

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 111 OF 2017

- 1] Digambar S/o. Vitthal Kale,
Age – 45 years, Occupation – Agriculturist and Business,
R/o. At – Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad
- 2] Manohar S/o. Namdeo Markad,
Age – 45 years, Occupation – Agriculturist,
R/o. At Post – Khultabad, Tal – Khultabad,
District – Aurangabad
- 3] Bhaginath S/o. Vishwanath Kale,
Age – 49 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad
- 4] Ramesh S/o. Bhaurao Kale,
Age – 55 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad
- 5] Abarao S/o. Waman Kale,
Age – 45 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad
- 6] Vilas S/o. Sarjerao Wagh,
Age – 50 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad
- 7] Kadubai Wd/o. Sainath Jadhav,
Age – 42 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad
- 8] Mithun S/o. Kailas Wagh,
Age – 30 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad

.. Appellants
(Original Defendants)

Versus

- 1] Vasant S/o Kacharu Kale (**Original Plaintiff**),
Age – 48 years, Occupation – Service,
R/o. at post Salukheda, Tal – Khultabad,
District – Aurangabad

- 2] Walmik S/o. Jagannath Jadhav,
Age – 47 years, Occupation – Agriculturist,
R/o. At Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad

**(Defendant No. 11 in R.C.S., denied to be
a party in appeal therefore, arrayed as
Respondent in R.C.A. and Second Appeal)**

- 3] Ramdas S/o. Sominath Jadhav,
Age – 40 years, Occupation – Agriculturist,
R/o. At – Salukheda, Post – Khirdi,
Tal. - Khultabad, District – Aurangabad

**(Defendant No. 6 in R.C.S., and Appellant No. 6 in
R.C.A., but denied to be a party in Second appeal
therefore, arrayed as Respondent in Second Appeal)**

- 4] Subhash S/o. Kisan Kale,
Age – 35 years, Occupation – Agriculturist,
R/o. At – Salukheda, Post – Khirdi,
Tal – Khultabad, District – Aurangabad

**(Defendant No. 7 in R.C.S. and Appellant No. 7 in
R.C.A., but denied to be a party in Second appeal
therefore, arrayed as Respondent in Second Appeal)**

- 5] Sheknath S/o. Tukaram Kale,
Age – 51 years, Occupation – Agriculturist,
R/o. At – Salukheda, Post – Khirdi,
Tal – Khultabada, District – Aurangabad

**(Defendant No. 8 in R.C.S. and Appellant No. 8 in
R.C.A., but denied to be a party in Second appeal
therefore, arrayed as Respondent in Second Appeal)**

- 6] The Tahsildar, **(Original Respondent No. 13 in R.C.S.)**,
Khultabad, Tal – Khultabad, District – Aurangabad

**(Formal Respondent – passed order in
favour of present Appellants)**

.. Respondents
(Original Respondents)

...
Mr. B.K. Patil, Advocate for the appellants
Mr. P.K. Nikam, Advocate for respondent no. 1
Respondents no. 2 to 5 served – absent
Respondent no. 6 – formal party.
...

CORAM : MANGESH S. PATIL, J.

**RESERVED ON : 5 JANUARY 2022
PRONOUNCED ON : 11 JANUARY 2022**

JUDGMENT :

Heard both sides at the admission stage.

2. Some of the defendants, who are aggrieved by the concurrent findings of the Courts below, whereby the suit filed by the respondent no. 1 declaring that the order passed by the respondent no. 3 - Tahsildar in a proceeding under section 5(2) of the Mamlatdar's Courts Act, 1906 (for short "**the Act**") is null and void and granting perpetual injunction restraining them from creating any way or cart track through his property being a portion admeasuring 4 Acres situated in the north-east corner of the land Gat no. 51, has been decreed.

