

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

WRIT PETITION NO.1185 OF 2022

1. Babasaheb s/o Bhagwat Pachore,
Aged: 46 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.
2. Gopinath s/o Bhagwat Pachore,
Aged: 43 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.

... Petitioners

Versus

1. Yogesh s/o Raosaheb Pachore,
Aged: 25 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.
2. Ramnath Changdeo Pachore,
Aged: 57 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.
3. Vandana Gopinath Pachore,
Aged: 34 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.
4. Bhagwat Dada Pachore,
Aged: 73 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.
5. Manish Babasaheb Pachore,
Aged: 39 years, Occ: Agriculture,

R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.

6. Draupadabai Bhagwat Pachore,
Age: 69 years, Occ: Agriculture,
R/o Pachoremala, Bahadarabad,
Post Jawalke, Tq. Kopargaon,
Dist. Ahmednagar.

7. The Sub-Divisional Officer,
Shirdi Division, Shirdi,
Dist. Ahmednagar.

8. The Tahsildar, Kopargaon,
Dist. Ahmednagar.

... Respondents

...

Advocate for Petitioners : Mr. Rajendra L. Kute
AGP for Respondents – State : Mr. S. B. Pulkundwar
Advocate for Respondent Nos. 1 and 2 : Mr. V. H. Dighe

...

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 08th MARCH, 2022
PRONOUNCED ON : 08th APRIL, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.

2. This petition is directed against the order dated 26-07-2021 passed by the Tahsildar, Kopargaon, in Rasta Case (Re-Inquiry) No.152/2021 (Old Rasta Case No.03/2019), which is confirmed by the Sub-Divisional Officer, Shirdi Division, Shirdi, in Revision Application No.230/2021.

3. The respondent Nos. 1 and 2 filed Rasta Case No.03/2019 before the Tahsildar, Kopargaon, under Section 5(2) of the Mamlatdar's Courts Act, 1906 (for short 'the Act, 1906') claiming that for approaching their land Gut No.58 there was a road on common *Bandh* of lands bearing Gut No.62/5 and Gut No.57. It is obstructed by the petitioners and respondent Nos. 3 to 6 by putting sand, stones and constructing a shed. Hence, they prayed for removal of the obstruction and clear 12 feet road.

4. Site inspection was conducted on 30-05-2019 wherein it was found that the owner of Gut No.57 had installed iron angles abutting to the boundaries. Though alternate road was tried to be shown from Gut Nos. 60 and 59, however, on that day no access road was found for Gut No.58. On 20-07-2019 the Tahsildar granted temporary injunction in favour of respondent Nos. 1 and 2.

5. The petitioners and two others (respondent Nos. 3 and 5 herein) filed Regular Civil Suit No.120/2019 against the Collector, Ahmednagar, Tahsildar, Kopargaon and Circle Officer, Pohegaon, Tq. Kopargaon, as well as the respondents seeking injunction against the defendants that they should not create a road from the plaintiffs' field and they should not obstruct the peaceful possession of the plaintiffs, so

also, they should not make any encroachment in the suit property i.e. Gut No.62/5. The Civil Court by a detail order enjoined defendant No.2 (Tahsildar) from acting upon the interim order dated 20-07-2019 passed in Rasta Case No.03/2019. Further injunction is granted against the defendant Nos. 4 and 5 (i.e. respondent Nos. 1 and 2 herein) and/or any one on their behalf, thereby restraining them from creating encroachment over the suit property, as well as causing hindrance to the plaintiffs from peaceful enjoyment of the suit property i.e. Gut No.62/5, till final disposal of the suit. The Tahsildar was granted liberty to proceed further with the Rasta Case No.03/2019 in accordance with law.

6. The Tahsildar vide order dated 20-07-2020 allowed the Rasta Case No.03/2019 filed by respondent Nos. 1 and 2 and directed to give respondents 10 feet wide road from western side of Pohegaon Ves road and North *Bandh* boundary of Gut No.62/5 to approach Gut No.58, by removing obstructions. The said order was challenged by filing revision before the Sub-Divisional Officer, who initially stayed the order of Tahsildar and subsequently partly allowed the revision and remanded the matter back to the Tahsildar. After remand the Rasta case No.03/2019 is re-numbered as Rasta Case (Re-Inquiry) No.152/2021.

