

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9825 OF 2019

Shri. Ashok Devman Gangurde) ...Petitioner

Versus

Shri. Dagdu Chiman Gangurde and others) ...Respondents

Mr. R.N. Gite, Advocate for Petitioner.

Mr. Pandit Kasar, Advocate for Respondent No.1.

Mr. S.D. Rayrikar, A.G.P. for Respondent Nos.8 to 11.

CORAM : MILIND N. JADHAV, J.
RESERVED ON : 26th February, 2020.
PRONOUNCED ON : 2nd JULY, 2020

JUDGMENT :-

1. Rule.

2. Rule is made returnable forthwith. Heard finally with consent of the parties.

3. This petition has been filed by the petitioner under the provisions of Article 227 of the Constitution of India challenging the judgment and order dated 19.7.2019 passed by Deputy Collector, Sub-Division, Chandwad, Dist. Nashik

(respondent No. 10) in RTS Revision No. 91 of 2018.

4. Brief facts, necessary for appreciation of the controversy between the parties are as under:-

4.1 In the year 1974, under the consolidation scheme, there was exchange of land amongst various members of the Gangurde family and the petitioner and respondent No. 1 became entitled to Gat Nos. 36 & 37 and 34 & 74 respectively.

4.2 It is contended by respondent No. 1 that since then a road has been in existence as approach road to Gat No. 74 through the aforesaid Gat Nos. which belong to the petitioner and respondent No. 1. It is further contended that by virtue of sale deed dated 16.12.1988, respondent No. 1 has purchased Gat No. 37 from one Chimma Shivram Gangurde and by another sale deed of even date, the father of the petitioner has sold certain land. It is the contention of respondent No. 1 that in both the aforesaid sale deeds, there is a mention of the aforesaid approach road to the western

side bandh which runs from north to south (hereinafter for brevity sake, referred to as the '**north south road**'). According to respondent No. 1, to the western side of Gat Nos. 36 and 37, the above north south road still exists. The petitioner obstructed this north south road sometime in 1998 and respondent No. 1 was constrained to file vahivat application dated 1.12.1998 before respondent No. 8 - Tahsildar, Chandwad, Dist. Nashik for seeking removal of obstruction under the provisions of Section 5 of the Mamlatdars' Courts Act, 1906 (hereinafter referred to as "**the said Act**").

4.3 Respondent No. 1 filed Vahivat Case No. 3/98 on 1.12.1998 and impleaded several family members of Gangurde family who were the owners of various adjacent and neighboring plots of land near the north-south road stated above.

4.4 On 2.4.1998, Tahsildar, Chandwad issued notice to the concerned parties and carried out panchnama i.e. personal inspection on the spot and recorded the statement

of panchas (witnesses) that no road existed at the said spot. Based on the above inspection report, respondent No. 8 - Tahsildar, Chandwad dismissed Vahivat Case No. 3/98 filed by respondent No. 1.

4.5 Being aggrieved, respondent No. 1 filed Revision Application bearing No. 4/98 before respondent No. 9 - Sub-Divisional Officer, Malegaon, District Nashik under Section 23 of the said Act. The Sub-Divisional Officer Malegaon dismissed the Revision Application on 29.4.1999. Against this dismissal, respondent No. 1 did not file any appeal / revision or writ petition.

4.6 Respondent No. 1 filed Vahivat Case No. 19/2018 before respondent No. 8 - Tahsildar, Chandwad, Dist. Nashik seeking right of way to Gat No. 34 through Gat Nos. 36, 37, 38, 74 and 75 of Mouje Kalamdare, Taluka Chandwad. Respondent No. 1 is the owner of Gat Nos. 34 and 74. Petitioner is the owner of Gat Nos. 36 and 37. Gat No. 38 is commonly owned and cultivated by respondent No. 1 and some other members of the Gangurde family.

4.7 In the above background after a lapse of 20 years, respondent No. 1 once again filed Vahivat case bearing No. 19/18 in respect of the same cause of action which was subject matter of Vahivat Case No. 3/98.

