

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

WRIT PETITION NO.7978 OF 2019

**SAHEBRAO DATTU MANE AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS**

...

Mr. Manoj Shinde h/f Mr. Ramesh V. Naiknavare, Advocate for the Petitioners.

Mr. S. S. Dande, A.G.P. for the Respondent Nos.1 and 2.

Mr. Narsing B. Jadhav, Advocate for Respondent Nos.3 to 9.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : 05.01.2023.

PRONOUNCED ON : 17.01.2023.

FINAL ORDER:-

1. The petitioners are aggrieved by the order dated 10.06.2019 passed by the Joint Civil Judge, Senior Division, Osmanabad in R.D. No.382/2015, whereby the liberty was given to the decree holders to restore the suit lands to its original status, as sought for by the decree holders, who are respondent nos.3 to 10 herein.

2. Shorn off unnecessary details, the facts of the case are as under:

The petitioners are agriculturists residing at village Panwadi and Ter and their agriculture land is at village Mohtarwadi, Tq. and Dist. Osmanabad. Due to non-availability of access road to their fields, an application came to be filed before the Tahsildar under Section 143 of the Maharashtra Land

Revenue Code (for short 'MLRC') and pursuant to the spot inspection drawn on 18.12.2010, the Tahsildar passed an order dated 19.05.2011 directing the opening of a cart way on the boundaries of the block nos.128, 129, 130, 135, 136, 149 to 156 and 127.

Aggrieved by the order dated 19.05.2011 passed by the Tahsildar, the present respondent nos.3 to 10 filed a suit for declaration, injunction and restoration of suit bandh to its original status and for compensation. It was the case of the respondents in the suit that there was a cart way from Northern side of Gut Nos.160 and 161, which was being used by the petitioners as an approach way to their fields and also the petitioners had an approach way through the bandh situated on the fields bearing Gut Nos.122, 123 and 128 and also an access road in the form of the kachcha road.

It was the case of the respondents that, although the petitioners had different approach ways, an application was made before the Tahsildar making a grievance that the old approach way has been closed, which by the order dated 19.05.2011 the Tahsildar issued a direction to clear the same. The suit bearing RCS No.174/2011 was partly decreed and it was declared that the order dated 19.05.2011 issued by the Tahsildar for creating road on the suit bandh situated on the fields of respondent nos.3 to 10 is illegal and the petitioners be directed to restore the suit bandh within a period of two months, while perpetually restraining the Petitioners from using the suit bandh as an approach way or for any other purpose as well as from creating any permanent or semi-permanent road thereon.

Appeal bearing RCA No.15/2013 against the judgment and decree dated 05.12.2011 was filed before the Appellate Court, which came to be dismissed on 13.03.2015, as against which a Second Appeal No.480/2015 was preferred in this Court by the petitioners. During the hearing of the Second Appeal No.480/2015, it was pointed out that, the appellants therein had initiated appropriate proceedings after the decision of the Appellate Court in the year 2015, as such, this Court by order dated 10.02.2016 observed, as the appellants appeared to have taken recourse to an avenue, this Court did not deem it fit to proceed with the Second Appeal and it was open for the parties to take up all such contentions before the concerned authority. By order dated 10.02.2016, the Second Appeal was disposed of, as being not entertained, however, the parties were directed to maintain status quo till the decision of the application before the Tahsildar.

On 21.11.2017, the application filed by the petitioners before the Mamlatdar under Section 5 of the Mamlatdars' Courts Act, 1906 came to be allowed and it was directed that no obstruction should be caused on the existing road situated near the lands bearing Gut Nos.123, 126, 127, 149, 160 and 161. Parallel execution proceedings were initiated by the respondents seeking to execute the order dated 05.12.2012 passed in RCS No.174/2011 in which the impugned order dated 10.06.2019 came to be passed granting liberty to the respondents to restore the suit lands to its original status as decreed.

3. Affidavit-in-reply has been filed on behalf of respondent nos.2-Tahsildar stating that, the action of removal of

the obstruction on the said road is in progress pursuant to the order passed by this Court on 15.06.2019 directing the Tahsildar to personally carry out the inspection of the concerned property and place on record the actual situation prevailing as far as the access and obstruction is concerned.

4. Affidavit-in-reply dated 22.08.2019 has been filed by respondent nos.3 to 9 stating that, the order of the Tahsildar dated 19.05.2011 was passed without notices to the respondents and as such, the same came to be assailed by way of RCS No.174/2011 resulting in decree dated 05.12.2012. The affidavit further states that, once the issue of obstruction of way is adjudicated by the competent Civil Court, then the bar under Section 26(b) of the Mamlatdars' Courts Act, 1906 operates and the subsequent application filed under Section 5(2) of the Mamlatdars' Courts Act, 1906 could not have been entertained.

