

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5226 OF 2020

1. Sharad s/o Shivaji Golande,
Age 31 years, Occ. Agriculture.
2. Pandit s/o Shivaji Golande,
Age 34 years, Occ. Agriculture.
3. Shivaji s/o Dada Golande,
Age 60 years, Occ. Agriculture.
4. Sow. Parvati w/o Shivaji Golande,
Age 56 years, Occ. Agriculture.
5. Sow. Renuka w/o Pandit Golande,
Age 30 years, Occ. Agriculture.

All r/o. Ukkadgaon, Tq. Shrigonda,
District Ahmednagar.

... **Petitioners.**

VERSUS

1. Bankat s/o Dada Golande,
Age 46 years, Occ. Agriculture.
2. Gorakh s/o Dada Golande,
Age 56 years, Occ. Agriculture.

Both r/o. Ukkadgaon, Tq.
Shrigonda, Dist. Ahmednagar.

3. The Tahsildar,
Shrigonda, Tq. Shrigonda,
District Ahmednagar.
4. The Sub Divisional Officer,
Shrigonda-Parner Division,
Dist. Ahmednagar.

... **Respondents.**

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Advocate for the Petitioners : Mr. R.R. Karpe,
Advocate for the Respondents No. 1 & 2 : Mr. P.B. Shirsath.
AG.P for the Respondents No. 3 & 4/State : Mrs. V.S. Choudhary.

CORAM : **MANGESH S. PATIL, J.**
RESERVED ON : **16/09/2020**
PRONOUNCED ON : **23/09/2020**

JUDGMENT :

Heard both the sides. Rule. The Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioners are impugning the judgment and order passed by Tahsildar Shrigonda in Rasta Case No. 44/2018 on 05.04.2019 and the order confirming it passed by the Sub Divisional Officer Shrigonda in Revision Application No. 217/2019 dated 18.03.2020, whereby the revision preferred by them has been dismissed.

3. The petitioner No. 3 and the respondents No. 1 and 2 are the real brothers. Land Gat No. 45 is their ancestral property. By virtue of Mutation Entry No. 1119 that land along with another land Gat No. 116 was partitioned amongst them. The land Gat No. 45 was trifurcated East-West in the direction. The Southern most portion was allotted to respondent No. 1. The middle portion was allotted to respondent No. 2 and the Northern most portion was allotted to the petitioner No. 3. It is then alleged that during the course of time the respondent No. 2 sold his share in piecemeal manner to the petitioners No 1 and 2 who happen to be the sons of the petitioner No. 3. In proceeding under the Prevention of Fragmentation and Consolidation of Holdings Act, each of these three sharers were to get an additional 7 Are portion. Apprehending that the petitioners might have to part with a portion of the land, they started damaging it by removing sand. They also destroyed the customary way that was existing for use of all the sharers situated in the middle of the land Gat No. 45 and runs North-South in direction and which situate to the East of the houses of the petitioners and the respondent No. 1 situated in their respective portions. Hence the

respondents No. 1 and 2 filed a proceeding under Section 5(2) of the Mamlatdar Courts Act, 1906 (hereinafter 'the Act'). By the impugned judgment and order the Tahsildar allowed the application and issued a mandatory injunction directing the petitioners to restore the customary way to the original state. The revision preferred by the petitioners having been dismissed, the petitioners are before this Court.

4. The learned advocate Mr. Karpe for the petitioners vehemently submitted that the Authorities have grossly erred in appreciating the matter in dispute and their powers under Section 5 of the Act. In fact, the entire land Gat No. 45 was only a single piece of land and there could not have been any customary way running across in the middle of the piece of land. No proper enquiry was conducted by the respondent No. 3-Tahsildar to ascertain if really any such way was ever in existence. The inference drawn by him barely on the basis of a spot panchnama was grossly incorrect much less to arrive at some definite conclusion. Without there being sufficient material/evidence before the respondent No. 3-Tahsildar he has drawn conclusions purely based on surmises and conjectures. The respondent No. 4-Sub Divisional Officer has also grossly erred in overlooking all these shortcomings and readily subscribing to the conclusions drawn by the respondent No. 3-Tahsildar. The observations and conclusions drawn by both the Authorities are perverse and arbitrary and may be quashed and set aside.

