

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

WRIT PETITION NO.5434 OF 2018

Sadashiv Govinda Patil,
Age: 50 years, Occu: Agril.
Through G.P.A. Sagar Sadashiv Patil
Age: 30 Years, Occu: Agril.,
R/o: Kerhala, Taluka: Raver,
District: Jalgaon.

... Petitioner

Versus

Ramkrushna Narayan Patil,
Age: 55 years, Occu: Agril,
R/o: Kerhala, Taluka: Raver,
District: Jalgaon.

... Respondent

...

Mr. Himmatsingh D. Deshmukh, Advocate for the Petitioner
Mr. A. J. Patil, Advocate for the Respondent

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CORAM : N. B. SURYAWANSHI, J.

DATE : 29th November, 2021

ORAL JUDGMENT :

1. **RULE.** Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This petition challenges the order passed by the Civil Judge, Junior Division, Raver, District, Jalgaon, below Exhibit-6 in Regular Civil Suit No.17/2017 which is confirmed in Misc. Civil Appeal No.15/2017 by the learned District Judge-2, Bhusawal.

3. The Petitioner filed proceeding under Section 5 of the Mamlatdar's Courts Act, 1906 (For short "the said Act") before the Tahsildar, Raver the customary right of way which he claimed to be obstructed by the Respondent. The Tahsildar allowed the said application by the order dated 21-12-2016 and directed the Respondent to clear the obstruction on the customary way/road and granted right of way to the Petitioner.

4. The Respondent filed Regular Civil Suit No.17/2017 for declaration and permanent injunction against the Petitioner, thereby seeking a relief of declaration that the Petitioner has no right to use the right of way from eastern, western and northern bandh of the Respondent as mentioned in para-2 of the plaint the suit property (Para-2). In the said suit, application Exhibit-6 was filed for temporary injunction. The suit was resisted by the Respondent by filing written statement as well as say to the application Exhibit-6. The Trial Court, after hearing the parties, granted temporary injunction in favour of Respondent, thereby restraining the Petitioner from passing through the agricultural land belonging to the Respondent.

5. The Petitioner challenged the order of Trial Court by filing Misc. Civil Appeal No.15/17 which came to be dismissed by the Appellate Court. The order passed below Exhibit-6 and the order in Misc. Civil Appeal are questioned in the present appeal.

6. Heard the learned advocate for the Petitioner and the learned advocate for the Respondent.

7. The learned advocate for the Petitioner submits that the Trial Court as well as Appellate Court have erred in granting temporary injunction in favour of the Respondent. By relying on 1969 Rules particularly, Rule-4, the learned advocate for the Petitioner submits that, merely because, there is an alternate road that cannot be a ground to grant temporary injunction in favour of Respondent. The order passed by the Tahsildar under Section 5 of the said Act is not properly appreciated by the Civil Courts. He further contended that, the order of Mamlatdar Courts was not challenged in a civil suit, on that ground, also the impugned orders cannot sustain. In support of his arguments, he relied on the decision in **Shrikrishna Shehsrao Dane & Ors. Vs. Vasant Ramrao Tayade and Anr.** reported in **2018 (2) Mh.L.J. 98** and **Karbhari Abaji Lodhe & Ors. Vs. Devidas Ukandrao Lodhe & Ors.** reported in **2015 (1) Mh.L.J. 700**.

8. On the other hand, the learned advocate for the Respondent submitted that, taking into consideration the map filed along with plaint, the orders passed by the Civil Court are justified. According to him, the Petitioner has destroyed the bandh between Gut No. 138/1/A and 139 and the Petitioner has a right of way from the northern side of Gut

No.139. In the suit, the Petitioner has claimed right of way from the bandh, whereas in the writ petition, the Petitioner has claimed a right of way from Gut No.138/1/B which is not permissible. He further submitted that since the alternate way is available to the Petitioner from his own field, both the Courts are justified in passing the impugned orders. He further submitted that the Mamlatdar has not conducted spot inspection before passing the order under Section 5 of the said Act. No statements of the adjoining land owners were recorded, therefore, his order cannot be given much importance. According to him, the Tahsildar has failed to give findings in the order passed under Section 5 of the said Act. Therefore, it was not necessary for him to challenge the order passed by Tahsildar in a suit. According to him, the order passed by the Tahsildar is without jurisdiction. He further submitted that, the Petitioner had not claimed any relief in respect of boundary marks under Section 147 of the Maharashtra Land Revenue Code, 1966 (For short "MLR Code") and the Civil Court has jurisdiction to entertain the grievance of the Respondent. He, therefore, supported the impugned orders passed by the Courts.

9. In support of his submissions, the learned advocate for the Respondent placed reliance in **Rajendra Sheshrao Shendge Vs. Smt. Shobhatai S. Ravate and Anr.** in Writ Petition No.3312/2006 dated 16-1-2007, **Mohommad Khan S/o Rahim Khan Vs. Shri Shankar S/o Maroti Dhage** in (Second Appeal No.386/2003 dated 08-03-2017 by the Hon'ble

Bombay High Court), & reported in 2017 (3) Mh.L.J. 135, and Union of India & Ors. Vs. Maruti Madhav Kerulkar and Ors. reported in 2002 (4) Mh.L.J.

