

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

CIVIL REVISION APPLICATION NO. 59 OF 2021

Khushalchandra Sagarmal Sancheti and ors.

..VS..

Sheikh Suleman Shaikh Vajeer (dead), thr. R-2 Sheikh Hamid Sheikh Suleman and ors.

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri R.G. Kavimandan, Advocate for the applicants.
 Shri M.I. Dhattrak, Advocate for respondent nos. 3 to 6.
 Shri M.A. Kadu, A.G.P. for respondent nos. 8, 9 and 10.

CORAM : M.S. KARNIK, J.
DATED : 18/04/2022.

Heard learned Counsel for the applicants and
 learned Counsel for the non-applicants.

2. The challenge in this revision application is to the impugned order dated 27.02.2019 passed by the Sub-Divisional Officer, Buldhana in a revision filed under Section 23(2) of the Mamlatdars' Courts Act, 1906 (for short 'the Act'). The revision was filed against the order passed by the Naib Tahsildar, Buldhana rejecting the application made by the applicants under Section 5 of the Act.

3. It is the contention of the learned Counsel for the applicants that they are the owners of Gat Nos. 30, 31 and 32 situated at Mauza Jambharun Shivar, Taluka and District Buldhana and the land belonging to the non-applicant Nos.1 to 7 is Gat Nos.26, 27 and 29 in the same village. It is the contention of the learned Counsel for the applicants that there was an approach road passing through Gat Nos. 26, 27 and 29 to approach their land Gat Nos. 30, 31 and 32, which was obstructed by the non-applicants. The application was

therefore made under Section 5 of the Act for removal of the obstruction. Counsel for the applicants placed reliance on the village Map at page 50 of the paper book to show the existence of a road passing through Gat Nos.26, 27 and 29 to approach Gat Nos.30, 31 and 32. It is further submitted that both the authorities below were not justified in recording a finding that the application is barred by the principles of *res judicata*.

4. Learned Counsel points out that only two of the applicants i.e. applicant nos.4 and 5 were parties to the application made on the previous occasion under Section 5 of the Act before the Naib Tahasildar. It is further submitted that the order dated 10.09.2013 passed on an application under Section 5 of the Act previously filed by the predecessors of the applicants which also comprised of applicant nos.4 and 5, cannot operate as *res judicata* as the other applicants in the present proceedings were not parties to the earlier proceedings. Moreover, it is submitted that the earlier application is not decided on merits, but the application is dismissed on technical grounds and therefore not hit by the principles of *res judicata*. He submitted that the principles of *res judicata* cannot apply to proceedings under the Mamlatdars' Courts Act.

5. Learned counsel relied on a decision of this Court in the case of ***Jagdish Shriram Dhande vs. Ramchandra Chinduji Dhande and ors. 2020 (2) Bom.C.R. 122*** to contend that if the procedure prescribed under the Act, is not followed, the orders are liable to be set aside. He contends that as the order dated 10.09.2013 was passed even without giving a proper and adequate opportunity to the applicants,

such order cannot operate as *res judicata* for the purposes of the present application.

6. Heard the learned Counsel for the non-applicants. I have gone through the orders passed by the authorities below. Both the authorities below have concurrently held that the order dated 10.09.2013 in the previously instituted proceedings would operate as *res judicata* for the purposes of the present application. I find that applicant nos.4 and 5 were parties to the previously instituted proceedings under Section 5 of the Act. Even in the application instituted previously under Section 5 of the Act, the contention was raised that the non-applicants have obstructed the approach road which should be removed. I have also gone through the order dated 10.09.2013 in the previously instituted proceeding, which is produced on record by the learned Counsel for the respondents. The Naib Tahsildar while rejecting the application under Section 5 of the Act in the previously instituted proceedings has categorically recorded a finding that the applicants therein failed to adduce any evidence to establish their case that there exists a road passing through Gat Nos.29 and 30. The only addition in the present application is Gat No.26. There has been no further challenge to the order dated 10.09.2013 passed by the Naib Tahsildar. Considering the findings recorded by the Naib Tahsildar in the order dated 10.09.2013, it cannot be said that the application is rejected on technical grounds, but such application is rejected on merits. Failure on the part of the applicants to adduce evidence, moreso when the applicants have pursued the application previously instituted on merits on the basis of available materials, cannot be regarded as technical ground of rejection as sought to be contended by

learned counsel for the applicants. The previously instituted proceedings under Section 5 of the Act between the same parties was contested and a fair opportunity was given to prove the applicants' case. The decision was on merits. Having regard to the nature of proceedings under Section 5 of the Act and the general principles of *res judicata*, the decision in the previously instituted proceedings on merits after contest will operate as *res judicata* in the later proceedings which is the subject matter of the present Civil Revision Application. In the facts of the present case, the applicants cannot be permitted to defeat the principles of *res judicata* only on the plea that Gat No. 26 was not a part of the earlier proceedings.

7. I therefore do not see any reason to interfere with the concurrent findings recorded by the authorities below. This is not a case where the authorities have acted in the exercise of their jurisdiction with material irregularity. It is always open for the applicants to avail the remedies provided by law as indicated by the authorities below including challenging the order dated 10.09.2013 in accordance with law. Keeping this liberty open, the application is rejected.

JUDGE

Trupti