

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

WRIT PETITION NO. 3421 OF 2023

- 1) Nanasaheb Yashwant Kalekar,
Age; 50 years, Occ; Agriculture,
R/o; Kankuri, Taluka – Rahata,
District; Ahmednagar.
- 2) Mangal Nanasaheb Kalekar,
Age; 47 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
Dist. Ahmednagar.
- 3) Tarabai Ashok Kalekar,
Age; 49 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 4) Padmabai Uttam Kalekar,
Age; 43 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 5) Yamunabai Balasaheb Kalekar,
Age; 44 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 6) Latabai Sopan Kalekar,
Age; 48 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

...PETITIONERS
(Orig. Deft. Nos. 1
to 6)

V E R S U S

- 1) Dattatraya Maruti Darandale,
Age; 65 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 2) Hirabai Rangnath Dange,
Age; 61 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 3) Gokul Rangnath Dange,
Age; 43 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 4) Rajendra Dagadu Mhaske
Age; 50 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 5) Bebi Vishwanath Bhokare,
Age; 45 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 6) Sangita Ramesh Bhokare,
Age; 43 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 7) Digambar Pandurang Jadhav,
Age; 70 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 8) Sainath Ravji Gadekar,
Age; 55 years, Occ; Agriculture,

R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

- 9) Babanbai Deoram Dange,
Age; 80 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 10) Goraknath Deoram Dange,
Age; 67 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 11) Jagannath Deoram Dange,
Age; 55 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 12) Baban Sitaram Dange,
Age; 55 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 13) Navnath Sitaram Dange,
Age; 56 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 14) Eknath Sitaram Dange,
Age; 68 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.
- 15) Rangnath Sitaram Dange,
Age; 70 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

- 16) Kanta Sainath Gadekar,
Age; 52 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 17) Kisan/ Krushna Ravji Gadekar,
Age; 63 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 18) Keepak Kisan Gadekar,
Age; 26 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 19) Sindhu Kisan Gadekar,
Age; 56 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 20) Sanjay Balasaheb Bansode,
Age; 50 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 21) Rakesh Balasaheb Bhokare,
Age; 42 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 22) Arun Mhasu Bhokare,
Age; 56 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,
District; Ahmednagar.
- 23) Tarabai Changdeo Dange,
Age; 72 years, Occ; Agriculture,
R/o; Kankuri,Taluka; Rahata,

District; Ahmednagar.

24) Sarjerao Eknath Shinde,
Age; 46 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

25) Bhausahab Natha Jape,
Age; 59 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

26) Vinayak Trimbak Jape,
Age; 53 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

27) Abasaheb Rama Jape,
Age; 70 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

28) Gavaji Krushna Jape,
Age; 70 years, Occ; Agriculture,
R/o; Kankuri, Taluka; Rahata,
District; Ahmednagar.

...RESPONDENTS
(Nos. 1 to 20 –
Orig. Pltffs, and
Nos. 21 to 28 –
Orig. Deft. Nos.
7 to 14)

.....
Advocate for the Petitioners : Mr. Subodh P. Shah
Advocate for the Respondent Nos. 1, 2 & 4 to 20 : Mr. Rahul R. Karpe
Advocate for Respondent Nos. 3, 21 to 28 : Mr. Rajendra L. Kute
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CORAM : KISHORE C. SANT, J.

Date of Reservation : 14.07.2023.

Date of Pronouncement : 13.09.2023.

JUDGMENT [PER : KISHORE C. SANT, J.] :

1. Rule. Rule made returnable forthwith by consent of the parties.
2. This petition is filed by the original defendants before the Tahsildar in a suit under Section 5 of the Mamlatdar's Court Act. (The parties are referred to as per their original status in the proceedings before the Tahsildar). The respondents are the original applicants before the Mamlatdar seeking removal of obstruction of 6 feet on the way between land Gut No. 56 and also for removal of obstruction on the way of South side and for not to erect hole or plant trees thereon. The respondent Nos. 1 to 20 are the original plaintiffs before the Tahsildar. Defendant Nos. 11 to 28 are the original defendants before the Tahsildar.
3. The challenge is raised to the order passed in revision application dated 24.01.2023 passed by the learned Sub Divisional Officer, Shirdi (for short "the SDO), allowing the revision petition and thereby setting aside the order of dismissal passed by the Tahsildar in Rasta Case No. 24 of 2020.
4. In short, it is the case of the plaintiffs that they are the

owners of the land mentioned in the first chart of the suit. There is a way on the southern side in the direction East-West, which is used as an easementary way. The said way is a common way. The way is on the South-North bandh and is also shown in the village map. There are houses of all the plaintiffs and respondents on both sides of the way shown in the village map. In November, 2013 an application was made, that time the Tahsildar had directed to remove the encroachment/obstruction. However, again, the defendant Nos. 1 and 2 started encroaching upon the bandh of Gut No. 56. In 2020 also there was obstruction, however, it was removed after a complaint was made to the Tahsildar, who directed police and after the police came to the spot along with Circle Officer. It is alleged that in October, 2020 again the defendants encroached upon the land to the extent of 6 feet and therefore a case was filed.