5. Heard the learned counsel appearing for the parties.

6. Learned counsel for the petitioners submits that, the Doctrine of Merger applies in the present case and as such, the orders of the Trial Court and the Appellate Court merged into the order passed in Second Appeal No.480/2015 and as such the decree of Trial Court has ceased to exist. He would further urge that, the order dated 21.11.2017 passed on the application filed under Section 5 of the Mamlatdars' Courts Act operates and hence, the Executing Court could not have permitted the decree holders to restore the suit lands to its original status by way of execution of the decree dated 05.12.2012. Learned counsel for the petitioners relied upon the following judgments to buttress his submissions:

1. The Commissioner of Income Tax Vs. M/s. Tanaji Farasram Kharawala, AIR 1953 Bom. 887.
2. Commissioner of Income Tax Vs. M/s Amritlal Bogilal & Co., AIR 1958 SC 868.
3. Kunhayahmed and others Vs. State of Keral, (2000) 6 SCC 359.
4. A. V. Papayya Sastry & others Vs. Govt. of A.P. and others, (2007) 4 SCC 221.
5. Central Bank of India Mumbai Vs. Anil Puranmal Bansal & ors., 2016 (3) Mh.L.J. 774.
6. Surindar Pal Soni Vs. Sohal Lal (dead) through L.Rs., (2020) 15 SCC 771.

7. Per contra, learned counsel for the respondents submits that the issue has been adjudicated by the Trial Court, which has attained finality, in view of the fact that in Second Appeal this Court has not deemed it fit to interfere with the decree of the Trial Court, and as such, the Executing Court is right in executing the decree of the Trial Court.

8. I have considered the rival submissions of the parties.

9. The order dated 19.05.2011 passed by the Tahsildar directs the concerned officers i.e. Circle Officer, Talathi, Gram Sevak and the Superintendent of the Land Records to make available the lands as per Option No.2 in accordance with the law. It appears that, the said order is passed under Section 143 of the Maharashtra Land Revenue Code, ("MLRC" for short) which came to be challenged in RCS No.174/2011 resulting in the decree dated 05.12.2015. The said course is permissible in view of the Section

143(4) of the MLRC. The decree of Trial Court came to be challenged before the Appellate Court being R.C.A No 15/2013, which came to be dismissed on 13.03.2015, as against which the Petitioners preferred Second Appeal No 480/2015. In my view, the order dated 10.02.2016 passed by this Court in Second Appeal did not adjudicate the Appeal on merits and was disposed of as it was informed to this Court that alternate avenue has been preferred by the Petitioner. As such, in my view, the order of the Appellate Court dated 13.03.2015 upholding the decree of the Trial Court dated 05.12.2015 attained finality. The Respondent Nos 3 to 10 were justified in putting the decree dated 05.12.2015 in execution, which directed the Petitioners to restore the suit bund to its original state by removing the road created thereon and perpetually restrained the Petitioners from using the suit bund as approach way. The order of the executing Court dated 04.04.2019 directing the Petitioners to remove the road and order dated 10.06.2019 permitting the Respondent Nos 3 to 10 to do so for failure on part of the Petitioners in accordance with the decree of Trial Court cannot be faulted with.

10. As regards the submissions of the learned counsel appearing for the petitioners that, Doctrine of Merger applies and the orders of the Trial Court and the Appellate Court merged into the order passed by this Court in Second Appeal No.480/2015 is concerned, a perusal of the order dated 10.02.2016 in Second Appeal No.480/2015 shows that the proceedings were not decided on merits and as it was informed to this Court that the petitioners have initiated separate proceedings, the parties were permitted to take up all such contentions as are available to them factually and legally before the authorities concerned and this Court did not

deem it fit in proceeding with the Second Appeal. Doctrine of Merger postulates the merger of the Subordinate Forum's decision into the decision of the Appellate or Revisionary Forum modifying, reversing or affirming such decision, by virtue of which the subsequent decision and not the former decision exists in the eyes of law. In the present case, the order dated 10.02.2016 passed in Second Appeal No.480/2015 did not result in the adjudication on merits modifying, reversing or affirming the decision of the Appellate Court and as such, Doctrine of Merger, which is being pressed into the service by the petitioners cannot be accepted.

11. As far as the decisions relied upon by the learned counsel for the petitioners is concerned, there is no quarrel as far with the propositions laid down in the said decisions regarding the Doctrine of Merger, however, in the facts of the present case considering the order passed in Second Appeal No.480/2015, as already observed the Doctrine of Merger does not apply and as such, the decisions does not assist the case of the petitioners.

12. Considering the limited submissions made by the petitioners only as regards the applicability of the Doctrine of Merger, I am not inclined to interfere with the impugned order.

13. Writ Petition is accordingly dismissed.

(SHARMILA U. DESHMUKH)
JUDGE

Later on:-

14. At this stage, request is made for stay of the order for a period of six weeks.

15. The *status quo* granted by this Court by order dated 10.02.2016 in Second Appeal No.480/2015 is continued for a further period of six weeks from today.

(SHARMILA U. DESHMUKH)
JUDGE

Devendra/January-2023