

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.11905 OF 2022**

**BHAUSAHEB BABURAO THORAT AND OTHERS
VERSUS
STATE OF MAHARASHTRA THROUGH COLLECTOR AND
OTHERS**

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Mr. S. V. Natu, Advocate for the Petitioners.

Mr. S. N. Morampalle, AGP for Respondents-State.

Mr. Amol S. Gandhi, Advocate for Respondent Nos.4 to 9 and 11 to 13.

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**CORAM : SANDEEP V. MARNE, J.
DATED : 29th NOVEMBER, 2022.**

PER COURT:-

1. By this petition petitioners challenge the judgment and order dated 23.09.2022 passed by the Additional Sessions Judge, Ahmednagar rejecting petitioners' Miscellaneous Civil Appeal No.96/2022 and confirming the order passed by the Trial Court on 06.05.2022 rejecting petitioners' application for temporary injunction.

2. The petitioners/plaintiffs have filed suit challenging the order of Tahsildar dated 15.03.2021 passed under the provisions of Section 5(2) of the Mamlatdars' Courts Act, 1906 (for short 'the Act, 1906'). The petitioners/plaintiffs sought temporary injunction by application at Exhibit-5 to restrain defendants from interfering in the suit property on the basis of Tahsildar's order. The Trial Court has rejected the plaintiffs' application for temporary injunction and the Appeal filed by petitioners has been rejected by the District Court.

3. Appearing for petitioners Mr. Natu, learned counsel would submit that the order passed by the Tahsildar is in gross violation of scheme of the Act, 1906, as the Tahsildar has not recorded any evidence of the parties nor granted proper opportunity of hearing to petitioners before passing order. He would submit that two panchanamas drawn were exparte without issuance of notice in the proceedings to petitioners. He would, therefore, submit that Tahsildar's order premised solely on those panchanamas prepared behind the back of petitioners is unsustainable. Mr. Natu would further submit that both the Courts below have ignored this aspect while passing impugned orders. Mr. Natu would rely upon the following judgments in support of his contentions:

1. Mohammad Rahim Khan Vs. Shankar Maroti Dhage & anr., 2017 (3) Bom. C.R. 472.
2. Sanjay s/o. Keshav Bhoite & ors. Vs. The Collector, Collector Office, Ahmednagar & Ors., Writ Petition No.6640/2022 decided on 29.06.2022.
3. Tarabai Ravsaheb Chaudhari & Ors. Vs. The State of Maharashtra & Ors., Writ Petition No.6074/2018 decided on 05.07.2022.
4. Sudhir Yashwant Dhangade Vs. Ankush Kashiram Bole & ors., 2019 (2) Bom. C.R. 145.

4. Mr. Gandhi, learned counsel appearing on behalf of respondent nos.4 to 9 and 11 to 13 opposes the petition.

5. The Tahsildar's order dated 15.03.2021 has been passed after due participation by petitioners. True it is that, plaintiffs' suit challenging the order of the Tahsildar may be

maintainable in view of the judgment of this Court in **Mohammad Rahim Khan Vs. Shankar Maroti Dhage & anr.** (supra). However, the issue here is about grant of interim injunction in favour of petitioners during pendency of the suit. The Tahsildar has relied upon two panchanamas to arrive at a finding that there existed a road and that petitioners created an obstruction thereon by cultivating crops. It is the contention of petitioners that panchanamas have been drawn *exparte* and that the evidence of panchas was not recorded. This is something which can be decided at the time of final hearing of the suit.