4.8 Respondent No. 8 Tahsildar, Chandwad after perusing the documentary evidence pertaining to Vahivat Case No. 3/98, the panchnama recorded therein and other relevant papers, came to the conclusion that Vahivat Case No. 19/2018 was barred by the principles of *res judicata*. Therefore, by order dated 24.7.2018, respondent No. 8 dismissed Vahivat Case No. 19/2018.

4.9 Being aggrieved, respondent No. 1 filed RTS Revision Application No. 91/2018 before respondent No. 10 i.e Dy. Collector, Sub Division Chandwad, District Nashik under the provisions of Section 23 of the said Act.

4.10 By judgment and order dated 19.7.2019, respondent No. 10 allowed the above revision application filed by respondent No. 1 and remanded the case back to

respondent No. 8 Tahsildar, Chandwad for fresh consideration.

5. In the above factual background, it will be apposite to lay down the rival submissions.

6. Mr. Gite, learned counsel appearing on behalf of the petitioner submitted that the impugned order dated 19.7.2019 suffers from gross and grave non-application of mind to the relevant facts and material evidence placed on record by the petitioner, inter alia, pertaining to Vahivat Case No. 3/98 which was in respect of the same subject property, same cause of action and involving the same parties. He submitted that the cause of action involved in the present case was directly and substantially the same in Vahivat Case No. 3/98 and was therefore, barred by the principles of *res judicata* and constructive *res judicata*. He submitted that in the earlier round of litigation between the same parties, respondent No. 8 Tahsildar had himself under his endorsement carried out spot inspection and recorded the statement of panchas, inter alia, recording that there was no

road in existence at the spot. He submitted that Revision Application No. 4/98 against the Tahsildar's order dismissing Vahivat Case No. 3/98 was dismissed by the Appellate Authority 29.4.1999. He submitted that respondent No. 1 did not challenge the Revision Order dated 29.4.1999 before this Court. Therefore, according to him, the order of Tahsildar had attained finality. He submitted that the impugned order dated 19.7.2019 holds that Vahivat Case No. 19/2018 was maintainable and this finding is not based on correct appreciation of the material evidence on record. He submitted that respondent Nos. 1 to 7 and the petitioner belong to Gangurde family and partition had taken place between various branches of the family in respect of several holdings. He submitted that pursuant to this partition, there was no road in existence on the said spot as claimed by respondent No. 1. He submitted that in view of the earlier Vahivat Case No. 3/98 having been decided against respondent Nos. 1 to 7, there was no valid and legal reason for respondent No. 10 to ignore the provisions of Section 11 of the Code of Civil Procedure, 1908 and the applicability of the bar of *res judicata* to the case of respondent No. 1 and

remand the case back to the Tahsildar for a fresh decision.

6.1 Mr. Gite has referred to and relied upon the judgment of the Apex Court in the case of **Lal Chand (dead) by L.Rs. & Ors. Vs. Radha Kishan**¹. He submitted that once the earlier proceedings before the same competent authority had been decided, then applying the principles of *res judicata* and considering that the issues involved in both the proceedings were identical, it was not open to the parties to agitate the same issues once again before the same competent authority. He referred to and drew the court's attention to paragraph No. 19 of the above decision which reads thus:-

19. Only one more aspect of the matter needs to be adverted to. The respondent after obtaining a decree for eviction against Lal Chand and his alleged sub tenants applied for permission of the competent authority to execute that decree. Permission was granted to him to execute the decree in respect only of the two rooms on the second floor and in pursuance of that permission he obtained possession of those two rooms. We are unable to understand how after working out his remedy under the 'Delhi Rent Control Act as modified by the Slum Clearance Act, it is competent to the respondent to bring a fresh suit for evicting the appellants from the premises on the ground floor. The authorities under the Slum Clearance Act who are exclusively invested with the power to determine whether a decree for eviction should be permitted to be executed and, if so, to what extent, had finally decided that question, refusing to allow the respondent to execute the decree in respect of the ground