7. After remand, site inspection was conducted by the

Tahsildar on 23-03-2021. The Tahsildar by the impugned order dated 26-07-2021 allowed the application and directed to remove obstructions and give 10 feet wide road to the respondents for going to Gut No.58 from northern boundary of Gut No.62/5 and southern boundary of Gut No.57, by removing trees, constructions, iron poles, etc. The said order is confirmed by the Sub-Divisional Officer in the revision. Hence, the present petition.

8. Heard the learned advocate Mr. R. L. Kute for petitioners, learned advocate Mr. V. H. Dighe for respondent Nos. 1 and 2, learned Assistant Government Pleader Mr. S. B. Pulkundwar for respondents – State at length. Perused the documents placed on record by the respective parties.

9. The record reveals that during the inquiry in Rasta Case No.03/2019 the site inspection panchanama was prepared, so also, the statement of witnesses were recorded, who were cross-examined before the Tahsildar. In the first panchanama conducted on 30-05-2019, the old constructions in Gut No.62/5 like residential house, farm tank, big *Neem* tree near the boundary and Mhasoba Temple on the *Bandh*, were found. Iron angles were found abutting to the boundaries of Gut No.57. However, no road as claimed by the respondents was noticed, at the

time of said panchanama. Admittedly, after the temporary injunction was granted by the Tahsildar on 20-07-2019, immediately the petitioners and others filed R.C.S. No.120/2019, in which after hearing the parties injunction granted by the said order of the Tahsildar is stayed by the Civil Court and respondent Nos. 1 and 2 were restrained from creating encroachment on the suit property i.e. land Gut No.62/5.

10. In the second panchanama dated 23-03-2021 which was held after the remand, big *Neem* tree was found abutting to the boundary, so also, Mhasoba Temple was found abutting to the land Gut No.57. It is recorded in the said panchanama that if customary road is granted from Gut No.62/5 and Gut No.57 then there would not be any damage to the Temple. It is further recorded in the Panchnama that owner of Gut No.57 has measured her land and has raised iron poles abutting to the *Bandh* as boundary marks. Therefore, obstruction is created for approaching Gut No.58 from the boundary of Gut Nos. 62/5 and 57.

11. The Tahsildar, thereafter again by the impugned order allowed the application filed by respondents and directed to remove the obstructions i.e. trees, shed, iron poles etc. and to clear 10 feet wide road. In the revision the Sub-Divisional Officer has confirmed this order.

It is therefore clear from the record that in the first panchanama as well as in the second panchanama customary road could not be found. It is to be noted here that there are old constructions, big trees, etc. on the boundary of Gut Nos. 62/5 and 57. It is pertinent to note that owner of Gut No.57 is not a party in the Rasta Case or in the revision. It is observed in the panchanama dated 23-03-2021 that as the owner of Gut No.57 has erected iron poles on the boundary of her land, there is obstruction for the owner of Gut No.58 to approach his field from the *Bandh* of Gut Nos. 62/5 and 57. Thus, the panchanama nowhere mentions that there was obstruction on the part of the petitioners i.e. owners of land Gut No.62/5.

12. The witnesses of respondent Nos. 1 and 2 have admitted in their cross-examination that at no point of time the land of the respondents was fallow and even at the time of hearing of Rasta Case there was a crop standing in Gut No.58. In that view of the matter, it is clear that respondents had alternate way to approach their land Gut No.58. The witnesses have further admitted before the Tahsildar in cross-examination that there were old constructions i.e. cattle shed of Vandana Pachore erected 7 to 8 years before, the farm tank was constructed 4 years ago, 30 to 40 years old dilapidated house of Bhagwat Pachore and 25 to 30 years old *Neem* tree abutting to the

northern *Bandh* of Gut Nos. 62/5 and 57.