3. The learned Advocate for the appellants would vehemently submit that since the respondent no. 1 had appeared in the proceedings under section 5(2) of the Act, he is not entitled to assail the judgment and order passed therein by a separate suit when a separate remedy is provided to challenge that order by way of revision under section 23(2) of the Act. The learned advocate would further submit that both the Courts below have grossly erred in appreciating the facts, circumstances and evidence on the record. He would advert to the topography demonstrated by a rough sketch in the memo of the second appeal at page number 10, to precisely point out the matter in controversy. He would submit that the fact regarding existence of the two roads and a streamlet which divide and run east-west across the entire land Gat no. 51 was specifically admitted by the respondent

during his testimony. Right in the teeth of such admission, both the Courts below ought to have held that the way, as was being claimed by the appellants before the Tahsildar was, in fact, in existence. Being a public road, no such declaration or injunction could have been granted by the Courts below. Though the respondent no. 1 is banking upon the judgment and decree passed in an earlier suit being R.C.S. 1349 of 2001 dated 27-3-2006, the appellants were not party to that suit. Noting this fact, the Tahsildar had refused to give any importance to the judgment even though it was in respect of the very same cart way that is being claimed by the appellants in the present dispute. That was not a judgment in rem and would not bind the appellants. The learned Advocate, therefore, submits that substantial questions of law, as mentioned in the appeal memo arise and even otherwise both the Courts below having reached the conclusions perversely, the second appeal be admitted.

4. The learned Advocate for the respondent no. 1 would support both the judgments of the Courts below. He would submit that the powers of the Mamlatdar to cause obstruction to the cart way to be removed in exercise of the powers under section 5(2) of the Act are not plenary powers and does not supersede the powers of a civil Court to decide the dispute between the parties touching the selfsame dispute regarding obstruction to the way.

5. The learned Advocate would further point out that the revenue record demonstrates existence of the other two ways and even

a streamlet across the entire land Get no. 51 running east to west. The village map does not demonstrate existence of any way, as is being claimed along the northern side of land Gat no. 51 or along its eastern boundary.

6. The learned Advocate would then submit that The appellants were not parties to the earlier suit between the respondent no. 1 and one Namdev Kishan Markad. However, certified copy of judgment was placed on Record of the trial court at Exhibit – 46. That defendant - Namdev Kishan Markad was none other than the father of present appellant no. 2. Even in that suit, it was the stand of the father of the appellant no. 2 regarding the selfsame cart way, which the appellants are now asserting along the northern and eastern boundaries of Gat no. 51. The civil court had specifically refuted such a claim while answering Issue no. 5 in that suit. Though, none of the appellants were parties to the suit, since the matter in controversy was touching the existence of the cart way being claimed by them, the respondent no. 3 - Tahsildar ought to have examined and given due weight to such a finding of the civil court. He would, therefore, submit that conveniently by giving a complete go bye to that judgment and decree once again, under the garb of existence of such a cart way, the appellants approached the Tahsildar under section 5(2) of the Act and taking into account aforementioned facts and circumstances, the Tahsildar had exercised the jurisdiction by refusing to consider the judgment of the civil court in the right perspective.

7. Lastly, the learned Advocate Mr Nikam submitted that in any way, there are concurrent findings of the courts below who have taken a plausible decision by appreciating all the evidence that was available on the record, no substantial question of law arises nor can it be said that the judgments are based on no evidence or suffer from any perversity.

8. I have carefully considered the rival submissions. As can be appreciated, the dispute is clearly in respect of existence or otherwise of a cart way along the northern and eastern boundary through the land Gat no. 51. There is no dispute about the fact that originally the entire land was owned by a single person, who from time to time disposed of various portions from that land including the father of the appellant no. 2 and to the respondent no. 1. There is no dispute about the fact that the respondent no. 1 is the owner in possession of 4 Acre portion of the north east corner from that land.

9. Village map does point out existence of a couple of roads and a streamlet across the entire land Gat no. 51, all of which run east west in direction. Conspicuously, this village map does not demonstrate a similar state-of-affairs in respect of existence of the disputed cart way. If really, such a cart way has been in existence since years together, as is being claimed by the appellants, and found out by the respondent no. 3 – Tahsildar, in the normal course, the village map also would have displayed such way. It is indeed a vital aspect which conspicuously does not find place in the reasoning of the courts below. The fact

remains that the village map shows existence of couple of other ways and a streamlet across the same property but there is no reason why if at all the disputed way has been in existence, it should not depict its existence.