1 AIR 1977 SC 789

floor premises. By the present suit, the respondent is once again asking for the relief which was included in the larger relief sought by him in the application filed under the Slum Clearance Act and which was expressly denied to him. In the circumstances, the present suit is also barred by the principle of res judicata. The fact that section 11 of the Code of Civil Procedure cannot apply on its terms, the earlier proceeding before the competent authority not being a suit, is no answer to the extension of the principle underlying that section to the instant case. Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law. The issues involved in the two proceedings are identical, those issues arise as between the same parties and thirdly, the issue now sought to be raised was decided finally by a competent quasi-judicial tribunal. The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. Were it permissible to bring suits of the present nature, the beneficial jurisdiction conferred on the competent authority by the Slum Clearance Act would become illusory and meaningless for, whether the competent authority grants or refuses permission to execute a decree for eviction, it would always be open to the landlord to enforce the ejectment decree by filing a substantive suit for possession. Verily, the respondent is executing the eviction decree by installments, now under the garb of a suit. Apart from the fact that the suit is barred on account of principles analogous to res judicata, it is plainly in violation of the injunction contained in section 19(1)(b) of the Slum Clearance Act, if regard is to be had to the substance and not for the form of the proceedings"

6.2 Mr. Gite, thereafter, referred to a decision in the case of **State of W.B. Vs. Hemant Kumar Bhattacharjee & Ors.**². He referred to and drew the court's attention to paragraph No. 14 which reads thus:-

2 AIR 1966 SC 1061

"14. Before proceedings with these arguments in detail, we can dispose of second contention very shortly. This argument proceeds on a fundamental misconception, as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The learned judges of the High Court who rendered the decision on 4-4-1952 had ample jurisdiction to decide the case and the fact that their decision was on the merits erroneous as seen from the later judgment of this Court, does not render it any the less final and binding between the parties before the Court. There is, thus, no substance in this contention. The decision of the High Court dated 4-4-1952 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not."

7. PER CONTRA, Mr. Pandit Kasar, learned counsel for respondent No. 1 submitted that though partition of properties between various members of Gangurde family i.e the petitioner and respondent Nos. 1 to 7 had taken place in the year 1972, the petitioner had never objected to the use of the north-south road by respondent No. 1. He submitted that all along, the north-south road was used by respondent No. 1 as a "vahivat road" without the petitioner raising any objection. He submitted that the north south road was in existence and it was used by respondent No. 1 as access road to approach his field / Gat Number. He fairly submitted that though in the year 1998, Vahivat Case No. 3/98 came to be dismissed and further Revision proceedings were also

dismissed against respondent No. 1, but even then there was no restriction / obstruction by the petitioner to the use of the north-south road thereafter in so far as respondent No. 1 was concerned. He submitted that because of obstruction, respondent No. 1 was forced to take a longer and circuitous rout to access / approach his Gat numbers / fields. He submitted that the obstruction by the petitioner was contrary to the understanding between the family members of the Gangurde family regarding the use of the north-south road.

8. Mr. S.D. Rayrikar, learned AGP appearing on behalf of respondent Nos. 8 to 11 supported the impugned order in as much as stating that the impugned order was not fatal to both the parties and that both the parties would get an equal opportunity to place their respective evidence before respondent No. 8, Tahsildar, Chandwad. Incidentally, on a question being put by the Court as to why the affidavit in reply dated 3.1.2020 filed by Mr. Kailash Balkrushna Jangam, Nayab Tahsildar, Chandwad, Dist. Nashik on behalf of respondent Nos. 8 to 11 did not deal with the submissions made by the petitioner in respect of Vahivat Case No. 3/98

and subsequent Revision Application No. 4/98, the learned AGP had no answer to the same.

9. I have considered the arguments and pleadings filed by the respective parties and have perused the impugned order dated 19.7.2019. At the outset, the provisions of Section 5 and Section 23 of the Mamlatdars' Courts Act, 1906 which are relevant to the present *lis* between the parties need to be referred to. Section 5 and Section 23 of the said Act read thus:-

"SECTION 5: POWERS OF MAMLATDARS' COURTS

(1) Every Mamlatdar shall preside over a Court, which shall be called a Mamlatdars' Court, and which shall, subject to the provisions of Sections 6 and 26, have power, within such territorial limits as may from time to time be fixed by the State Government-

