

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.5227 OF 2020

- 1] Sardar Shankar Patil (Dead),
though his L.R,
- 1a] Dhyaneshwar Sardar Patil,
Age:43 yrs, Occ: Agri,
- 2] Yeshubai Daulat Patil,
Age: 83 yrs, Occ: Household & Agri,
- 3] Dinkar Bhila Patil,
Age: 60 yrs, Occ: Retired & Agri,
Pet.No.1 to 3 R/o Kothali,
Tq: Bhadgaon, Dist: Jalgaon.

PETITIONERS

VERSUS

- 1] Dashrath Lala Patil,
Age – 59 yrs, Occu- Agri,
- 2] Jijabai Dashrath Patil,
Age -56 yrs, Occu – Agri,
Resp. No. 1 & 2 R/o Kothali,
Tq: Bhadgaon, dist: Jalgaon.
- 3] The Tahsildar,
Bhadgaon dist: Jalgaon.
- 4] The Sub-Divisional Officer
Pachora Div: Pachora
Dist: Jalgaon.

RESPONDENTS

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Advocate for Petitioners : Mr. S.P. Brahme h/f. Mr. Swapnil S. Patil
AGP for respondent Nos. 3 and 4: Mr. P.G. Borade
Advocate for Respondent Nos.1 and 2 : Mr. Harshal P. Randhir

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CORAM : MANGESH S. PATIL, J.

Reserved on 04.09.2020

Pronounced on : 14.09.2020

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. Learned AGP and the learned advocate for the respondent Nos. 1 and 2 waive service. With the consent of both the sides the matter is heard finally at the stage of admission.

2. By way of this Writ Petition invoking the powers of this Court under Articles 226 and 227 of the Constitution of India, the petitioners who are the original defendants from the proceeding initiated by the respondent Nos.1 and 2 herein under the provisions of Section 5 of the Mamlatdars' Courts Act, 1906 (herein after the Act) are impugning the judgment and order passed by the Tahsildar, Bhadgaon in Wahiwat Suit No.7/2018 dated 16.05.2018 and confirmed by Sub Divisional Officer in Wahiwat Revision No.67/2019 dated 16.06.2020.

3. In sum and substance the averments made by the respondent Nos. 1 and 2 in their plaint are to the effect that the petitioners are the owners of Gat Nos. 157/1/B, 157/1/A and 157/2 whereas the respondent Nos. 1 and 2 are the owners of lands Gat Nos. 160/1A, 160/4 and 160/2, 160/1/B. The respondent Nos. 1 and 2 averred that there was an old cart way along the eastern side of the bandh of the petitioners' lands which was in use for going to their lands. However, the petitioners destroyed a portion of the way. Hence, by filing the suit under Section 5 of the Act they sought removal of obstruction and injunction.

4. The petitioners contested the suit by filing a written statements.

The learned Tahsildar directed inspection of the spot, gave an opportunity to both the sides to lead evidence and by the impugned judgment and order allowed the application of the respondent Nos. 1 and 2 and issued injunction as prayed for. Being aggrieved and dissatisfied by such order, the petitioners preferred a revision under Section 23(2) of the Act before the learned Sub Divisional Officer, Pachora who by the impugned judgment and order dismissed the Revision and confirmed the order passed by the Tahsildar. Hence this Writ Petition.

5. The learned advocate Mr. Brahme for the petitioners vehemently submitted that the two courts below have failed to appreciate the facts, circumstances and evidence on the record and have reached a conclusion which is perverse and illegal. He would point out that they have not at all referred to and considered the evidence and have readily accepted the plea of the respondent Nos. 1 and 2. They failed to appreciate that even during Spot Panchnama dated 24.05.2018, trees were found on the bandh along which a cart way was alleged to be in existence. Both of them have heavily relied upon the Spot Panchnama and without scrutinizing it have reached a jumping conclusion about existence of some way and its destruction. Learned advocate would further submit that a substantive suit filed by the petitioners has been pending against the respondent Nos. 1 and 2 in the Civil Court and it would have been appropriate for the authorities under the Revenue Jurisdiction to direct the parties to get their dispute settled through that civil litigation and there was no need to hastily reach

the conclusion which they have. Thus the learned advocate submits that the impugned orders would now be taken aid of by the respondents to create a way which hitherto never existed which is not the jurisdiction and power vested in the Tahsildar under Section 5 of the Act.

6. The learned advocate for the respondent Nos. 1 and 2 submitted that the observations and the conclusion drawn by the Tahsildar in the impugned judgment and order are clearly based on the evidence available in the form of testimonies and the Spot Panchnama which clearly demonstrated existence of the way to approach the respondents' lands. He would point out that the disputed way along the bandh has been in existence only up to a specific point which in the normal course would not have been a case had no such way been in existence at all. This is clearly evident from the Spot Panchnama which has been conducted in presence of both the sides. Since the material before the Tahsildar was sufficient to demonstrate and substantiate the averments of the respondent Nos. 1 and 2, there is no perversity or arbitrariness in the order passed by the Tahsildar.