5. The learned advocate Mr. Karpe further submitted that the proceeding contemplated under Section 5 of the Act is a Summary Proceeding. It does not give rise to creation of any right in a substantive manner and the decision rendered thereunder cannot supersede the decision of a Civil Court in a substantive suit. Though the respondents No. 1 and 2 had invoked the powers under Section 5 of the Act, it was specifically brought to record that the petitioners have filed a Regular Civil Suit No. 152/2018 against the respondents No. 1 and 2 touching *inter alia* the same

dispute as to the existence of the disputed way. The learned advocate would then submit that not only that but another suit has also been pending between the parties bearing Regular Civil Suit No. 107/2018 filed by the respondents No. 1 and 2 against the petitioners and even in that suit, the respondents No. 1 and 2 have racked up the same issue touching existence of the disputed way and the obstruction created by the petitioners. The learned advocate would therefore submit that when the dispute was pending before the Civil Court in the form of these two suits wherein the selfsame issue regarding right to the disputed way was raised and was to be decided conclusively determining the respective rights and duties, both the Authorities below ought to have allowed the parties to get the dispute decided by the Civil Court. Instead of adopting such a reasonable course, the Authorities seem to have acted in haste and have reached jumping conclusions which are liable to be quashed and set aside.

6. Lastly, the learned advocate Mr. Karpe submitted that in fact, sensing that respondent No. 3-Tahsildar was acting in haste the petitioners had applied to the Collector for transfer of the proceeding to some other Officer and the Collector by the order dated 31.05.2019 had also directed the matter to be transferred. In spite of such transfer order the respondent No. 3-Tahsildar decided the proceeding which gives rise to a reasonable doubt about the matter having been decided impartially.

7. The learned AG.P substantiated the observations and the conclusions impugned in the petition.

8. The learned advocate Mr. Shirsath for the respondents No. 1 and 2 at the out set pointed out that the order regarding transfer of the proceeding was passed by the Collector on 31.05.2019 whereas the impugned order was passed by respondent No. 3-Tahsildar on 05.04.2019 and therefore there was no fault or error committed by the respondent No. 3-Tahsildar in deciding the matter.

9. The learned advocate Mr. Shirsath then submitted that the Mutation Entry No. 1119 clearly demonstrated that the two ancestral properties were divided amongst the three brothers on 17.08.2002 and the partition was effected on an application filed by their father Dada. The learned advocate pointedly demonstrated as to how even in this Mutation Entry there was a reference to existence of a common way through this land Gat No. 45, simultaneously mentioning about each of the three sharers having equal right in the well, electric motor and the pipe line existing in land Gat No. 45. He would further submit that reference can be made to the wording of this mutation entry to infer that there was indeed a common way in existence in land Gat No. 45 for use of all the three sharers which was not found in existence during the spot panchnama conducted by the respondent No. 3-Tahsildar. It was specifically noticed during this panchnama that the petitioner No. 3 has obstructed the way by dumping fodder and by erecting a fence to the back side of his house as shown in the map annexed thereto. He further pointed out that it was also noticed during the panchnama that some portion of the compound was removed but pomegranate trees were planted in that place and it was flooded with water. The learned advocate further pointed out that it was pointedly noted in the panchnama that there is no alternate way available to the respondent No. 1 for approaching his house and that he was unable to approach his land. If such was the state of affairs, no fault has been committed by the respondent No. 3-Tahsildar in drawing an inference about existence of the way and its obstruction by the petitioners.

10. Lastly, the learned advocate Mr. Shirsath submitted that though the suits have been pending between the parties, those do not specifically raise the issue regarding the disputed way. Besides, pendency of the Civil Suits does not take away the jurisdiction vested in a Tahsildar under Section 5 of the Act. Therefore there was no error committed by the respondent No. 3-Tahsildar in exercising the jurisdiction. He therefore prayed to dismiss the

petition.

