

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 4746/2018
 (CHANDRASHEKHAR VIJAY DHOSEWAN **VERSUS** SUNIL BHAURAO BIHARI & OTHERS)

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

Court's or Judge's orders

 Shri R.A. Bagade, counsel for petitioner.
 Shri S.A. Marathe, counsel for R-1 to 6.
 Shri V.A. Thakare, A.G.P. for R-7 & 8.
 Shri S.R. Chakravarti, counsel for R-9 & 10.
 Shri D.A. Sonwane, counsel for R-11.

CORAM : A.S. CHANDURKAR, J.
DATE : JUNE 17, 2019.

In this writ petition filed under Article 227 of the Constitution of India, the order dated 12.07.2018 passed on the application below Exhibit 26 preferred by the defendant nos.1 to 11 before the trial Court whereby the original plaintiff and defendant no.12 were directed to remove the fencing wire is under challenge. Similarly, the orders passed on 26.05.2010 and 06.07.2017 in proceedings under the Mamlatdar Courts Act, 1906 (for short, 'the said Act') are also under challenge.

The petitioner is the original plaintiff who has filed suit for declaration that the defendant nos.1 to 11 had no right or authority to use the bullock-cart way as shown in the plaint map through the field of the plaintiff. The plaintiff has also claimed damages for the forceful entry by the defendants in the field of the plaintiff. In that suit, the plaintiff filed an application for temporary injunction but the same came to be rejected by the trial Court. An appeal challenging that order is still pending. In the meanwhile, the defendant nos.1 to 11 filed an application below Exhibit 26

under Section 151 of the Code of Civil Procedure, 1908 (for short, 'the Code') in which it was stated that during pendency of the suit the plaintiff and the defendant no.12 had erected a fencing wire with a view to obstruct the movement of the said defendants for approaching their respective fields. This application was opposed by the original plaintiff and by the impugned order, the trial Court was pleased to allow the said application after recording a finding that by erecting such fencing during pendency of the suit, the plaintiff could not have altered the *status quo* that was in existence.

In the proceedings filed by some of the defendants against the father of the petitioner under Section 5 of the said Act, the Naib Tahsildar on 26.05.2010 had directed the petitioner's father to remove the obstruction caused so as to enable the applicants therein from approaching their respective fields. The said order was then challenged by filing a revision application before the Additional Collector and the same came to be dismissed on 06.07.2017. That order is also sought to be challenged in the present writ petition.

Shri R.A. Bagade, learned counsel for the petitioner submitted that the trial Court committed an error in allowing the application filed below Exhibit 26. According to him, in the suit filed by the petitioner it was not permissible for the defendants to seek any interim injunction without there being any counter claim and without satisfying the requirements of Order XXXIX Rule 1 and 2 of the Code. It was only the petitioner as plaintiff who could have sought any interim injunction but disregarding the legal position the trial Court entertained the application as filed under Section 151 of the Code and issued directions therein. The said directions were also beyond the scope of the suit and great prejudice was caused to the petitioner by granting the prayer as made in the

application at Exhibit 26. In that regard, the learned counsel placed reliance on the decisions in *Maharashtra Jeevan Pradhikaran Versus Lark Construction Private Limited* [2005(1) Mh.L.J. 953], *Metro Marins & Another Versus Bonus Watch Co. Pvt. Ltd. & Others* [AIR 2005 SC 1444], *Kanaklata & Others Versus Subhadra & Others* [AIR 2009 MP 268] and *Smt.Shakunthamma & Others Smt.Kanthamma & Others* [AIR 2015 Karnataka 13].

Insofar as the orders passed under the provisions of the said Act are concerned, it was submitted that the application moved by the said defendants was not supported by any affidavit. Referring to the provisions of the said Act, it was urged that mandatory compliance with the requirements was necessary but the same was not done by the applicants therein. Though this aspect was raised before the Revisional Authority, the same has not been considered in the proper perspective. The said order therefore was liable to be set aside. He referred to the decision in *Sanjay Versus Shankerappa* [1971 Mh.L.J. 78]. It was thus submitted that the orders impugned were liable to be set aside.

Shri S.A. Marathe, learned counsel for the respondent nos.1 to 6, Shri V.A. Thakare, learned Assistant Government Pleader for the respondent nos.7 & 8 and Shri S.R. Chakravarti, learned counsel for the respondent nos.9 and 10 supported the impugned orders. It was submitted by Shri S.A. Marathe, learned counsel that the defendants were justified in moving the application below Exhibit 26 under Section 151 of the Code. The original plaintiff had sought to obstruct the right of way of the said defendants without any legal authority. The Authorities under the said Act had passed an order directing the plaintiff's father to remove the obstruction. Though orders were passed in the year

2010, the petitioner chose to ignore the same and during pendency of the suit sought to obstruct the plaintiff. The provisions of Section 151 of the Code were rightly invoked by the defendants and the trial Court in exercise of its inherent jurisdiction and with a view to ensure that the defendants were in a position to cultivate the respective fields rightly passed the order. He referred to the decision in *Manohar Lal Chopra Versus Rai Bahadur Rao Raja Seth Hiralal* [AIR 1962 SC 527] as well as the decision in *Harishchandra Narayan Maurya Versus Rajendraprasad Dargahi Varma* [1997(3) Mh.L.J. 437] in that regard.