(a) to remove or cause to be removed any impediment, erected otherwise than under due authority of law, to the natural flow in a defined channel or otherwise of any surface water naturally rising in or falling on any land used for agriculture, grazing, trees or crops, on to any adjacent land, where such impediment causes or is likely to cause damage to the land used for such purpose or to any such grazing, trees or crops thereon;

(b) to give immediate possession of any lands or premises used for agriculture or grazing, or trees, or crops or fisheries, or to restore the use of water from any well, tank, canal or water course, whether natural or artificial used for agricultural purposes to any person who has been dispossessed or deprived thereof otherwise than by due course of law, or who has become entitled to the

possession or restoration thereof by occasion of the determination of any tenancy or other right of any other person, not being a person who has been a former owner or part-owner, within a period of twelve years before the institution of the suit of the property or use claimed, or who is the legal representative of such former owner or part-owner

Provided that, if in any case the Mamlatdar considers it inequitable or unduly harsh to remove or cause to be removed any such impediment or, to give possession of a such property or to restore any such use to a person who has become entitled thereto merely by person of the determination of any such tenancy or other right, or if it appears to him that such case can be more suitably dealt with by a Civil Court, he may in his discretion refuse to exercise the power aforesaid, but shall record in writing his reasons for such refusal.

(2) The said Court shall also, subject to the same provisions, have power within the said limits where any impediment referred to in sub-section (1) is erected, or an attempt has been made to erect it, or, when any person is otherwise than by due course of law disturbed or obstructed, or when an attempt has been made so to disturb or obstruct any person, in the possession of any lands or premises used for agriculture or grazing, or trees, or crops, or fisheries, or in the use of water from any well, tank, canal or watercourse, whether natural or artificial used for agricultural purposes, or in the use of roads or customary ways thereto, to issue an injunction to the person erecting or who has attempted to erect such impediment, or causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from erecting or attempting to erect any such impediment or from causing or attempting to cause any further such disturbance or obstruction.

(3) No suit shall be entertained by a Mamlatdar's court unless it is brought within six months from the date on which the cause of action arose.

(4) The cause of action shall be deemed to have arisen on the date on which the impediment to the natural flow of surface water or the dispossession, deprivation or determination, of tenancy or other right occurred, or on which the disturbance or obstruction, or the attempted impediment or disturbance or obstruction, first commenced.

Explanation : "The exercise by a joint owner of any right which he has over the joint property is not a dispossession, or disturbance of possession of the other joint owner or owners within the meaning of this section.

SECTION 23: BAR OF APPEAL

(1) There shall be no appeal from any order passed by a Mamlatdar under this Act.

(2) But the Collector may call for and examine record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit.

(2A) The Collector may delegate the powers conferred on him by this section to any Assistant Collector Deputy Collector, or assistant Commissioner] subordinate to him],

(3) Where the Collector, Assistant Collector, Deputy Collector or Assistant Commissioner takes any proceedings under this Act he shall be deemed to be a Court, under this Act."

10. Under Section 5 of the said Act, every Mamlatdar has been described as a Court within the State territorial limits having power to remove or cause to be removed any obstruction made otherwise than or under due authority of law and to restore possession thereof by removing such impediment. Section 23 of the Act provides for revision against the above order as there is no appeal provided from any order passed by the Mamlatdar under the said Act.

11. In the present case, respondent No. 1 has filed original Vahivat Case No. 3/98. This application dated 28.11.1997 is annexed at Exh. A to the Petition. At Exh. B to the Petition, the Petitioner has annexed his affidavit-in-reply in Vahivat Case No. 19/2018. Annexed to this affidavit-in-reply, is the panchnama dated 2.4.1998 which was carried out in Vahivat Case No. 3/98. A perusal of the panchnama placed on record at page No. 22 of the petition reveals that in the entire property pertaining to various Gat numbers, there does not exist any vahivat road or motorable road at all. This panchnama / inspection report has been prepared by the Tahsildar and has been signed by four witnesses namely Karbhari Bhimrao Gangurde, Laxman Chingu Gangurde, Ashok Vitthal Gangurde and Bhausahab Devman Gangurde in presence of Tahsildar Chandwad on 2.4.1998. This panchnama is also endorsed and signed by the Tahsildar, Chandwad. Further, the order dated 24.4.1998 passed by Tahsildar Chandwad in Vahivat Case No. 3/98 is also placed on record at page 23 of the petition. By this order, the application of respondent No. 1 has been dismissed by a reasoned order on the ground that there is no material