7. The learned advocate would then submit that by virtue of Section 23 (1) of the Act no appeal lies against the order of the Mamlatdar and only a revision is maintainable under Sub Section (2) of Section 23. Obviously, being a revision, the learned Sub Divisional Officer could not have been able to interfere with the order passed by the Tahsildar since it was not perverse, arbitrary or capricious. Therefore, the learned advocate submits that there is no error committed by both the courts below in

appreciating the facts and circumstances and no interference is called for.

8. The learned advocate for the respondent Nos. 1 and 2 further submitted that the suit filed by the petitioners against them has been filed during pendency of the present litigation and it is not that it was already pending before the Civil Court when this proceeding under Section 5 of the Act was initiated. Therefore, there was no reason or occasion for the Tahsildar to direct the parties to the Civil Court.

9. As can be gathered, the respondent Nos. 1 and 2 sought to invoke the jurisdiction vested in the Mamlatdar under Section 7 of the Act which gives powers to a Mamlatdar *inter alia* of removing any obstruction in the use of a customary way and to issue injunction against a person causing such obstruction. It also empowers him to remove the obstruction. The respondent Nos. 1 and 2 who are the owners of the lands Gat No. 160 and its sub divisions averred that an old customary way was in existence along the northern side bandh in the lands of the petitioners. They specifically averred that the petitioners destroyed that way on 13.05.2018 and thereby created obstruction to them in approaching their lands. It is important to note that this power to be exercised by a Mamlatdar is expected to take all the drappings of a suit beginning with presentation of a plaint, appearance of the defendants holding of the trial including recording of testimonies of the parties and the witnesses, inspection of the disputed site and passing of a decision/order as also its execution. By virtue of Section 23 no appeal lies against such order passed by a Mamlatdar but a

Collector has the power to entertain a revision.

10. I am referring to this with the sole object of pointing out as to how the Tahsildar was expected to proceed in the matter in hand. He registered the plaint, the petitioners filed their written statements, he undertook a spot inspection in the form of a panchnama and allowed the respondents to lead evidence pursuant thereto the respondent No.1 was allowed to be cross-examined on behalf of the petitioners. The petitioners do not seem to have sought to lead any oral evidence and by the impugned judgment and order the Tahsildar allowed the application of the respondent Nos. 1 and 2 and holding that a customary way was in existence as averred by them issued injunction against the petitioners. However, a bare perusal of the impugned judgment and order passed by him would reveal that except narration of the facts and a passing reference about holding of a spot inspection that he has reached a conclusion that a customary way was in existence and was obstructed by the petitioners. There is absolutely no discussion much less scanning the testimony of the respondent No.1 wherein, he failed to explain as to how in the application he had averred about existence of customary way 'over the bandh' of the petitioners' land Gat No.157 but has subsequently altered the version to the effect that what he meant to say was that the customary way was in existence 'in the land' Gut No.157. He specifically admitted that he was seeking a way along the bandh of the petitioners land Gat No.157 and not over it.

11. It is thus quite clear that when the dispute was in respect of

availability of a customary way as averred by the respondent Nos. 1 and 2 and its destruction by the petitioners, the learned Tahsildar does not seem to have endeavored to reach a conclusion as to if really such a customary way was in existence and was destroyed as has been sought to be averred by the respondent Nos. 1 and 2.

12. The Tahsildar does not seem to have taken any initiative to collect the information independently as well. Admittedly, as has been admitted by the respondent No.1 during his cross-examination, the disputed way apparently divides the lands of the respondent Nos. 1 and 2 and the lands of 6 other agriculturist who owned and possessed fractions of land Gat No.158 and the said boundary is East-West in direction and the lands of the petitioners situate to the South of these lands Gat No.157 and 158. If at all some customary way has been in existence since long, obviously, the owners of the lands Gat No.158 and its fractions would be the persons who would have been in a better position to either confirm existence of such a customary way or deny its existence. During cross-examination of the respondent No.1 he failed to even tell as to who are the owners of these other lands situated to the North of his land Gat No.157 and its fractions.

13. Though the Tahsildar seems to have visited the spot he does not seem to have even cared to call upon the owners and possessors of these adjoining lands. When responsibility has been cast on the Tahsildar while giving him powers under Section 5 of the Act, it was expected of him to have been more proactive in ascertaining existence or otherwise of the

disputed way. The impugned order does not address these aspects and *ex facie* the observations and the conclusions drawn by him are without indulging in the scanning of the material available before him or the one which he could have collected in the inquiry is, therefore, clearly perverse, arbitrary and capricious and cannot stand the scrutiny of law.

