

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

Writ Petition No.3155 of 2018
(Mahesh Laxman Kalpande and ors. .vs. Gajanan Pundlik Ugle and
another)

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

Mr. U.J. Deshpande, Advocate for Petitioners.
Mr. H.R. Gadhia, Advocate for Respondent No.1.
Mr. S.B. Bissa, AGP for Respondent No.2.

CORAM : Manish Pitale, J.
DATED : March 29, 2019.

By this writ petition, the petitioners have challenged order dated 31.03.2018 passed by the respondent no.2- Additional Collector, thereby the revision application filed by the respondent no.1 was allowed and order passed by the Tahsildar under the provisions of the Mamlatdars' Courts Act, 1906 was set aside. The respondent no.2 Additional Collector held that the respondent no.1 had made out a case for grant of a direction against the petitioners to restrain them from creating obstruction in a way being used by the respondent no.1 from his field to the public road.

2. The respondent no.1 filed an application before the Tahsildar on 08.07.2013 claiming that the petitioners had obstructed him from using a way which was existing for a long period of time for travelling from his field to the Government road. It was claimed that the said customary way was available adjacent to the

agricultural land of the petitioners located in Survey No. 79. Although it was a simple application filed by respondent no.1 without specifically mentioning the provisions of the aforesaid Act, it was treated by the Tahsildar as an application under the said Act and notices were issued to the petitioners calling upon them to explain why the relief sought by the respondent no.1 ought not to be granted. In the process of the enquiry and proceedings before the Tahsildar, two reports including maps were prepared, one by the Circle Officer and the other by the Tahsildar upon spot inspection. These reports were prepared in the presence of the parties.

3. On the basis of the material that came on record including the evidence of the parties recorded before the Tahsildar, order dated 14.08.2017 came to be passed by the Tahsildar rejecting the application of the respondent no.1. It was held in the said order that existence of customary way as claimed by the respondent no.1, was not found in the enquiry and the material on record did not support the claims made by respondent no.1. On this basis, the application stood rejected. Aggrieved by the same, the respondent no.1 approached the Additional Collector by filing revision application. By the impugned order dated 31.03.2018, the revision application was allowed and the petitioners were restrained from creating any obstruction for the respondent no.1 to use the aforesaid way.

4. The petitioners filed the present writ petition

challenging the said order of the Additional Collector. It has been contended that the application dated 08.07.2013 preferred by respondent no.1 was devoid of particulars and that there was no pleading regarding the exact nature of obstruction which the petitioners had allegedly created for respondent no.1. It was further submitted that such an application could not have been treated as a plaint under the provisions of the aforesaid Act. By inviting attention of this Court to the two maps on record as also the evidence of the respondent no.1 and his witness, it was contended that there was nothing to show existence of a customary way for the respondent no.1 to have invoked jurisdiction of the Tahsildar under the aforesaid Act. On this basis, it was submitted that the Tahsildar was justified in rejecting the application of the respondent no.1 and that the Additional Collector reversed the said order without any cogent reason.

5. Reliance was placed on judgments of this Court to emphasize that the exact nature of obstruction was required to be pleaded and proved by the respondent no.1 and further that an existence of the customary way was required to be proved by sufficient material on record.

6. On the other hand, it was contended on behalf of the respondent no.1 that the two maps on record appeared to be contradictory and that in the application as well as the evidence before the Tahsildar, the respondent no.1 had indeed pleaded and proved

existence of customary way. It was pointed out that the pleading regarding obstruction of way was also on record and that the Additional Collector had taken into consideration the difficulty faced by the respondent no.1 by reversing the order of the Tahsildar and restraining the petitioners from obstructing the way of respondent no.1. On this basis, it was contended that the writ petition deserved to be dismissed.

7. Having heard the learned counsel for the parties and on perusal of the material on record, it appears that the most crucial question to be answered in the present case is, as to whether the respondent no.1 was able to show that there indeed existed a customary way and that the petitioners had obstructed him from using the same to justify invoking the jurisdiction of the authorities under the aforesaid Act. A perusal of the application dated 08.07.2013 filed by the respondent no.1 shows that such a statement regarding existence of a way which was being used for 10 years, has been indeed made in the application. In the affidavit in evidence before the Tahsildar, the respondent no.1 has reiterated the said claim, but in the cross-examination, certain statements have been made which show that there exist more than one ways by which the public can access the Government road. Apart from this, on the crucial question of existence of a customary way, there does not appear to be any material other than the statements made by the respondent no.1. The admission given in the cross-examination by the respondent no.1 in this regard is

crucial where it is stated by the respondent no.1 that he has moved the application before the Tahsildar in order to ensure that a shorter way becomes available to him. Such statements clearly show that there is absence of material to support the claim of respondent no.1 that there indeed existed a customary way which the petitioners had obstructed.

8. A perusal of the two maps on record shows that upon spot inspection, it was not found clearly as to whether such a customary way indeed existed. The said spot inspection and the consequential reports and maps were prepared in the presence of the rival parties. It appears that the Tahsildar took into consideration the aforesaid oral and documentary evidence on record to come to a specific conclusion that a customary way did not exist as claimed by the respondent no.1 adjacent to the fields belonging to the petitioners in Survey No. 79/1.

9. This finding of fact has not been upset by the Additional Collector in the impugned order. Instead, the Additional Collector has proceeded to examine the inconvenience that the respondent no.1 would be suffering if his prayer is not granted. The entire approach of the Additional Collector appears to be erroneous because a perusal of Section 5 of the aforesaid Act shows that under sub-section (2) thereof, the Authority can exercise the power to grant injunction restraining a person from obstructing the applicant from using "customary way or road". Thus, in order to

exercise power under the provisions of the said Act, the first requirement is a positive finding regarding the existence of such a customary way. In the present case, the Tahsildar upon appreciating the material and evidence on record, came to a specific finding of fact that such a customary way was not found to be existing. The Additional Collector has upset the said order of the Tahsildar without adverting to the material on record in the correct perspective and in the absence of coming to a conclusion that the said finding of fact rendered by the Tahsildar was either erroneous or perverse. All that is stated in the impugned order passed by the Additional Collector is that it appeared that the Tahsildar had not considered the report of the Circle Officer in detail. It was recorded that since there did not appear to be an alternative way available to the respondent no.1, the order of the Tahsildar was liable to be set aside. This finding appears to be contrary to the material on record because the reports and the maps on record, as also the admissions given in the cross-examination by respondent no.1, show that there exist more than one alternative ways for access to the Government road. In any case, the scope of enquiry in such proceedings could not be the existence or otherwise of alternative ways but first and foremost the question was of existence of a customary way to which the applicant had a right to use which the non-applicant could not obstruct. The Additional Collector completely misdirected the nature of enquiry that was to be conducted and in that light committed an error in reversing the order passed by the Tahsildar.

10. In the light of the above, the impugned order passed by the Additional Collector is unsustainable. Accordingly, the writ petition is allowed, the impugned order passed by the respondent no.2 - Additional Collector is quashed and set aside and the order dated 14.08.2017 passed by the Tahsildar is restored.

JUDGE

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