Thus, it is clear that the obstruction to the respondents was created long ago and respondents approached belatedly i.e. beyond the period of six months as contemplated in the said Act and on that ground also, their case was liable to be rejected.

13. Respondent Nos. 1 and 2 have failed to prove on record that there was a customary way available from *Bandh* of Gut Nos. 62/5 and 57 which was obstructed by the petitioners or owner of Gut No.57. In absence of that it was not proper on the part of the Tahsildar to allow the Rasta Case filed by respondent Nos. 1 and 2. It is to be noted here that the owner of Gut No.57 is not a party in the rasta case and in her absence the Tahsildar has exceeded it's jurisdiction in directing removal of iron angles installed by her. The non-application of mind on the part of Tahsildar in directing removal of old constructions, old trees and shade erected prior to 7 to 8 years, is writ large on the face of record. The Tahsildar has ignored the fact that if the obstructions were raised prior to many years, the cause of action aroused to respondents when the said obstructions were erected and/or created. Thus, it appears from the record that the proceedings for removal of obstruction were initiated beyond the period of six months from the day of cause of action. The

ratio in ***Vishnu Sukhdev Ghanvat and Others Vs. Collector, Ahmednagar and Others, 2017 (1) Mh.L.J. 811***, relied on by the learned advocate for petitioners supports the case of the petitioners on this point.

14. Admittedly, when the Civil Court is seized of the matter and has passed interim injunction in favour of the petitioners thereby restraining the respondent/defendant Tahsildar from acting upon the interim order, after hearing all the concerned parties and further restraining the defendant Nos. 4 and 5 (respondent Nos. 1 and 2 herein) from creating encroachment over the suit property till final decision of the suit, by a detailed order, the respondent Tahsildar and Sub-Divisional Officer have failed to follow the said order and thereby they have erred in passing the impugned orders. The decision of the Civil Court in temporary injunction application Exhibit-5 by order dated 07-08-2019, ought to have been taken into consideration by the Tahsildar and Sub Divisional Officer while deciding the Rasta case. The Tahsildar and Sub-Divisional Officer ought to have given due weightage to the observations of the Civil Court while deciding the rasta case. Since the impugned order passed by the Tahsildar is contrary to the *prima facie* observations recorded by the competent Civil Court, the impugned judgment is unsustainable. The Sub-Divisional Officer has erred in mechanically confirming the order passed by the Tahsildar. In view of the fact that the

Civil Court has refuted contentions of respondent Nos. 1 and 2 regarding existence of the disputed way while deciding the application for temporary injunction in R.C.S. No.120/2019, the respondent Tahsildar could not have reached to the contrary conclusions. Since the parties are already before the Civil Court which has passed interim order in favour of the petitioners the impugned orders passed by ignoring the observations of Civil Court apparently are erroneous and irrational and the same are liable to be quashed and set aside. The petitioners were justified in relying on the decision of the Co-ordinate Bench of this Court in *Writ Petition No. 5227/2020 (Sardar Shankar Patil (Dead) Through his L.Rs. Vs. Dashrath Lal Patil and Others)* and *Writ Petition No.5226/2020 (Sharad Shivaji Golande and Others Vs. Bankat Dada Golande and Others)* in support of this argument.

15. It is not possible to accept the submission of the learned advocate for respondent Nos. 1 and 2 that there is no alternate road to approach Gut No.58, in view of the clear-cut admissions given by the witnesses examined by them. I find no merit in the submissions of the learned advocate for respondent Nos. 1 and 2 that the petitioners had not challenged the order of Tahsildar before the Sub-Divisional Officer and respondent No.2 is respondent No.3 in the revision before the Sub-

Divisional Officer and hence, the petition filed by them is not maintainable.

16. In the result, the writ petition is allowed in terms of prayer clause 'C'. The impugned orders are quashed and set aside.

17. Rule is made absolute in the above terms. No costs.

(NITIN B. SURYAWANSHI, J.)