

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.1826 OF 2018

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| 1. Vasudev Pandharinath Raikar, |] | |
| Age : 60 years, Occ. Agriculture |] | |
| 2. Rushikesh Chandrakant Raikar, |] | |
| Age : 26 years, Occ. Business |] | |
| 3. Swapnil Chandrakant Raikar, |] | |
| Age : 24 years, Occ. Agriculture & Business |] | |
| All residing at Dhayari, Taluka Haveli, |] | |
| District Pune. |] | |
| All through Power of Attorney holder |] | |
| i.e. Petitioner No.1 above. |] | Petitioners |

Versus

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| 1. Manoj Mohan Dalvi, |] | |
| Age : 36 years, Occ. Business, |] | |
| R/at 423, Near Power House, |] | |
| Shivarkarwada, Rasta Peth, Pune. |] | |
| 2. Janakiram Eknath Kanade, |] | |
| Adult, Occ. Business, |] | |
| R/at Dhadage Estate, Nanded, |] | |
| Taluka Haveli, District Pune. |] | |
| 3. Prakash Kiran Navagire, |] | |
| Adult, Occ. Business, |] | |
| R/at 74/6B, Near Common Well, |] | |
| (Near Gaon Well), Raikarmala, |] | |
| Dhayari, Tal. Haveli, Dist. Pune. |] | Respondents |

Mr. A.V. Anturkar, Senior Counsel, a/w. Mr. Prathamesh B. Bhargude, for the Petitioners.

Mr. Sanjiv A. Sawant, a/w. Mr. H.S. Kadam, for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 20TH MARCH 2018.

PRONOUNCED ON : 23RD MARCH 2018.

JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Anturkar, learned Senior Counsel for the Petitioners, and Mr. Sawant, learned counsel for the Respondents.

2. This Writ Petition, filed under Article 227 of the Constitution of India, takes an exception to the concurrent findings of fact recorded by the two Courts below, thereby allowing the application for interim injunction filed by the Respondents-Plaintiffs at “Exhibit-5” in Special Civil Suit No.1246 of 2016. The order challenged in this Writ Petition is dated 23rd August 2017 passed by the District Judge-14, Pune, thereby dismissing the Miscellaneous Civil Appeal No.12 of 2017, confirming the order passed below “Exhibit-5” by the Trial Court.

3. According to the Petitioners, they are having the 'right of way' from the property of the Respondents, bearing Survey No.49/3A and

49/3C, situate at Village Vadgaon Khurd, Taluka Haveli, Dist. Pune. As the Respondents-Plaintiffs were obstructing to the said 'right of way', they filed a Suit against the Respondents before the Mamlatdar's Court, under Section 5(2) of the Mamlatdars' Courts Act (2 of 1906). The said Suit was allowed and the Mamlatdar was pleased to direct the Respondents that the road may be made clear on the East-West border of the lands bearing Survey Nos.49/3A and 49/3C. The said order was challenged by the Respondents by preferring Revision Application before the Sub-Divisional Officer. The Sub-Divisional Officer dismissed the same, thereby confirming the order of the Mamlatdar. However, during the pendency of the Revision Application, the Respondents filed this Special Civil Suit No.1246 of 2016 before the Trial Court, restraining the Petitioners from causing obstruction to the possession of the Respondents in their lands and also from raising this 'right of way'. Along with the Suit, Respondents also filed an application for interim injunction and the said application came to be allowed by the Trial Court, which order is confirmed by the Appellate Court.

4. While challenging this impugned order, three-fold submissions are advanced by learned Senior Counsel for the Petitioners. In the first place, it is submitted that, the Suit itself was not maintainable, in view of the concurrent orders passed by the Mamlatdar and the Sub-Divisional Officer, upholding the 'right of way' of the Petitioners. Secondly, it is

submitted that, the finding of the fact recorded by these two Courts below, i.e. Mamlatdar and Sub-Divisional Officer, which Courts are though of limited jurisdiction, they were binding on the Civil Court, in view of the Explanation-VIII to Section 11 of the Code of Civil Procedure, 1908. The third contention is that, if the Petitioners are using this 'right of way' since last several years, Respondents cannot restrain the Petitioners from doing so and hence, the concurrent finding of fact recorded by the Trial Court and the Appellate Court needs to be quashed and set aside.