14. The learned Sub Divisional Officer was approached by the petitioners invoking the powers of revision conferred upon him under Sub Section (2) of Section 23 of the Act. He was expected to undertake the scrutiny to ascertain if the observations and the conclusion drawn by the Tahsildar were perverse, arbitrary or capricious so that he could have invoked the powers of revision. Unfortunately, even the approach of the Sub Divisional Officer is equally casual. Simply by narrating the pleadings and facts, in one paragraph he has confirmed the findings of the Tahsildar by observing that the Tahsildar having conducted the spot inspection in presence of the parties and having drawn the inference that the disputed way was in existence, has readily confirmed the conclusions and has dismissed the Revision. He has not undertaken any exercise to reach the conclusions independently by undertaking a critical scrutiny of the order under challenge before him. The aspects discussed herein above could have been easily noticed by the Sub Divisional Officer had he undertaken a similar scrutiny which would have enabled him to reach an appropriate conclusion.

15. In this respect it is interesting to note that the Tahsildar as well

as the Sub Divisional Officer have referred to the Spot Panchnama and have described the topography but conspicuously the rough sketch annexed to the Spot Panchnama does not refer to situation of Gat No.157/2, 158/2/A, 157/2/B. If at all the spot inspection was conducted by the Tahsildar and if he was to draw the conclusions and was referring to these lands, a bare look at the sketch which is the part of the Spot Panchnama drawn by him should have referred to the situation of these lands. It is thus quite clear that he has not even correctly drawn the sketch and has not even taken care to refer to it meticulously while referring to the situation of various lands particularly lands Gat No. 157/2, 158/2/A, 157/2/B. To my query to the learned advocate for the respondent Nos. 1 and 2 on these lines even the learned advocate was unable to point out from this sketch drawn in the Spot Panchnama about location of these three pieces of lands. Therefore I have no manner of doubt that the inquiry conducted by the learned Tahsildar was not at all judicious one and was not conducted in the manner expected of him while exercising the powers under Section 5 of the Act. Even the Sub Divisional Officer confirming that order has grossly erred in not undertaking the desired scrutiny and has readily accepted and confirmed the order passed by his subordinate. Therefore in my considered view both the impugned orders are perverse, arbitrary and capricious and are liable to be interfered with while exercising the Writ Jurisdiction.

16. However, simultaneously, it is important to note that admittedly, may be during pendency of the proceeding before the lower authorities, the

petitioners have initiated a substantive civil suit against the respondent Nos. 1 and 2 in the form of Regular Civil Suit No.57/2018 in respect of the self same dispute touching existence of the disputed way. It is important to note that in view of the scheme of the Act, the decision of Mamlatdar is not conclusive as can be seen from the provisions of Section 22 and particularly the Second Proviso which reads thus:

22. Subject to the provisions of section 23, sub-section (2), the party in favour of whom the Mamlatdar issues an order for removal of an impediment of the party to whom the Mamlatdar gives possession or restores a use, or in whose favour an injunction is granted, shall continue to have the surface water upon his land flow unimpeded on to adjacent land or continue in possession or use, as the case may be, until otherwise decreed or ordered, or until ousted, by a competent Civil Court :

Provided, firstly, that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in a competent Civil Court mesne profits for the time he has been kept out of possession of any property or out of enjoyment of any use:

Provided, secondly, that in any subsequent suit or other proceeding in any Civil Court between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property or the enjoyment of any use or respecting the title to or valuation of any crop dealt with under the proviso to sub-section (1) of section 21, shall not be held to be conclusive.

17. As can be seen from the provisions and particularly the second proviso, in a subsequent suit between the same parties the Mamlatdar's decision respecting *inter alia* enjoyment of any use which would include a right of use of customary way is not to be treated as conclusive and would not operate as *res judicata* under Section 11 of the Code of Civil Procedure. If this be so, it would be appropriate that instead of remanding the matter to

the Tahsildar for decision afresh the parties can prosecute/contest the Civil Suit and the Civil Court would have an opportunity to independently decide the issue.

18. It is in view of such a state of affairs, though the Writ Petition deserves to be allowed, I am allowing it partly by setting aside the impugned judgments and orders but expecting the parties to get the dispute as to existence of the disputed customary way and its destruction as well as right of the respondent Nos. 1 and 2 in that respect to be decided in the Regular Civil Suit No.57/2018.

19. The Writ Petition is accordingly partly allowed. The impugned judgments and orders passed by the Tahsildar and the Sub Divisional Officer are quashed and set aside. However, the dispute shall be decided in Regular Civil Suit No.57/2018 pending between the petitioners and the respondent Nos. 1 and 2 expeditiously and without being influenced by the observations made herein. Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)