10. Apart from the above state-of-affairs, again even if both the courts below have missed the point, the appellant no. 2 has conspicuously failed to grace the witness box. The reason is not far to seek. Regular Civil Suit no. 1349 of 2001 was filed by the respondent no. 1 against his father wherein, the latter had raised the selfsame issue about existence of the selfsame cart way in the northern and eastern side of the land Gat no. 51. That claim was refuted by the civil court and in order, probably, to avoid being in an awkward position that he must have been held back by the appellants and it is only the appellant no. 1, who was examined as a witness on their behalf.

11. Apart from the above state-of-affairs, during his testimony, the appellant no. 1 specifically admitted that to the east of the share of respondent no. 1, the land owned by his father Vitthal Mhatarji situates. He also admitted that along the eastern boundary, there is a bund intervening land Gat no. 51 and the land to its east belonging to his father. He then admitted about existence of trees along that bund, meaning thereby that the circumstance is clearly indicative of the fact that there are not even signs of existence of any cart way along the eastern boundary of land Gat no. 51. All these facts and circumstances and evidence clearly demonstrate that there is dearth of evidence to

subscribe to the stand of the appellants regarding the existence of a cart way as is being claimed by them.

12. Above all, though strictly speaking, the judgment and decree passed in Regular Civil Suit no. 1349 of 2001 is not binding on the appellants inasmuch as none of them was parties, as is mentioned herein-above, the father of the appellant no. 2 was the sole defendant in that suit and had raised the selfsame issue that is now been agitated in the matter in hand, regarding existence of a cart way along the northern and eastern boundary of land Gat no. 51. Even if such a judgment was not binding on the appellants, once it was produced before the respondent no. 3 during an enquiry under section 5(2) of the Act, he ought to have given some weightage to it and to have persuaded himself to investigate the matter in further detail. Instead, he has simply brushed aside the decree of the civil court on the ex facie erroneous grounds by observing that the suit was not in respect of any right of way and the injunction was not being claimed in respect of any dispute pertaining to it, when, as is mentioned herein-above a specific issue regarding existence of the way was framed and answered in the negative against the father of the appellant no. 2.

13. In the light above state-of-affairs, by no stretch of imagination can it be said that the observations and conclusions drawn by the courts below are perverse or based on no evidence.

14. So far as the aspect regarding the jurisdiction of civil court to grant a relief touching an order passed by the Tahsildar under section 5(2) of the Act, true it is that an order of the Mamlatdar in such a proceeding is revisable under section 23(2) of that Act. However, conspicuously, section 22 of the Act clearly declares that any decision or order passed by the Mamlatdar would be subservient to the decision of a competent civil court in a proceeding preferred before it. Section 22 of the Act reads thus :-

“22. Subject to the provisions of section, 23 sub-section (2), the party in favour of whom the Mamlatdar issues an order for removal of an impediment of the party to whom the Mamlatdar gives possession or restores a use, or in whose favour an injunction is granted, shall continue to have the surface water upon his land flow unimpeded on to adjacent land or continue in possession or use, as the case may be, until otherwise decreed or ordered, or until ousted, by competent Civil Court:

Provided, firstly, that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in a competent Civil Court mesne profits for the time he has been kept out of possession of any property or out of enjoyment of any use :

Provided, secondly, that in any subsequent suit or other proceeding in any Civil Court between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property or the enjoyment of any use or respecting the title to or valuation of any crop dealt with under the proviso to sub-section (1) of section 21, shall not be held to be conclusive.”

A bare perusal of the provision would clearly indicate that irrespective of the decision of the Mamlatdar under section 5(2), a party may approach

a civil court and obtain any relief even contrary to the decision of the Mamlatdar setting it at naught.

15. To conclude, no substantial question of law arises in this appeal. The scope for causing interference by invoking powers under section 100 of the Code of Civil Procedure being limited and the concurrent observations and the conclusions of the courts below being based on plausible appreciation of the evidence on record, this court cannot cause any interference.

16. The Appeal is dismissed.

[MANGESH S. PATIL, J.]

arp/