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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5116 OF 2018

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| 1. Gajeram s/o Tulshiram Marathe
Age – 75 years, Occ – Agril, | PETITIONERS |
| 2. Sundarbai Gajeram Marathe,
Age – 60 years, Occ – Agril | |

Both R/o Horpada, Taluka & District – Dhule

VERSUS

- | | |
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| 1. The Sub Divisional Officer
Dhule, Taluka and District – Dhule | RESPONDENTS |
| 2. The Tahsildar, Dhule
Taluka and District – Dhule | |
| 3. Subhash s/o Lava Malche (Bhill)
Age – Major, Occ – Agril
R/o Village Horpada
Taluka and District – Dhule | |

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Mr. M. R. Wagh, Advocate for the petitioners
Mrs. V. S. Chaudhari, AGP for respondent - State
Mr. Shaikh Samir Ahmed, Advocate for respondent No.3

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 29th NOVEMBER, 2021

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of learned advocates for the parties.

2. This petition takes exception to the order dated 15th February, 2016 passed by the Tahsildar, Dhule in Wahivat Case No.76 of 2014 and confirmed by the Sub Divisional Officer, Dhule in RTS Revision No. 33 of 2016 vide order dated 15th July, 2017, thereby allowing the proceedings filed by the respondent No.3 and directing the petitioners to remove the obstruction in the way of the respondents.

3. Respondent No.3, on 30th July, 2013 filed Wahivat Case No. 76 of 2014, under section 5 of the Mamlatdars' Courts Act, 1906 (for short "the said Act"), seeking right of way, contending that he is owner and possessor of land Gut No.50/3 at village Horpada. The petitioners own and posses lands Gut No. 69 and 70, abutting to his land Gut No.50/3. There was a brook and government road abutting to the boundaries of lands Gut No. 69 and 70. Said road is blocked by the petitioners, which is causing hardships to the respondent to approach his land Gut No.50/3.

4. A site inspection Panchanama was prepared by Talathi. Statements of adjoining land owners were recorded. The Tahsildar allowed the proceedings filed by the respondent and directed the petitioners to remove the obstruction and clear the road, which was in use since long.

The petitioners challenged the said order passed by the Tahsildar, before the Sub Divisional Officer, by filing revision, which came to be dismissed. Hence the present writ petition.

5. Heard learned advocate for the petitioners, learned Assistant Government Pleader for respondents No. 1 and 2 - State and the learned advocate for the respondent No.3.

6. Learned advocate for the petitioners vehemently submitted that the impugned orders are unsustainable for not following the provisions of sections 7, 9, 10, 12 and 19 of the said Act. He further submitted that both the authorities have failed to take into consideration the village map. The prayer of the respondent No. 3 claiming right of way is contrary to the position reflected in the village map. According to him, the application filed under section 5 of the said Act was beyond limitation, as prescribed under section 12 of the said Act. The Tahsildar has not followed the prescribed procedure while dealing with the application of the respondent and on that ground alone, the proceedings ought to have been dismissed. The impugned orders are, therefore, unsustainable and the same are liable to be quashed and set aside.

7. Learned advocate for the petitioners, in support of his

contentions, relied on following judgments -

- i. *“Purushottam Umrao Chavan v/s The State of Maharashtra and Others”* passed by this court in Civil Revision Application No. 187 of 2009 dated 16th November, 2010.
- ii. *“Indubai Haribhau Ghule V/s The State of Maharashtra and Others”* passed by this Court in Writ Petition No. 7145 of 2016 dated 2nd September, 2021.
- iii. *“Sudhir Yashwant Dhangade V/s Ankush Kashiram Bole and Others”*, reported in 2019 (1) ALL MR 825
- iv. *“Bharatkumar Murlidhar Patil and Others V/s Chinda Gajmal Thelari and Another”* passed by this court in Writ Petition No. 12712 of 2018 dated 26th August, 2019
- v. *“Eknath Punjaji Ghube and Another V/s Deputy Collector and Others”* passed by this court (Nagpur Bench) in Writ Petition No.1130 of 2020 dated 25th October, 2021.

8. Per contra, learned advocate for respondent No. 3 contended that there is substantial compliance of the provisions. By placing reliance on the decision of this court in writ petition No.14096 of 2018 dated 31st July, 2019, he submitted that there is substantial compliance of the provisions of law and the

impugned orders are not liable to be interfered with. By placing reliance on the site *panchanama*, he submitted that the obstruction caused by the petitioners is reflected in the spot inspection report as well as in the statements of the adjoining land owners recorded by the Talathi. In that view of the matter, he submitted that no case is made out by the petitioners to cause interference in the impugned orders.

9. Learned Assistant Government Pleader supported the impugned orders, adopting the arguments advanced on behalf respondent No.3. She has further submitted that no case is made out by the petitioners to interfere with the impugned orders and the writ petition is liable to be dismissed.

10. The record reveals that the application filed by respondent No.3 was beyond the limitation, as prescribed under section 12 of the said Act. No date is mentioned in the application as to when the obstruction was caused. The application is not in prescribed proforma in terms of section 7 of the said Act. Even the procedure, prescribed under sections 8 to 11 of the said Act, was not followed by the Tahsildar while entertaining the said application. Section 12 of the said Act provides that the Tahsildar shall reject the plaint where plaintiff declines to make a statement on oath under section 9 or where the plaintiff is willing

to make or has made a statement on oath under section 9, but fails to furnish the particulars specified in section 7 within the time fixed under section 9, then the Tahsildar was expected to follow the said procedure, as prescribed under section 12 of the said Act.

