for disturbing with the discretionary order passed by the trial Court more so when plaintiffs did not implead respondents No.4 to 7, who were parties in Vahivat case.

10. Mr. Sathaye submitted that only plaintiffs herein are singled out. I do not find any merit in this submission. Both the Courts below have concurrently found that plaintiffs have committed encroachment in Nallah. For the reasons recorded by the trial Court in paragraphs 11 to 13 of the order and confirmed by the appellate Court, I do not find any case is made out warranting interference under Article 227 of Constitution of India. In view thereof, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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