

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7539 OF 2020

Sudam s/o Namdeo Madke ... PETITIONERS

VERSUS

The State of Maharashtra & ors. ... RESPONDENTS

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Shri S.R. Sapkal, Advocate for petitioner
Shri S.P. Tiwari, A.G.P. for respondents No.1 to 5
Shri D.B. Pokale, Advocate for respondent No.6
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CORAM : R. G. AVACHAT, J.

Date of reserving order : 29th January, 2021

Date of pronouncing order : 28th April, 2021

ORDER :

The challenge in this Writ Petition is to the order passed by the Mamlatdar, Kallam on 3/1/2018, rejecting the petitioner's application (suit) for removal of impediment created by the respondent No.6 in the way. The petitioner had challenged the said order before the Sub-Divisional Officer (S.D.O.) and thereafter before the Additional Collector and then before the Divisional Commissioner as well. The

petitioner has, however, been unsuccessful before all the authorities from Mamlatdar to the Additional Commissioner. He is, therefore, before this Court.

FACTS : --

2. There is an agricultural land bearing Gut No.1, situated at village Moha, Taluka Kallam, District Osmanabad. The respondent No.6 is uncle of the petitioner. The land Gut No.1 is their ancestral property. The land came to be partitioned in equal share between the petitioner and the respondent No.6 in 2008. As such, both have 1 Hectar and 4 R land in Gut No.1. There is a well, borewell and a cement water tank in the said land. Those have been kept in common. The petitioner is required to go to the well to switch on electric connection to run the electric pump for watering crops in the land of his share. The petitioner is, therefore, required to go along/ pass from the way that runs from in front of the house of the respondent No.6. The petitioner has been making use of the said way for long. The respondent No.6, however, blocked the said way with trunks of coconut tree. The petitioner, therefore, moved the application dated 27/5/2013 to the Mamlatdar with a view to redress his grievance. The Mamlatdar, Kallam, by her order dated

13/1/2015, allowed the application moved by the petitioner granting him a right of pathway. The respondent No.6 was restrained from obstructing the petitioner from making use of the pathway.

3. The respondent No.6 challenged the said order in appeal before the S.D.O. The S.D.O., vide his order dated 7/7/2015, allowed the appeal and set aside the Mamlatdar's order dated 13/1/2015. The petitioner thereafter moved the Additional Collector against the order passed by the S.D.O. on 7/7/2015. The Additional Collector allowed the appeal and remanded the matter back to the Mamlatdar with a direction to make spot inspection and decide the matter on merits. The Mamlatdar, vide his impugned order dated 3/1/2018, rejected the petitioner's application on the ground of availability of a suitable alternative way. The petitioner unsuccessfully challenged the said order, first before the S.D.O. and then before the Additional Commissioner and the Additional Commissioner as well.

4. Shri S.R. Sapkal, learned counsel appearing for the petitioner would submit that, the Mamlatdar had paid visit to the site on 7/10/2013. Statements of the petitioner and

respondent No.6 were recorded. Photographs were seen. The Mamlatdar found that there did exist a pathway. The petitioner was using the pathway. The respondent No.6, by using the coconut trumps, blocked the pathway. According to learned counsel, the petitioner was using the said pathway as of right. The land under the pathway was part and parcel of the ancestral land. On partition of the land, the petitioner continued to make use of the pathway as of right to approach the common well, borewell and water tank. The learned counsel, therefore, urged for setting aside the impugned order of the Mamlatdar, dated 3/1/2018 and restoration of the order dated 13/1/2015.

5. Shri Pokale, learned counsel for respondent No.6 would, on the other hand, submit that the partition of the ancestral land took place between the petitioner and the respondent No.6 way back in 2008. The petitioner did not have a right to use the pathway that runs from in front of the house of respondent No.6. The petitioner has the suitable alternative way. The authorities below have, therefore, rightly negatived the claim of the petitioner. He, therefore, urged for dismissal of the Writ Petition.

The learned A.G.P. supported the impugned order.

6. It is for the first time in this Writ Petition learned counsel for the petitioner submitted that the application dated 27/5/2013 moved by the petitioner was for a relief under Section 5 of the Mamlatdar's Courts Act (for short the Act). If it was so, the procedure to be complied with before passing any order under Section 5 of the Act appears to have not been followed. Section 7 of the Act speaks that, all suits under the said Act shall be commenced by a plaint. The plaint has to be presented before the Mamlatdar in open Court. The plaint shall contain the following particulars :

- (a) the name, age, religion, caste, profession and place of abode of the Plaintiff;
- (b) the name, age, religion, caste, profession and place of abode of the Defendant;
- (bb) the name and situation of the impediment erected and the situation of the lands which are adjacent to each other and the nature of the relief sought;
- (c) the nature and situation of the property of which possession for use is sought or the nature of the injunction to be granted, as the case may be;

- (d) the date on which the cause of action arose;
- (e) the circumstances out of which the cause of action arose; and
- (f) a list of the Plaintiff's documents, if any, and of his witnesses, if any, showing what evidence is required from each witness, and whether such witnesses are to be summoned to attend or whether the Plaintiff will produce them on the day and at the place to be fixed under Section 14.

7. The application preferred by the petitioner is not in conformity with requirements of Section 7 of the Act. True, the Mamlatdar had been authorised to treat the informal petition as plaint. Section 12 of the Act speaks about rejection of the plaint. If the plaint is found to be admissible, a Mamlatdar has to receive and file it. He has then to fix the convenient day and place for trial of the case. Section 15 of the Act speaks about enforcement of attendance of witnesses. The Mamlatdar has been authorised to record evidence of the parties to the proceedings/ suit and their witnesses. The procedure of recording of evidence contemplates opportunity to the parties to cross-examine witnesses examined by the other side. The Mamlatdar has also been authorised to

personally pay visit to the site.

8. The record and proceedings of the case is before this Court. Nothing of the sort as has been stated above did take place before the Mamlatdar. It appears that, in response to the application moved by the petitioner, it was the Circle Officer who paid the visit to the land and prepared spot panchanama dated 7/10/2013. The statements of the petitioner and respondent No.6 have been recorded by the Circle Officer himself and not by the Mamlatdar. There is no cross-examination of the petitioner and the respondent No.6 as well. It has, therefore, become necessary to remand the matter back to the Mamlatdar with a direction to treat the application of the petitioner as a plaint under Section 5 of the Act and then follow the procedure prescribed under the Act, and decide the matter in accordance with law.

9. The petitioner had exhausted remedies of appeal provided under the Maharashtra Land Revenue Code. It needs to be stated that, when the application moved by the petitioner is stated to be one under Section 5 of the Act, the only remedy to the aggrieved from the decision of the Mamlatdar is in the nature of a revision before the Collector/

Sub-Divisional Officer under Section 23(2) of the Act and thereafter to approach the High Court under Article 227 of the Constitution of India.

10. For the reasons hereinabove, the Writ Petition is allowed in terms of the following order :

- (i) The Writ Petition is allowed in terms of prayer clause (B).
- (ii) The matter is remanded to the Mamlatdar to decide it afresh in the light of the observations made hereinabove and in accordance with the provisions of the Mamlatdar's Courts Act.
- (iii) The Mamlatdar is expected to decide the matter within a period of three months from the date of receipt of copy of this order.

**(R. G. AVACHAT)
JUDGE**

fmp/-