6. Perusal of the findings recorded by the District Court would indicate that it has taken into consideration an additional material independent of the findings recorded by Tahsildar. The District Court has held in its order as under:

“9. The photographs are vehemently relied by appellant. It is said that there is a standing crop of sugarcane. If the photographs are seen, it showed that upto Gat no.72, there is a straight boundary road of 15 feet or plus or minus. And later on road is brought under cultivation as there is total curve line ahead of Gat No.72 and the road which is visible in photograph is from Gat No.52. In my opinion, when the road was from the Gat No.73 of the appellant, he closes it by encroaching on road it does not lie in appellant's mouth that road may be given from Gat No.52. This shows that the plaintiff appellant did not come with clean hands and trying to raise unnecessary issues on count of road granted by Tahsildar which was in existence since the sale deed of parties respective predecessors. In this reference the submissions of learned advocate for appellant that respondents are having approach from Gat No.81 shown in gaon map of the village. The main road which is adjacent to Gat No.72 of the appellant goes toward Gat No.112, at that spot there is square and the another field and house of respondent is on that road. When this is position since long, in my opinion the claim of appellant that respondents are having alternate approach road do not ring truth but it

shows that the appellant want to deny the right of respondents to access road to their field which was in existence already. The encroachers cannot claim that other party should do equity when they did not comply this principle from their part.

10. Now let us turn to the aspect whether Tahsildar gave opportunity to appellant or not. The respondent filed copy of roznama of Tahsil road case. It showed that Tahsildar gave notice on 21.01.2021 and called upon appellant to submit his objection if any. Second letter having title Sammati patra says that Bhausahab Thorat is ill, he is not in position to participate in proceeding, so he gave authority to his brother Vijay Thorat and son Chetan Thorat to put his stand in this proceeding to which he will be bound. Thereafter roznama dated 02/11/2020, 19/11/2020, 3/12/2020, 10/12/2020, 8/02/2021, 18/02/2021 showed that all concerned parties including appellant's representative participated in this proceeding, they were given opportunity and lastly on 18/02/2021 the proceeding was closed for order. This roznama again falsifies the claim of appellant that he was not given opportunity to contest road case.

11. From the discussion of facts and the record made above, I find that the arguments raised by learned advocate for appellants in support of his client's case are devoid of merit. There is no substance in grounds raised and argued by learned advocate for appellants. Rank encroacher cannot be protected. While praying for injunction or any interim relief, the party is duty bound to come with clean hand. Party has to prove prima facie case in his favour, that balance of convenience lies in his favour and if the relief is not granted, he would suffer irreparable loss. When the appellant himself committed illegality, encroached on the area kept open for approach to Gat No.72 onwards and so on ground that on encroached road crops are standing cannot get status of legality and protection from the law."

7. The District Court has thus perused the photographs produced before it and arrived at finding that the road was existing and petitioners created obstructions thereon. In this view of the matter, this Court would not be justified in interfering

with the *prima facie* findings on facts recorded by the Trial Court and lower Appellate Court.

8. Mr. Natu has relied upon the judgment of this Court in **Sanjay s/o. Keshav Bhoite and Tarabai Ravsaheb Chaudhari** (supra) in which this Court has dealt with the scope and ambit of enquiry under the Act, 1906. There can be no dispute about the principles enunciated by this Court in the said judgments. However, both the judgments are little assistance to petitioners. In **Sanjay s/o. Keshav Bhoite** (supra), this Court proceeded to remand the matter back to Mamlatdar for fresh enquiry after holding that the due procedure envisage under the Act was not followed. In **Tarabai Ravsaheb Chaudhari & Ors.** (supra), this Court held that no hearing had taken place before the Mamlatdar. An opposed those two decisions, the present petition arises out of orders passed by the Trial Court and lower Appellate Court in proceedings initiated by petitioners.

9. The judgment in the case of **Sudhir Yashwant Dhangade** (supra) relied upon by Mr. Natu deals with the issue of grant of opportunity of cross-examine the witness of the applicant before Mamlatdar, when such persons are examined. The issue of cross-examining the witness before Mamlatdar may not be relevant at this stage of considering petitioners' application for temporary injunction. In my view, the orders passed the Trial Court and lower Appellate Court are well reasoned and supported by the material on record.

10. The petition is devoid of merits and the same is dismissed without orders as to cost.

11. Needless to say that, Trial Court shall not be influenced by any of the observations made in the present order while deciding the suit finally.

(SANDEEP V. MARNE)
JUDGE

Devendra/November-2022