5. The defendant Nos. 1 to 6 denied the averments in the plaint claiming that the way shown is a private way owned by defendant Nos. 1 to 6 since generations. There was a reference of this particular way in the village map. The way was never in existence for all as alleged. It is also further the case of the

respondents that already a Civil Suit is pending in the Civil Court at Rahata for injunction.

6. The Tahsildar personally visited the spot on 12.10.2021. In the panchanama he specifically observed that on the land Gut No. 56 belonging to the defendants there is a sugar cane crop abutting the way. It is further recorded in the panchanama that on the way there are some trees standing which created obstruction. It is also mentioned that the land in the said Gut number was measured by some of the independent agency and thereafter the bandh was constructed and since then a dispute is started.

7. The learned Tahsildar after going through the evidence and after recording the panchanama concluded that the alleged way appears to be private way and no existence of an easementary way appears between the spot-A and spot-B shown in the map drawn at the time of panchanama and rejected the application.

8. Being aggrieved, the plaintiffs approached the learned SDO by filing a Revision Petition. The learned SDO after hearing the parties specifically recorded that an existence of way is not denied and the only defence is that the said way is privately owned. It is

recorded that on 19.11.2003 the office of the Grampanchayat had issued a certificate showing an existence of the said way. There was also work done of making way by inviting tenders. He thus, came to the conclusion that the way is in existence and the same does not appear to be private. He specifically referred to the portion of panchanama, wherein, it is specifically mentioned that from point-A to point-B an obstruction is created because of the trees and he allowed the said revision petition, therefore, the defendant Nos. 1 to 6 are before this Court.

8. The main submission of the defendants is that the learned SDO has exceeded the jurisdiction not vested in him under under Section 23 (2) of the Mamlatdar's Court Act. The customary ways are of two types one the 'public way' and another 'customary way'. The public way is vested in the State Government and every member of public is entitled to use the said way as of right. Whereas, the customary way is through the private lands. The customary way is created by following the usages. It is further argued that the way is not shown in the village map. In 1994 a suit was filed, in which a measurement was carried by Taluka Inspector of the Lands Record (for short "the TILR") as the Court

Commissioner, which supports the case of the defendants. As no such way is shown in the said map, he submits that there are affidavits supporting the case of the erstwhile owners. It is further submitted that to claim the relief under Section 5 (2) of the Act the plaintiffs has to show that some rights are vested. Further he needs to show that he has a right to use the said way being the member of public if it is a public way and in another case he has to show the right as customary way. Further submission is that it is not the case of the plaintiffs that the way is public way. An inference is drawn by the Revisional Court that on the basis of work of construction of way was done by Gram Panchyat by putting tenders. It is not correct which is beyond the scope of the revisional jurisdiction. He relied upon Section 4 of the Easementry Act which gives rise only to the owner and occupier of certain land and possessor on the land. His next submission is that in the case of easementry way, it is for the owner to prove that he was in uninterrupted enjoyment of the way for a period of 20 years. In this case the plaintiffs have no case in their support. He relied upon the following judgments :

(a) 2002 (4) Mh.L.J. 73 - Union of India Vs. Maruti Madhav Kerulkar.

(b) (2008) 17 SCC 491 - Bachhaj Nahar Vs. Nilima Mandal.

(c) 2018 (2) Mh.L.J. 98 - Shrikrishna Sheshrao Dane Vs. Vasant Ramrao Tayade.

(d) 2015 (2) Mh. L.J. 651 – Anjali Vitthal Ingole Vs. Sub Divisional Officer, Wasim.

9. The learned Advocate for the plaintiffs submits that the defendants have not denied the existence of the way, the only case is that the said way is a private way. Specifically drawing attention of this Court to the part of the pleadings wherein, it is seen that the the way was privately owned. Under Section 5 (2) of the Act, only relief prayed is of removal of obstruction and not to create way. He submits that the panchanama of the Tahsildar is clear that there was way in existence and the same is obstructed. It was rightly held by the learned SDO that the plaintiffs are entitled to the said way. He relied on the village map which shows that there is a way on the East-West side of the lands of the petitioners and the respondents, wherein only an obstruction on the defendants land Gut No. 56 is shown. On both sides of the said obstruction there is clearly a way of 12 feet in width. From the photographs which are annexed along with affidavit-in-reply, shows that only at particular spot path way is obstructed by digging the way and putting the

murum and stones.

