

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 1048 OF 2020

PETITIONER: Narendrakumar Gowardhandas Agrawal,
aged : 60 years, Occ. Business, residing at
Main Road, Near Bus Stop, Paratwada,
Taluqa : Achalpur and District : Amravati

...VERSUS...

RESPONDENTS: 1] The Gram Panchayat, Kandli, through
its Sarpanch, Taluqa : Achalpur,
District Amravati.

2] The Village Development Officer,
Gram Panchayat, Kandli, through
its Sarpanch, Taluqa : Achalpur,
District Amravati.

3] The Naib Tahsildar, Achalpur,

4] Amol s/o Prakashrao Pawar,
Aged : 30 years, Occ. Agriculturist,
R/o. Khaparde Plot, Paratwada,
Tq. Achalpur, Dist. Amravati.

5] Manoj s/o Bhanudas Hate,
Aged : 35 years, Occ. Private Service
R/o. Pandurang Nagar, Govardhan Vihar
Kandli, Tq. Achalpur, Dist. Amravati.

6] Rajesh s/o Nagorao Raut,
Aged : 40 years, Occ. Private Service
R/o. Kandli, Tq. Achalpur, Dist. Amravati.

7] Pramod s/o Uttamrao Dhakde,
Aged : 34 years, Occ. Private Service
R/o. Mouza Kandli, Tq. Achalpur,
Dist. Amravati.

Shri Sunil Manohar, Senior Counsel with Shri Rahul Dhande, Counsel for petitioner

Shri N.A.Gawande, counsel for Respondent Nos. 1 and 2

Miss. T.Khan, AGP for Respondent No.3

Shri S.J.Shingane, counsel for Respondent Nos. 4 to 7/Intervenors

CORAM : AVINASH G. GHAROTE, J.

DATE : 29/09/2021.

ORAL JUDGMENT

1] Heard Mr. Sunil Manohar, learned Senior Counsel with Mr. Dhande, learned counsel for the petitioner, Mr. Gawande, learned counsel for Respondent Nos. 1 and 2, Miss. T. Khan, learned AGP for Respondent No. 3 and Mr. Shingane, learned counsel for intervenors/Respondent Nos. 4 to 7.

2] **Rule.** Rule made returnable forthwith. Heard finally by consent of the learned counsels appearing for the parties.

3] The petition challenges the order dated 31.1.2020 passed by the Respondent No. 3, directing removal of obstruction claimed to have been created by the petitioner, upon the approach road to the village of Kandli, which was made upon an application filed by the villagers and the notice dated 15.2.2020, issued in

pursuance thereto by the Village Panchayat, Kandli/Respondent Nos.1 and 2.

4] The facts leading to the present petition are as follows :

a) The land of Survey No. 119 at village Kandli, was divided into six portions, out of which the petitioner is the owner of land bearing Survey No. 119/1 and 119/5.

b) The user of land Survey No. 119/5 was converted to non-agricultural use (industrial), by the order dated 30.12.1995, passed by the Tahsildar, Achalpur.

c) This conversion was recommended by the Assistant Director, Town Planning, Amravati, who had approved the lay-out plan.

d) The order dated 30.12.1995, of the Tahsildar, converting the user of the land of Sr.No.119/5 was cancelled by the Tahsildar himself by an order dated 21.3.2014.

e) This order of the Tahsildar dated 21.3.2014, cancelling his earlier order, was challenged before the Additional Collector, Amravati, who by his order dated 22.7.2014, set aside the order dated 21.3.2014, and remanded the matter back to the Tahsildar.

f) The proceedings in this regard are still pending.

g) On a plea raised by the villagers, that an 80 ft. Development Plan road was passing through the land of Survey No. 119/5, which was to be used by the villagers to approach the village, a notice was issued on 12.5.2014 to the petitioner by the respondents 1 and 2, claiming that the 80 feet DP road as passing through the land of Survey No. 119/5, was encroached by the petitioner and therefore, the same should be removed by 18.5.2014, failing which the encroachment would be removed on the next day by the Respondent Nos. 1 and 2.