11. Section 19 (2) of the said Act provides that the power of Mamlatdar to examine witnesses, which also includes the powers of cross examination to the witness. Even this procedure is not followed in the present case.

12. In "**Purshottam Umarao Chavan**" (supra), learned single judge of this court in paragraphs No. 6 and 7 has observed thus,-

"6. Taking survey of above sections, it is explicit that presentation of petition should be in the form of the suit, with compliance as indicated in Sections 7, 8 and 9 of the said Act. Section 12 directs rejection of the plaint, if the plaintiff declines to make a statement on oath under section 9.

7. There is no such statement of the original applicant/respondent on oath or verification; application does not give age, description and residence of the parties litigating. Consequently, on this solid ground, the order of the learned Tahsildar, Jamner and that of Sub Divisional Officer, Jalgaon call for interference and hence both the orders are set aside. Civil Application allowed. No costs."

13. In "**Indubai Haribhau Ghule**" (supra), learned single judge of this court, in paragraph No. 14 has held thus-

"14. Further, it is to be borne in mind that Section 5 (2) lays down a limitation for filing a suit which has to be filed within six months of creation of the obstruction. The plaint filed by the respondents clearly omits to state the exact date or even any date by way of approximation as to when the obstruction was created, even if it is assumed that it was so created. If that be so, the lower authorities ought to have considered this aspect as well. They are not supposed to step in and exercise the Jurisdiction unless the Suit was filed within the period of limitation prescribed. Needless to state that the question of limitation goes to the root of the Jurisdiction".

14. In "**Sudhir Dhangade**" (supra), the learned Single Judge of this Court in paragraphs No. 9 and 12 has held thus -

"9. Sub-section 2 of Section 5 confers powers on the Mamlatdar to issue injunction. Sub section 3 prescribes the period of limitation for filing of the suit under Section 5 of the Act and sub-section 4 of Section 5 relates to the cause of action. Sections 14 to 19 prescribe procedure to be followed by the Mamlatdar when the plaint is admitted. Sections 15, 16 and 19 of the Act confer specific powers on the Mamlatdar to summon and examine witnesses, to inspect the property in dispute and to record his findings on the issues raised in the plaint.

12. It is well settled that no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross examination. Under the circumstances, the learned Mamlatdar was not justified in placing

reliance on the evidence of the respondent no.1 and his witnesses without giving any opportunity of cross examination. The order passed by the learned Mamlatdar is in breach of principles of natural justice.”

15. In **"Bharkumar Patil"** (supra) the learned Single Judge of this court has held :

“7. It appears that before the Mamlatdar, no oral evidence was let in by the petitioners. The documents were simply produced for inspection by the Mamlatdar. Since deed granting right of way dates back to the period over thirty years, it may be looked into to find the petitioners to have been granted right of way. The question is whether, there exists a way through the land gat no.111. The village map on record does not delineate the way, as is alleged to exist, through the land gat no.111. It needs no mention that the averments in the plaint need to be proved by evidence. In the plaint before the Mamlatdar, the petitioners claimed to have been using a way through the land gat no. 111 over 50 years. In support of the said contention, neither the petitioners testified on oath nor any witness has been examined. The village Talathi made site inspection on the instructions of the Mamlatdar. Section 19 (2) of the Mamlatdar Court's Act empowers the Mamlatdar to summon and examine any witness. He may call for and cause to be proved any document, which has not been applied for or produced by either of the parties. Where he considers it expedient in the interest of justice to do, he may make personal inspection of the property in dispute in the presence of / or after issuing notice to the parties.

8. In my considered view, the Mamlatdar ought to have personally visited the land gat no.111 to find whether there exist a way through the said land. The petitioners have specifically averred

in the plaint to have no another way to approach their land gat no.107/1. The respondents/ defendants, on the other hand, have specifically contended that there exist some other way for the petitioners to approach their land. This vital aspect appears to have been ignored by the Mamlatdar. The S.D.O. on the other hand, non-suited the plaintiffs. The S. D. O. found the plaint to have been instituted with a view to have a nearest approach way to the land gat no. 107.”

The aforesaid ratios support the petitioners' case.

16. Though learned advocate for respondent No.3 has relied on judgment of this court dated 31st July, 2019 in Writ Petition No. 14096 of 2018 (*Udhavsing s/o Sahebsing Pawar and Others V/s The Additional Collector, Jalna*) to contend that where there is non compliance, which is not of substantial nature, so as to negate entire case of the respondents, the order passed by the Tahsildar should not be interfered with. However, as has been observed herein above, the non compliance of the procedure prescribed in the said Act, in the present case is of substantial nature, which has vitiated the impugned orders passed by the Tahsildar and confirmed by the Sub Divisional Officer.

17. In the result, the writ petition is allowed in terms of prayer clause "B". Impugned order dated 15th February, 2016 passed by the Tahsildar Dhule in Vahivat case No. 76 of 2014 and the

impugned order dated 15th July, 2017 passed by the Sub Divisional Officer, Dhule in RTS Revision No. 33 of 2016, are quashed and set aside. Rule is made absolute in aforesaid terms with no order as to costs.

Needles to state that the respondents are, however, at liberty to approach Tahsildar in case they intend to.

[NITIN B. SURYAWANSHI]
JUDGE

drp/wp5116-18