evidence whatsoever placed on record by respondent No. 1 to show that vahivat road ever existed on the said property. The order dated 29.4.1999 passed by respondent No. 10 in revision application No. 4/98 has also been placed on record by the petitioner at page 25 of the petition. The order in revision clearly records that there is no mention of vahivat road in the 7/12 extract pertaining to the said property. By reasoned order, Revision Application No. 4/98 under Section 23 of the said Act filed by respondent No. 1 has also been dismissed in the year 1999.

12. The affidavit filed on behalf of respondent Nos. 8 to 11 ought to have categorically dealt with the earlier proceedings namely Vahivat Case No. 3/98 and Revision Application No. 4/98 which was in respect of the same cause of action and between the same set of parties. The entire affidavit filed on behalf of respondent Nos. 8 to 11 does not deal with this aspect. Respondent Nos. 8 to 11 being statutory officers of the government under the provisions of the said Act, ought to have first hand knowledge of such proceedings from their record between the parties. On a

plain reading of the affidavit filed on behalf of respondent Nos. 8 to 11, it prima facie appears that an attempt has been made by the said respondents to suppress material facts pertaining to Vahivat Case No. 3/98 and Revision Application No. 4/98 from this Court. On the contrary, in paragraph No. 5 of the affidavit, an attempt has been made to suggest to the Court that the impugned order passed by respondent No. 10 is not fatal to either party as both the parties would get an equal opportunity to place their evidence before the Tahsildar, Chandwad. This conduct and stand on behalf of respondent Nos. 8 to 11, being statutory officers of the government and possessing statutory powers under the said Act is not appreciated and is deprecated. There is no whisper in the affidavit filed on behalf of respondent Nos. 8 to 11 on the legal issue of *res judicata*.

13. In view of the aforesaid two concurrent orders passed in the earlier Vahivat Case No. 3/98 and Revision Application No. 4/98, respondent No. 8 by his order dated 24.7.2018 has correctly dismissed the fresh Vahivat Case No. 19/2018 filed by respondent No.1 on the ground of *res*

judicata and constructive *res judicata*. There is a categorical finding given in this order which states that the cause of action and the subject property in the original Vahivat Case No. 3/98 is the same as that of Vahivat Case No. 19/2018. However, in revision proceedings against the above order dated 24.7.2018, the final impugned order gives a direction to conduct fresh inspection under the provisions of Section 5 of the said Act to the Tahsildar. Once the Mamlatdar's court decides the *lis* between the same parties under the provisions of Section 5 read with Section 23 of the said Act, then after a lapse of time, there cannot be a fresh round of litigation permissible under the same provisions, between the same parties and for the same cause of action. The impugned order dated 19.7.2019 is clearly hit by the bar of Section 11 of the Code of Civil Procedure, 1908 and thus, it was not within the jurisdiction of respondent No. 10 to direct reconsideration of the *lis* between the parties afresh and remand the same back to respondent No. 8 considering that the same cause of action was the subject matter of *lis* between the same parties in original Vahivat Case No. 3/98.

14. In view of the reasons recorded above, the impugned order dated 19.7.2019 passed by respondent No. 10 - Deputy Collector, Chandwad Sub Division, Chandwad, Dist. Nashik in RTS Revision No. 91/2018 is quashed and set aside and the order dated 24.7.2018 passed by respondent No.8, Tahsildar, Chandwad, District Nashik in Vahivat Case No. 19/18 is confirmed.

15. Interim relief granted earlier stands vacated.

16. Parties to bear their own costs.

17. Liberty to respondent Nos. 1.1 to 1.3 to pursue remedy available to them in law.

18. Rule is made absolute in the above terms. Petition is disposed off.

(MILIND N. JADHAV, J.)

Ravindra
M.
Amberkar

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Ravindra M.
Amberkar
Date: 2020.07.02
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