h) This notice dated 12.5.2014, was challenged by the petitioner before the 3rd Joint Civil Judge, Junior Division, Achalpur, by filing Regular Civil Suit No. 83/2014 (Narendrakumar vrs. Gram Panchayat, Kandli and another).

i) A specific issue was framed therein as to whether the defendants proved that the plaintiff had encroached on the alleged 80 feet way as demonstrated in para 8 of the judgment, which issue was answered in the negative and a decree was passed on 6.12.2017, against Respondent Nos.1 and 2, perpetually restraining them from disturbing the possession of the plaintiff/petitioner on the suit property (land of Sr.No. 119/5) without due process of law.

j) This decree was not challenged and therefore has attained finality.

k) After nearly four years thereafter, on 29.8.2019, a communication was issued by the Tahsildar, Achalpur, to the Deputy Director, TILR, contending that, in the jungle map, a road is indicated from the land of Survey No.119, which survey number has been sub-divided into various pieces and therefore, an enquiry be conducted to determine as to from which sub-division of Survey No.119, this road passes and submit a report.

l) The Deputy Director, TILR, by his communication dated 12.9.2019, wrote back to the Tahsildar, Achalpur, that before submitting a report, it would be necessary to measure the entire land for which the requisite measurement fee should be deposited.

m) No such deposit appears to have been made, neither any measurement has been conducted by the office of the TILR in pursuance to the request dated 29.8.2019.

n) Thereafter the impugned order has been passed on 31.1.2020 by the Respondent No. 3, as indicated above.

5] The contentions of Shri Sunil Manohar, learned Senior Counsel for the petitioner are as follows :

(i) That perusal of the order itself would indicate that the order will not sustainable in law as it does not indicate the exercise of power under which it has been passed.

(ii) The order itself indicates that in the Talathi Report it has been stated that since portions of Survey No.119 had been sub-divided and were being used for various purposes, out of which there was a Dal Mill in Survey No.119/5, it was impossible to determine from which Survey Number, the road shown in the jungle map was passing, in view of which a measurement was absolutely necessary which has not been done.

(iii) Though the order further notes that in the Development Plan, a road of 80 feet has been shown passing through the land of Survey No.119/5 which is claimed to have been blocked in 2013, there is nothing on record to indicate the existence of a Development Plan, or the reservation of any road passing through the land of S. No.119/5.

(iv) Though the report of the Talathi, which has been relied upon in the impugned order, itself indicates that there was a need to measure the land so as to determine the existence of the road/way, the same was not done and the impugned order came to be passed,

without such measurement, on which ground alone the impugned order is not sustainable.

(v) Though the Talathi report, indicates the need to determine the existence of the road, the impugned order presumes the existence of such a road and merely on such presumption, which was totally unjustified, directs removal of the obstruction, which is unjustifiable.

(vi) The notice thereafter as issued by Respondent Nos.1 and 2 on 15.2.2020, to the petitioner, in pursuance of the impugned order dated 31/1/2020, was illegal, as the respondents were bound by the decree as passed in RCS No.83/2014, being parties to it.

(vii) The decree as passed in Regular Civil Suit No. 83/2014 also has not been considered by Respondent No. 3 while passing the impugned order.

6] The contentions of Mr. Gawande, learned counsel for Respondent Nos.1 and 2 are as under :

(i) The petition is not maintainable, as the passing of the order can be attributed to the provisions of Section 50 of the Maharashtra Land Revenue Code, against which an appeal lies under Section 50(5) of the MLR Code.

(ii) Since the order of conversion of the land had been set aside, the land assumes the status of agricultural land again and therefore, the Revenue Authority had jurisdiction.

(iii) Section 53 of the Maharashtra Village Panchayat Act enjoins upon Respondent Nos. 1 and 2 to remove the encroachment and it is in pursuance to that duty that the Respondent Nos. 1 and 2 had acted in issuing the notice dated 15.2.2020, to the petitioner, in pursuance of the order dt.31/1/2020 passed by the Tahsildar.