11. I have carefully gone through the papers. Since Section 5 of the Act confers upon a Mamlatdar a power to remove obstruction in a customary way, obviously it cannot be said that pendency of the Civil Suit before the Civil Court would take away the jurisdiction vested in him. Therefore it cannot be said that any error has been committed by the respondent No. 3-Tahsildar in entertaining and deciding the proceeding under Section 5 of the Act albeit the suits have been pending.

12. But then, simultaneously one needs to bear in mind that the powers conferred upon a Mamlatdar under Section 5 of the Act require him to undertake a quasi-judicial scrutiny making it imperative for him to hold a detailed enquiry, calling upon the parties to lead evidence and then decide the dispute objectively based on the evidence led by the parties. The respondent No. 3-Tahsildar does not seem to have followed any such course while conducting the enquiry. As can be seen, he seems to have simply solicited a reply from the petitioners and then has undertaken a spot panchnama. After making a cursory reference to the observations in the panchnama and relying upon the Mutation Entry No. 1119 he has drawn an inference about existence of the way as claimed by the respondents No. 1 and 2 and its obstruction by the petitioners. It is therefore necessary to ascertain if the recitals in the panchnama and the mutation entry are sufficient enough and justify the inference drawn by him.

13. So far as the Mutation Entry No. 1119 is concerned, two lands bearing Gat No. 116 and Gat No. 45 were divided amongst the three brothers i.e. petitioner No. 3 and respondents No. 1 and 2 on an application filed by their father. It has been mentioned therein that a well, electric motor and pipeline exist in land Gat No. 45 and there is a way passing through this land which is a common way. However, at the most a reference to such a way would show that some way was or has been in existence and

was being used by all the sharers. However there are no further particulars as to how and where this common way has been in existence much less its use for any specific purpose like approaching the well or the houses. At the most therefore it can be said that this mutation entry only indicates existence of some way for common use.

14. Turning to the panchnama drawn by the respondent No. 3-Tahsildar is concerned, he has also prepared a rough sketch and one will have to appreciate and understand the contents of the panchnama with reference to this sketch. Pertinently, this panchnama and the sketch do not specifically refer to the exact location of the well. In fact, this rough sketch nowhere shows existence of any well in the land Gat No. 45. Only the houses of the petitioners and that of the respondent No. 1 have been shown located in the middle of the land. Though the panchnama mentions about existence of some way running along the Southern side of these houses and also mentions about existence of the way and it having been blocked by dumping fodder and by planting pomegranate saplings and flooded with water, the rough sketch does not indicate any such fodder, saplings or logged water at any specific point.

15. It is also mentioned in this panchnama that there is no alternate way in existence for the use of the respondent No. 1. In order to appreciate this fact if one peruses the rough sketch it clearly shows that this land Gat No. 45 is a strip of land which is located perpendicularly to the Ukkadgaon-Belwandi village boundary on the East which runs along North-South direction and joins Shirur-Belwandi road situated in East-West direction to the North of the land. In fact, the land Gat No. 44, 45 and 46 are three parallel strips of lands situated in the corner of this Shirur Belwandi road and Ukkadgaon Belwandi boundary. Admittedly, the entire land Gat No. 45 was a single piece of land till the partition was effected by virtue of Mutation Entry No. 1119. For want of evidence it cannot be ascertained if the separate houses were in existence in these lands being used by the three

brothers since before this partition and that they all were using same common way for ingress and egress to their houses.