10. Perusal of the record indicates that, the Petitioner is the owner of Gut No.138/1/A. To approach the said gut number, the Petitioner was using boundary of Gut No.138/1/B of the Respondent. Thereafter, the Petitioner has purchased the Gut No.139 which is abutting to the Kerhale-Mangrul road. From Gut No.139, the Petitioner has direct access to his Gut No.138/1/A. The rough map placed on record on Page-23 of the paper book indicates that, the Petitioner has direct access to his Gut No. 138/1/A from Gut No.139. In that view of that matter, the claim of the Petitioner that he is entitled to use the customary way going from the bandh of Respondent's Gut No.138/1/B is not justifiable.

11. Even if the contentions of the Petitioner are accepted that he was using alternate way from the boundary of Gut No.138/1/B of Respondent. After purchasing land Gut No.138, the said easementary right has come to an end because the Petitioner can directly access his land Gut No.138/1/A from Gut No.139, as Gut No.139 is directly connected to Kerhale-Mangrul road. Section 41 of Easement Act provides that an easement of necessity is extinguished when the necessity comes to an end. This principle is applicable to the facts of the present case and

therefore, the injunction prayed by the respondent is rightly granted by the trial Court and is confirmed by the Appellate Court. It is also noted in the impugned order that the Tahsildar has taken into account the provisions of Easement Act. Both the impugned orders are passed by giving proper reason and there are not liable to be interfered in extraordinary writ jurisdiction.

12. In the case of Shrikrishna Shehsrao Dane & Ors. (Supra), the Court was considering a case, wherein, there was no cart way available to the Defendants from the land to connect gairan road from southern side of the field. The inquiry was not properly conducted by the Mamlatdar and therefore, this Court was pleased to order in favour of the Appellants therein, which are not the facts of the present case.

13. In the case of Karbhari Abaji Lodhe & Ors. (Supra), Rule 4 of the Maharashtra Land Revenue (Boundaries and Boundary Marks) Rules, 1969 was taken into consideration and it was held that easementary rights created in favour of the owners of sub-divisions falls under Section 13 of the Easement Act, 1882. In that case, this Court came to a conclusion that real dispute was not considered by the District Judge and he has passed the impugned orders with the presumption that the Appellant must prove the acquisition of right of easement by prescription. In view of the matter, this Court allowed the matter in favour of the

Appellant therein. Since this decision is rendered in the different facts, the same cannot be said to be applicable to the case of the Petitioner.

14. In the case of **Rajendra Sheshrao Shendge** (Supra), this Court has held thus;

“11. Court has perused entire Mamlatdars’ Courts Act 1906. It is seen that Mamlatdars’ Courts Act presupposes and recognizes existence and continuation of powers and jurisdiction of Civil Court. The scheme provides for a summary jurisdiction and powers and a bar of suit to make orders of Mamlatdar or Collector etc., to be immune from scrutiny in a Civil Suit.

12. It is seen that there is no express bar of suit. According to Mr. Bhattad, bar is implied. There is no room left by virtue of totality of provisions and scheme as to how implied bar should be inferred. Argument of learned Advocate Mr. Bhattad that implied bar can be read from the provision to Clause (b) of sub-section (1) of Section 5 amounts to reading in a provision of legislation, such words and such scheme which is totally non-existent.

13. The Court cannot forget the wide compass of Section 9 of Civil Procedure Code. Exclusion and bar of jurisdiction cannot be read or inferred just for the sake of asking in the manner in which present petitioner wants. Existence of jurisdiction has to be presumed and not the bar.”

15. In the case of **Mohammad Khan s/o Rahim Khan** (Supra), this Court has held thus;

“7. I have gone through the provision Section 5 of the Mamlatdars’ Courts Act. The proviso below sub-section (1) of Section 5 of the said Act empowers the Mamlatdar to refuse to exercise the power under the said provision if it appears to him that such a case can be more suitably dealt with by the Civil Court. Though there is a revision provided under Section 23 of the said Act to challenge the order passed by the Mamlatdar under Section 5, the act nowhere attaches finality either to the order passed under Section 5 by the Mamlatdar on merits or to the order passed in revision under Section 23 of the said Act. In the absence of such finality being attached to the order passed under the Act, the jurisdiction of the Civil court cannot be held to be impliedly barred merely because the Act provides a separate machinery for getting the grievance redressed. The ouster of the plenary jurisdiction of Civil Court cannot be readily interfered and such jurisdiction remains intact and available to be exercised either against the order under Section 5 or against the order of revision under Section 23 of the said Act.”

16. The above ratio supports the case of the Respondent.

17. There appears substance in the submission of the Respondent that the Tahsildar has passed the order without conducting spot inspection and without recording the statements of adjoining land

owners. In that view of the matter, much reliance cannot be placed on the orders passed by the Tahsildar under Section 5 of the said Act.

18. In the result, the writ petition is dismissed. Rule is discharged. No costs.

(N. B. SURYAWANSHI, J.)

Sameer