(iv) The petitioner is guilty of suppression, which, according to him, is deliberate and intentional, as in spite of being aware that the order impugned had been passed at the instance of the villagers named therein, i.e. respondents 4 to 7, they were not made parties to the petition, who had subsequently filed application for intervention, which being allowed, they were then made parties/respondents 4 to 7 to the petition.

(v) Though an appeal was filed before the Sub Divisional Officer against the impugned order dated 31.1.2020, on 17.2.2020, without disclosing the same, the present petition was filed and the interim order was secured on 26.2.2020.

(vi) This was not a case of an inadvertent mistake on part of the petitioner, as the appeal before the SDO continued to pend till 12.10.2020, on which date it was withdrawn.

(vii) The petitioner is guilty of suppression and intentionally misleading this court as to the existence of availing an alternate remedy, on which ground alone the petition needs to be thrown out.

(viii) The decree as passed by the Civil Court in Regular Civil Suit No. 83/2014, was without jurisdiction, and therefore, did not bind the respondents 1 and 2, for which reliance is placed on *Village Panchayat, Antora vrs. Wasudeo Ramchandra Mohod and another, 2014 (5) Mh. L.J.189* (para 11).

7] Mr. Shingane, learned counsel for intervenor supports the argument advanced by Mr. Gawande, learned counsel for Respondent Nos.1 and 2. He further submits that since the petitioner in the layout plan submitted along with the application for grant of “NA permission” himself shows the existence of a road passing through the land of Survey No. 119/5, the petitioner is estopped from contending otherwise.

8] Mr. Manohar, learned Senior Counsel in rebuttal submits that there is no suppression and neither there was any intention to do so. He submits that merely because proceedings were filed before the SDO, that would not bar the petitioner from availing the remedy under Article 226 of the Constitutions before this Court. He submits that the proceedings before the SDO were not maintainable, were not prosecuted, but were withdrawn at the earliest possible opportunity and therefore did not prejudice the parties in any manner. He places reliance upon the judgment of the Hon'ble Apex Court in *S.J.S. Business Enterprises (P) Ltd. vrs. State of Bihar and ors*, (2004) 7 SCC 166; and on *Arunima Baruah vrs. Union of India*, (2007) 6 SCC 120. He further submits that it has to be also considered by this Court in such circumstances whether the position which was not mentioned, was material.

9] A bare perusal of the impugned order indicates that the same has been passed all post haste inasmuch as in spite of the earlier communication by Respondent No.3 dated 29.8.2019 addressed to the Deputy Director of Land Records, for determining the location of the road and from which sub-division of Survey

No.119 it was passing and the request for submitting such report in that regard; in spite of the return communication by the Deputy Director, Land Record, dated 12.9.2019, to Respondent No.3, asking him to deposit the measurement fee, nothing was done. Even the report of the Talathi Kandli, as referred to in the impugned order, from what has been stated in the order about it, clearly indicated that he was not in a position to determine from which part of Survey No.119, the alleged road was passing, as the entire land stood divided into various parts. Though the report of the Talathi, as adverted to by Respondent No.3 refers to a plan, in which the pandhan road has been shown, the details of the plan, who had prepared it and when, are conspicuously absent. Though the impugned order records that there is 80 feet Development Plan road passing through the land of Survey No.119, no such Development Plan has been placed on record to substantiate this position, which indicates that there is no such reservation at all, for had it been so, nothing prevented the respondents from placing the same on record, which to lead an irresistible conclusion, that no such reservation, is in existence. Even the impugned order does not indicate the date of the Development Plan, the reservation number, which is claimed to

be a DP road of 80 feet. In spite of the above position being on record, that it was impossible to ascertain the location of the alleged pandhan road, the Respondent No. 3 went ahead in passing the impugned order, which clearly is unsustainable in law.