10. He further submits that the photographs on record are not denied. When there is a way on both sides of the obstructed land, it is certainly can not be said to be a privately owned way. Since the Tahsildar had failed to appreciate the panchanama drawn by himself, the learned SDO has rightly considered the same. Even in 1994, on the strength of map drawn in Regular Civil Suit, he submits that the way was shown. That position continues even today. On 13.12.2019 in map only Gut No. 56 was shown by the surveyor, which also shows an existence of the way. In 2003 there was specific letter issued by the Tahsildar to the Talathi and the Police Inspector. A complaint was made to the Tahsildar for the way on which an order was passed by the Tahsildar, Rahata, & notice was given to Nanasaheb Kalekar to remove the encroachment at his own expenses. The said action was never challenged. He also invited my attention to the resolution passed by the Grampanchyat sanctioning an amount for construction of way from the local development funds. All these things necessarily show that the way is of length 1.5 k.m. for the use of all persons on both the sides of the way. It is submitted that the revisional authority has rightly

held in favour of the plaintiffs and has allowed application by rightly appreciating the existence of the way.

11. The learned Advocate Mr. Kute, for original defendant Nos. 3, 21 to 28 supported the case of the plaintiffs and submits that there is already a way in existence, which is obstructed by the petitioners and also supports the impugned order. He points out that on the both the sides of the way the house properties are shown and this fact clearly establishes that the way is not a private property. He submits that the judgments cited by the petitioners are not applicable to the present case.

12. Considering the submissions, the Court has to see the judgments cited by the petitioners. In the case of **the Union of India** (supra), it is held that

“it was a suit for declaration and perpetual injunction restraining the defendant authorities from obstructing the plaintiffs from using the suit way and claiming it to be a private way. The Court also considered the powers of the Mamlatdar’s Court holding that it does not empower the Mamlatdar to declare the rights of the parties as customary rights. In case any dispute arise about the ownership or the declaration the Mamlatdar has to refer the parties to the Civil Court.”

In the case of **Bachhaj Nahar** (supra), it was the case

where the plaintiffs had filed a suit for declaration, possession and enjoyment and it was a title suit. In that suit also it was held that the suit for enforcement of easementary rights, relates to rights possessed by a dominant owner/occupier over property not of his own and having effect of restricting natural rights of the owner/occupier of such property. It is held that,

“Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a watercourse, etc. Easement can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.”

13. The Hon’ble Apex Court further observed that as regards the easementary rights by prescription, the plaintiffs are required to plead and prove that they were in peaceful, open and uninterrupted enjoyment of the rights over a period of 20 years.

14. In the case of **Shrikrishna** (supra), the Court in the proceedings arising out of Section 5 (2) of the Act had considered and held that

“the Mamlatdar is required to see that there exists a way or a customary way in use, to grant the relief. In that case the defendants had examined predecessor in title of the land who had deposed that the way in question being used as a cart way.”

In the case of **Anjali** (supra), the Court had held that

“the appreciation in exercise of revisional powers in a manner as if the proceedings are the appellate proceedings is not permissible. The revision power is required to be exercised only within the prescriptive limits of the powers conferred by the legislature.”

15. Considering all aforesaid judgments there cannot be any dispute about the proposition. However, the case of Union of India would not be applicable to the facts of this case. The plaintiffs in that case had sufficiently proved the existence of the way. As it is in the written arguments and the submissions of the petitioners that the customary way is different than the public way. In this case though accepting that the way is not a public way still it is the case that it is not a way privately owned by the defendants and thus, this judgment is also not applicable in the present case. In the present case it is the case under Section 5 (2) of the Mamlatdar's Act, wherein, only the relief claimed is of removal of the obstruction in the way, which is already in existence and is in use by all the adjoining land owners, hence this judgment is also

not applicable to the present case.

16. In this case this Court finds that certainly the order passed by the Tahsildar was perverse and without properly considering panchanama. It is clearly observed that the way is obstructed by the defendants and still the suit was dismissed. The Revisional Court was perfectly within its powers to set aside such findings and order. The facts which are not denied by filing rejoinder by the petitioners clearly show that only on certain patch an obstruction is created. In the map on record the way is clearly seen on both side of the said obstruction. The said map is also not disputed by filing the rejoinder.

17. So far as, the submissions that in the village map no way is shown, also does not find force as it is in the written notes the petitioners have submitted that there can be a way used as customary way as distinguished from public way vested in Government. That does not necessarily mean that every way not shown in the village map must be a private way belonging to a private person. In this case by relying on the facts that on both the sides of the way there are houses of both parties. So the way is not

vested in the Government but certainly can be a way for the use of persons on both sides of the way.

18. This Court finds that there is no illegality pointed out for calling an interference in the judgment of the learned S.D.O. Thus, the petition is dismissed. The rule stands discharged.

19. At this stage, the learned Advocate for the petitioners makes a request that it be observed that the observations made in the Judgment may not come in the way of the petitioners while pursuing other remedies. Needless to state that the observations made in the Judgment will not come in the way of the petitioners.

**(KISHORE C. CHANT)
JUDGE**