5. Per contra, learned counsel for the Respondents has supported the order of the Trial Court by submitting that, both the Courts below have appreciated the material on record in its proper perspective and hence, this Court should be slow in setting aside such concurrent finding of fact, without any perversity being shown therein. Learned counsel for the Respondents has also pointed out the fact that the Petitioners are conspicuously silent about the availability of alternate road and has relied upon the affidavit of Respondent No.1 to show that, there is an alternate road available to the Petitioners as an access to their property and, therefore, as rightly held by both the Courts below, Petitioners cannot create this new 'right of way' on the basis of the orders passed by the Mamlatdar and the Sub-Divisional Officer.

6. At the outset itself, it has to be stated that, as the entire case is based on the factual finding, once such factual finding is arrived at by the Trial Court and confirmed by the Appellate Court, in writ jurisdiction, this Court cannot interfere in the same, unless some perversity is shown in the said finding. However, perusal of the impugned order makes it clear that, no such perversity can be noticed or pointed out even by learned Senior Counsel for the Petitioners. Both the Courts below have held that, the Petitioners have not even averred that, except for the disputed way, they are not having any other access to their property and hence, as an easement of necessity or by way of prescription, they are using this 'right of way' since last several years.

7. As a matter of fact, as observed by the Trial Court, it is not the case of the Petitioners that they are not having any other alternate way, except from the property of the Respondents. Petitioners have also not filed the affidavits of any adjoining occupants to prima facie show that, they are using this disputed way as access to their property since last several years, so that they could claim an easement of prescription. Further, the Petitioners have also not produced on record their 'Sale-Deed' to show that, they were given this 'right of access' from the disputed road to their property. Even in their case before the Mamlatdar, Petitioners have not contended that they do not have any alternate way, apart from the disputed way. In such situation, it is

apparent that, on the basis of the order of the Mamlatdar, Petitioners are now trying to create a new 'right of way'. It is pertinent to note that, the Panchanama drawn by the Mamlatdar clearly goes to show that, there is only a foot-way, which cannot be used as a road for passing of the bullock-cart or the tractor.

8. Respondent No.1 has also filed an affidavit on record to show that, the Petitioners are having the lands bearing Survey Nos.49/4, 49/2, 49/3B, 47/1/2B and 50, in which they are cultivating the sugar-cane crops. The road from Gaothan is very much available to the Petitioners upto Survey No.49/4 and they are using the said access for carrying their sugar-cane crops from Gaothan Road and from the plot bearing Survey Nos.51 and 52, which are owned by them. Petitioners have not disclosed these relevant facts. Further, Respondent No.1 has also stated that, Survey Nos.49/4 and 49/5 are not used for cultivation of sugar-cane crops by the Petitioners, but they have let-out the said lands to third persons, who are doing there the business of Fly Ash Bricks therein. Thus, the Petitioners are having their own lands for the purpose of access to Gaothan road, but they are trying to create a new access from the land of the Respondents, that too, on the basis of certain orders passed by the Mamlatdar and the Sub-Divisional Officer. Petitioners have not filed any counter-affidavit, challenging the averments made in this affidavit by Respondent No.1. Hence, both, the Trial Court and the

Appellate Court have rightly allowed the Respondents' application for interim injunction, restraining the Petitioners from creating such 'right of way' and from using the alleged non-existing road for their access.

9. As regards the contention raised by learned Senior Counsel for the Petitioners that, the Suit itself was not maintainable, the Appellate Court has rightly relied upon the Judgment of this Court in the case of *Mohammad Rahim Khan Vs. Shankar Maruti Dhage and Anr., 2017 (3) Bom.C.R. 472*, wherein it was held as follows :-

“The Proviso below sub-section (1) of Section 5 empowers Mamlatdar's Courts to refuse to exercise the power under the said provision, if it appears to him that such a case can be more suitably dealt with by the Civil Court. Though there is a revision provided under Section 23 of the said Act, to challenge the order passed by the Mamlatdar under Section 5, but the Act of 1906 nowhere attaches finality, either to the order passed under Section 5 by Mamlatdar on merits or to the order passed in Revision under Section 23 of the said Act. In the absence of such finality being attached to the order passed under the Act, the jurisdiction of the Civil Court cannot be held to be impliedly barred, merely because the Act provides a separate machinery for getting the grievance redressed. The ouster of plenary jurisdiction of Civil Court cannot be readily inferred and such jurisdiction remains in-tact and available to be exercised either against the order under Section 5 or against the order of revision under Section 23 of the said Act.”