10] Though Section 53 of the Maharashtra Village Panchayat Act enjoins upon Respondent Nos. 1 and 2 to remove the encroachment and it is in pursuance to that duty that the Respondent Nos. 1 and 2 claimed to have acted in issuing the notice dated 15.2.2020, to the petitioner, however, it is equally true, that the respondents 1 and 2 being party to the judgment and decree as passed in RCS No.83/2014, were duly bound by it, and ought to have brought this position to the notice of the learned Tahsildar, who had passed the impugned order. Since the notice dated 15/2/2020, is in pursuance to the order dated 31/1/2020, which has been quashed and set aside, the notice dated 15/2/2020, as a consequent fallout also has to go.

11] Even for exercising, the power under Section 50 of the Maharashtra Land Revenue Code, to which the impugned order, is

sought to be attributed, it has first to be demonstrated that the land vests in the Government, as against which, in the instant matter, it is an admitted position that the land of Survey No.119/5, is owned by the petitioner and therefore, the question of applicability of Section 50 of the Maharashtra Land Revenue Code would not have arisen in the given facts of the present matter.

12] The contention of Mr. Gawande, learned Counsel for the respondents 1 and 2 that the land of Survey No.119/5 still continues to be agricultural land, appears to be incorrect, for the reason, that the initial order of the Tahsildar, permitting non-agricultural (industrial) use was dated 30/12/1995. The application for review of this order, was allowed on 21/3/2014 by the Tahsildar, which order in review came to be set aside by the Additional Collector, by his order dated 21/3/2014, while remanding the matter back and therefore, the order in review dated 21/3/2014, ceased to exist on account of it being set aside, which indicates, that the order of conversion dated 30/12/1995, still continues to hold the field, due to which the user of the land, continues to be industrial, as of date.

13] The contention of Mr. Shingane, learned counsel for intervenor, that since the petitioner in the layout plan submitted along with the application for grant of “NA permission” himself shows the existence of a road passing through the land of Survey No. 119/5, the petitioner is estopped from contending otherwise, appears to be in conflict, with the Taluka map, filed by the respondents 4 to 7, on record, along with the Pursis dated 22/9/2021, which shows, a way, passing through the South-East corner of Survey No.119. The map, however, does not indicate the width of the road or for that matter, its exact passage through any sub-division of the original Survey No.119, in view of which, the report of the Talathi, that there was a need for measurement to determine, from which sub-division of Survey No.119, the road passed, clearly assumed significance and without such measurement, the impugned order could not have presumed the existence of the road from the land of Survey No.119/5.

14] In view of what has been said regarding the inapplicability of Section 50 of the Maharashtra Land Revenue Code, 1966, the contention regarding the existence of an alternate remedy,

is clearly untenable. Even otherwise, the existence of an alternate remedy cannot always be a bar for invoking the jurisdiction of this Court under Article 226 of the Constitution.

15] Much can be said about the conduct of the petitioner, in the matter of filing of the present petition, however considering that no attempts were made to prosecute both the remedies simultaneously and the appeal before the SDO came to be withdrawn, and since the learned counsel for the respondents are magnanimous enough to not seriously press this ground about suppression, when asked again I, am refraining myself from going into this issue. Needless to say that the counsel drafting the petition is forewarned to take appropriate care in the matter of taking instructions and making averments in the future.

16] In view of the above discussion, the impugned order dated 31/1/2020, passed by the Respondent No.3 and the notice dated 15/2/2020 as issued by the Respondent Nos.1 and 2 are hereby quashed and set aside. It is however, made clear that this would not disentitle the authorities from initiating appropriate

enquiries, under the relevant provisions of law to ascertain the claim regarding the existence of a road and determine its boundary after due measurement from the concerned authorities. The petition, therefore, is allowed in the above terms. No order as to costs.

17] Mr. Shingane, learned counsel for intervenors/Respondent Nos.4 to 7 and Mr. Gawande, learned counsel for Respondent Nos. 1 and 2, contend that since the villagers are already using the road from the land of Survey No. 119/5, the present judgment be stayed for a period of six weeks to enable them to approach the Hon'ble Apex Court. Considering that the matter relates to an issue of road which is claimed to be used by the villagers, the impugned judgment is stayed for a period of six weeks from today.

JUDGE