16. In fact, admittedly, after such division amongst the three brothers the respondent No. 2 has sold his middle portion to the petitioners from time to time in piecemeal manner. If at all any such common way has been in existence and use, certainly there would have been some reference to it in the sale-deeds under which the respondent No. 2 sold these portions of land to the petitioners. However, no attempt was made to produce the copies of the sale-deeds before the respondent No. 3-Tahsildar and even he was not apparently keen to appreciate this fact. It is thus clear that the conclusion drawn by the respondent No. 3-Tahsildar on the basis of the spot panchnama and a vague reference regarding existence of a common way in the Mutation Entry No. 1119 are the pieces of material which even if they are accepted are not sufficient to enable a person to reach a reasonable inference about existence of any common way as claimed by the respondents No. 1 and 2. The observations and the conclusions drawn by the respondent No. 3-Tahsildar are clearly perverse and arbitrary.

17. If such was the state of affairs, the respondent No. 4 Sub Divisional Officer should have undertaken the scrutiny while exercising the revisional powers conferred upon him under Sub Section 2 of Section 23 of the Act. A careful perusal of the impugned judgment passed by him shows that even he has committed the same error while subscribing to the inference drawn by the respondent No. 3-Tahsildar. Instead of appreciating the material in a more objective manner he seems to have readily subscribed to the conclusions of the respondent No. 3-Tahsildar.

18. Pertinently even the appreciation of the evidence and particularly the order passed on the temporary injunction application (Exhibit 5) in Regular Civil Suit No. 152/2018 filed by the petitioners against the respondents No. 1 and 2 has not been correctly considered. What has been

observed after going through this order is that the suit was filed by the petitioners against the respondents No. 1 and 2 and others and that the Civil Court had not noticed any obstruction having been created by the respondents No. 1 and 2. In plaint filed in that suit, the application- Exhibit 5 and the order passed thereon it has been specifically alleged and found by the Civil Court as mentioned in paragraph No. 18 of the order that the Consolidation Proceeding was yet to be finalized and the defendants therein i.e. respondents No. 1 and 2 herein were assuming that 7 Are portion was to be added to their share and that there was no question of creating obstruction to the petitioners possession over their portion of land Gat No. 45. Pertinently, as can be seen from paragraph No. 19 of the order, even before the Civil Court the respondents No. 1 and 2 had relied upon Mutation Entry no. 1119 for claiming existence of the common way. However, as is mentioned herein above the learned Civil Judge also could not pointedly read reference to the common way in that mutation entry at any specific point. It is equally important to note that even the respondents No. 1 and 2 had filed a copy of the application filed by them before the respondent No. 3-Tahsildar under Section 5 of the Act and had also produced the sketch/map annexed to that. In spite of production of such piece of evidence the Civil Court did not find any substance in the contention of the respondents No. 1 and 2 regarding existence of the common way.

19. It is important to note that the Civil court had decided the application for temporary injunction (Exhibit 5) by the order dated 01.11.2018. If such was the state of affairs, when the Civil Court in a substantive proceeding had drawn such inference and conclusion refuting the claim of the respondents No. 1 and 2 about existence of any common way when even they themselves had raised this issue by filing Regular Civil Suit No. 107/2018, the respondent No. 3-Tahsildar and his Superior Authority i.e. respondent No. 4-Sub Divisional Officer ought to have stayed away from exercising the powers under Section 5 of the Act. It is not a

matter of jurisdiction but indeed it was a matter of propriety, more so when second proviso to Section 22 of the Act clearly mentions that the decision under Section 5 of the Act would not be conclusive when such a suit between the parties is pending before the Civil Court.

20. The situation in the matter in hand is further grave in as much as the Civil Court had specifically refuted contention of the respondents No. 1 and 2 regarding existence of the selfsame disputed way while deciding the application for temporary injunction (Exhibit 5) in Regular Civil Suit No. 152/2018. In the teeth of such conclusion drawn by a Civil Court, the respondents No. 3 and 4 have been bold enough to proceed with and arrive at a contradictory conclusion. Since by virtue of second proviso to Section 22 the decision of the Civil Court is final, when the parties are already before the Civil Court raising the selfsame issue, the impugned orders cannot stand the scrutiny of law and are liable to be quashed and set aside.

21. The Writ Petition is allowed.

22. The impugned orders are quashed and set aside. The rule is accordingly made absolute.

(MANGESH S. PATIL, J.)

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