10. In this case, admittedly, the Respondents are not challenging the order of the Mamlatdar or the Sub-Divisional Officer. They have filed the Suit simplicitor for injunction, restraining the Petitioners from causing obstruction to their possession in the suit lands and from using the alleged road for their access. Even assuming that they are challenging the said orders indirectly, considering the legal position, which is no more *res integra*, the Civil Court has jurisdiction to entertain, try and decide the Suit challenging the order passed under Section 5 of the Mamlatdar's Courts Act.

11. The next contention raised by learned Senior Counsel for the Petitioners is that, even if the Suit is maintainable, in view of Explanation-VIII to Section 11 of CPC, as the issue relating to 'right of way' is already heard and finally decided by the Court of Mamlatdar, even if that Court is of a limited jurisdiction, the said finding will operate as *res judicata* in this Suit. To substantiate this submission, learned Senior Counsel for the Petitioners has relied upon the Judgment of the Apex Court in the case of *Sulochana Amma Vs. Narayanan Nair, (1994) 2 SCC 14*, wherein, relying upon the Law Commission Report, on the basis of which Explanation-VIII was introduced, it was held that,

“The Law Commission, in its report, recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any court, be it either of limited pecuniary jurisdiction or of

special jurisdiction, like Insolvency Court, Probate Court, Land Acquisition Court, Rent Controller, Revenue Tribunal etc. No doubt, main body of Section 11 was not amended, yet, the expression “the court of limited jurisdiction” in Explanation-VIII is wide enough to include a court, whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation-VIII. The result that would flow is that, an order or an issue, which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that, such court of limited or special jurisdiction was not a competent court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies. This question is no longer res integra.”

12. In my considered opinion, as this contention is not raised either before the Trial Court or before the Appellate Court and it is raised for the first time before this Court, it cannot be considered in writ jurisdiction. Even if this Court considers the same, it being a point of law, it cannot be upheld. Firstly, because, to operate any order or finding as *res judicata*, the parties to both the proceedings must be the same. Here in the case, admittedly, Respondent No.1 was not a party to the proceedings before the Mamlatdar's Court. Secondly, once it is held that,

Civil Court has jurisdiction to decide the correctness of the finding recorded by the Mamlatdar's Court, there is no question of *res judicata* operating in such case.

13. This Court, in the above referred Judgment of *Mohammad Rahim Khan Vs. Shankar Maruti Dhage and Anr. (Supra)*, by relying upon the earlier Judgment of this Court in the case of *Rajendra Sheshrao Shendge Vs. Smt. Shobhatai S. Ravate and Anr., 2007 (3) Mh.L.J. 431*, has categorically held that, the Civil Court has the jurisdiction to decide correctness and validity of the order passed by the Mamlatdar on merits, along with the adjudication on the question of 'right of way' of the parties, as claimed. In this reported Judgment, the substantial questions of law framed by the Court for its consideration in the Second Appeal were as follows :-

- “(a). *Whether the learned lower Appellate Court was justified in not framing a specific issue with respect to jurisdiction of the Civil Court to entertain Civil Suit, inter alia, challenging my order passed under the Mamlatdars' Courts Act, 1906, especially in view of the provision under Section 23 of the said Act?*
- (b). *Whether Civil Suit lies against the order passed by the Mamlatdar's Court under the Mamlatdars' Courts Act, 1906?”*

(c). *Even if it is held that the Civil Suit lies, inter alia, challenging the order passed under the Mamlatdars' Courts Act, 1906, whether the learned lower Appellate Court was justified in considering the entire controversy afresh ?”*

14. While deciding these questions of law, it was categorically held that, the Civil Court has such jurisdiction to question the validity of the order passed by the Mamlatdar on its own merits.

15. In view thereof, the question of applying the principle of *res judicata*, as per Explanation-VIII to Section 11 of CPC, does not arise for consideration.

16. This view is fully endorsed by another Single Bench of this Court in the case of *Mohammad Rahim Khan Vs. Shankar Maruti Dhage and Anr.* (*Supra*).

17. Thus, in the absence of any evidence produced on record by the Petitioners that the disputed foot-way is the only way of access to their lands for the purpose of carrying sugar-cane crops with the use of the bullock-cart or tractor and in the absence of any further evidence showing that, they are using this way since last more than several years, both, the Trial Court and the Appellate Court have rightly allowed the Respondents' application for interim injunction.

18. In the writ jurisdiction, no ground is made out to interfere in the said discretion. The Writ Petition, therefore, being without merits, stands dismissed.

19. Rule is discharged.

[DR. SHALINI PHANSALKAR-JOSHI, J.]