As regards the orders passed under provisions of the said Act are concerned, it was submitted that the same were passed against the father of the petitioner who was respondent no.11 in the writ petition. The father of the petitioner had not chosen to challenge the said orders and there was no reason for not challenging the same. It was not permissible for the petitioner to challenge those orders and the same was done only by way of an afterthought. It was thus submitted that no interference was called for.

Shri D.A. Sonawane, learned counsel, appeared for the respondent no.11 and supported the submissions as made on behalf of the petitioner.

I have heard the learned counsel for the parties at length and I have gone through the documents on record. It can be seen that initially the petitioner had filed Regular Civil Suit No.70 of 2015 against his father seeking a right in Khasra No.85/2. On 12.12.2015, the said suit was compromised and the rights of the plaintiff's father in Khasra No.85/2 were given up by him and those rights came to be transferred to the petitioner. Prior thereto some of the defendants had filed an application in the year 2010 seeking

removal of the obstruction that was being caused by the petitioner's father. The Tahsildar by order dated 26.05.2010 had directed the petitioner's father to remove such obstruction and that order was confirmed by the Additional Collector on 06.07.2017. In the subsequent civil suit as filed for declaration and perpetual injunction, the present petitioner had sought the relief of temporary injunction seeking to restrain the defendant nos.1 to 6 from entering the plaintiff's field and causing obstruction thereto. The trial Court rejected that application and the miscellaneous appeal filed by the petitioner is still pending.

In the meanwhile, according to the defendant nos.1 to 6 on 03.06.2018, the plaintiff and his family members sought to restrain the said defendants from approaching their field by putting a fencing wire. On 11.06.2018, the defendants moved an application before the Revenue Authorities and the Tahsildar directed the plaintiff and his family members to remove the said obstruction. It is on that basis that on 29.06.2018, the said defendants by invoking the provisions of Section 151 of the Code prayed before the trial Court that the plaintiff be directed to remove the fencing wire that was causing obstruction to the defendants from approaching their fields. The trial Court has observed that in view of earlier orders passed by the Tahsildar and the Additional Collector in proceedings under the said Act, the defendants were using the way in question for approaching their fields. It has further observed that the alleged obstruction was after rejection of the application for temporary injunction and therefore it was necessary to pass orders to preserve the *status quo* with regard to the suit way. Hence, in view of the fact that the property in dispute was in danger of being wasted, the trial Court found it fit to exercise inherent powers under Section 151 of the Code.

The scope of the provisions of Section 151 of the Code are wide enough and situations not governed by the provisions of Order XXXIX Rule 1 and 2 of the Code can be met by passing suitable orders under Section 151 of the Code. The only requirement was that such powers should not be exercised when the same may be in conflict with the powers that have been expressly conferred. In the present case, the trial Court found that despite orders passed by the Tahsildar and Additional Collector in proceedings under the said Act and despite rejection of the application for temporary injunction, the plaintiff had thereafter sought to obstruct the way of the said defendants. It was thus found fit by the trial Court to exercise powers under Section 151 of the Code. It is found that in the facts of the present case, the trial Court was justified in invoking its inherent powers so as to preserve the *status quo* of the situation that was in existence. There was no reason for the plaintiff to have obstructed the right of way of the said defendants on 03.06.2018 especially when the application for temporary injunction was rejected by the trial Court. It was not necessary for the defendants to have filed a counter claim as urged. The trial Court was competent to handle the situation in the light of the obstruction sought to be caused by the plaintiff despite rejection of the application for temporary injunction and in the wake of orders passed in proceedings under the said Act. The observations in *Harishchandra Narayan Maurya* (supra) apply to the present case. It is therefore found that the trial Court did not commit any jurisdictional error when it allowed the application below Exhibit 26 and directed the plaintiff as well as the defendant no.12 to remove the fencing wire put up by them. The impugned order passed below Exhibit 26 therefore does not deserve to be interfered with.

Insofar as the challenge to the orders passed under the provisions of the said Act are concerned, it is seen that the respondent no.11-petitioner's father was a party in those proceedings but he has not chosen to challenge those orders. The revision application preferred by the said respondent no.11 has been dismissed on 06.07.2017. Though it is stated that in the light of the compromise decree passed in Regular Civil Suit No.70 of 2015 dated 12.12.2015, the plaintiff has a right to challenge said orders, the terms of compromise placed on record do not indicate the same. The said suit was only with regard to 83R land from Khasra No.85/2 while the proceedings under the said Act pertain to the right of way of the defendants. I therefore find that liberty can be granted to the respondent no.11-petitioner's father to challenge the orders passed under the provisions of the said Act independently if so advised. I am not inclined to examine that challenge at the behest of the son of the respondent no.11 especially when there is nothing on record to indicate that it is only the petitioner who is now concerned with right, title and interest in respect of the property/properties from which the said right of way has been granted. Hence, the challenge in that regard is kept open.

In the light of the foregoing discussion, the order passed below Exhibit 26 dated 12.07.2018 stands confirmed. It is not necessary to interfere with the said order. It is open for the respondent no.11 who was a party in the proceedings filed under the said Act to challenge the orders passed by the Additional Collector on 06.07.2017 in accordance with law. The challenge to that order at the behest of the petitioner is not entertained as there is absence of locus as well as any legal right of the petitioner to challenge the same. The points raised in that regard are kept open.

Subject to what is stated hereinabove, the writ petition stands dismissed with liberty as granted. Observations made in this order are only for considering the challenge to the order passed below Exhibit 26. The parties shall bear their own costs.

JUDGE

APTE