

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1752 OF 2022
WITH CA/14226/2022 IN WP/1752/2022

Sanjay Uttam Dhangar And Another ...Petitioners

Versus

Tukaram Bhika Patil
Deceased Through his Legal Heirs
Sugantabai Tukaram Patil And Others ...Respondents

Mr. V.B. Patil, Advocate for the petitioners.
Mr. S.R. Andhale, Advocate for respondents No. 1A To 1E and 2.
Mr. S.N. Pawde h/f. Mr. A.M. Salok, Advocate for respondents No.
3 and 4.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 23rd MARCH, 2023

ORDER :

1. By this petition filed under Article 226 and 227 of the Constitution of India, the petitioners/original defendants challenge the order passed by learned Civil Judge Junior Division, Raver, below Exhibit-9 in Regular Civil Suit No. 82/2021, thereby allowing the said application.

2. The petitioners filed proceeding No. 10/2019 under section 143 of the Maharashtra Land Revenue Code, 1966, before Tahsildar seeking right of way to approach their field as they claimed that their agricultural land is land locked. Tahsildar

after visiting the spot, conducting panchnama and after recording evidence of the parties, allowed the proceeding and granted way to the petitioners as per the map A-B, mentioned in the order dated 11.06.2021.

3. Respondents No. 1 and 2/original plaintiffs challenged the order of Tahsildar by filing Regular Civil Suit No. 82/2021, thereby seeking mandatory injunction against the petitioners in the suit.

4. Thereafter, plaintiffs by filing application Exhibit-6 under Order 39 Rule 1 and 2 of Code of Civil Procedure, sought injunction against defendants No. 1 to 4 from creating a new way from their agricultural land, pursuant to the order of Tahsildar.

The plaintiffs also filed application Exhibit-9 under section 151 of CPC seeking stay to the order of Tahsildar, dated 11.06.2021.

5. Defendants appeared and resisted the suit by filing written statement and say to the applications filed by the plaintiffs.

6. Upon hearing the parties, Trial Court rejected the application Exhibit-6. By the impugned order application Exhibit-9, filed by the plaintiffs under section 151 of CPC is allowed. The petitioners are aggrieved by this order.

7. Heard the learned advocate for the petitioners, learned advocate for respondents No 1 and 2 and learned advocate for respondents No. 3 and 4. Perused the grounds raised in the petition, documents placed on record and the impugned order.

8. Admittedly, the order passed by Tahsildar is after conducting spot inspection, drawing map and after hearing the parties. In the said order, Tahsildar has specifically observed that the land of the petitioners is land locked and they are entitled for right of way.

9. Prima facie, the map prepared by the Tahsildar at the time of site inspection shows that the land of the petitioners is land locked. In that view of the matter, at this stage, no fault can be found with the order passed by the Tahsildar.

10. While rejecting application Exhibit-6, the Trial Court observed that at this stage it would not be proper to hold

whether the order of Tahsildar is correct or not. It is further observed that, however, till the said order is implemented the defendants No. 1 and 2 have no right to use the said way granted by the Tahsildar. It is further held that if the order passed by Tahsildar is implemented then defendants No. 1 and 2 cannot be prevented from using the said road. It is further held that since order of Tahsildar is not implemented there is no prima facie case and balance of convenience in favour of plaintiffs. Therefore, the Trial Court has rejected the said application.

11. The entire approach on the part of the Trial Court appears to be erroneous in observing that since the order of Tahsildar is not implemented and if the same is implemented the defendants would not be prevented from using the said way. Self contradictory findings are recorded by the Trial Court in the said order.

12. Apart from above, having rejected application Exhibit-6, it was not proper on the part of the Trial Court to allow application Exhibit-9 in which almost same relief is sought, though, in different words. By prayer made in application Exhibit-9, plaintiffs prayed for stay to the order of Tahsildar. This

order is also passed on the same date on which application Exhibit-6 is rejected.

13. Again, in this order self contradictory findings are recorded by the Trial Court stating that the Tahisldar has held that defendants land is land locked, however, it will be matter of evidence as to whether really the said land is land locked. By observing that father of defendants No. 1 and 2 has purchased Gut No. 99 in the year 1997 and since then they are cultivating the said land. Prior to that also approach way to the said land was available. It is further held that even gut No. 93/1 is owned by defendants No. 1 and 2 and both these lands are adjacent to each other. Defendants No. 1 and 2 have not claimed that they do not have approach way to land gut no. 93/1. It is further held that implementation of order of Tahsildar will create a new easement and suit would become infructuous. Therefore, till the evidence is led to show that the land of defendants No. 1 and 2 is really land locked, it would be proper to stay the order of Tahsildar.

14. The Trial Court has misdirected itself in recording aforesaid findings and staying the order passed by Tahsildar by ignoring the settled legal principles on which interim orders are

to be passed. It is ignored that prima facie case in the form of order passed by the Tahsildar is in favour of defendants No. 1 and 2. The balance of convenience is in their favour and irreparable loss would be caused to them if stay is granted.

15. The impugned order passed by the Trial Court is contrary to the ratio in Laxmi Investment Company Private Limited Akola vs. Tarachand Harbilas and others, 1967 Mh.L.J., 970, wherein it is held that:

"12. We may make it clear at this stage that we are strictly confining ourselves to a case where an application to restore a suit to file is dismissed for default and not a case where an ex parte order is passed, for as pointed out in Ramkarandas v. Bhagwandas, different considerations would prevail in such a case. In such a case it may be urged that a remedy under Order IX rule 13 exists and therefore the inherent power under section 151 could not be invoked. In the Supreme Court case to which we have just referred the Supreme Court was concerned with an ex parte decree passed in a summary suit under Order 37 of the Code of Civil Procedure and the question was whether such a decree could be set aside under the inherent power under section 151. The Supreme Court

pointed out that Rule 4 of Order 37 expressly gives power to the Court to set aside the decree passed under the provisions of that Order and therefore there was no scope for resort to section 151 for setting aside the decree. Similarly in another case referred in the arguments before us namely Arjun Singh v. Mohindra Kumar, the Supreme Court was considering a case where an ex parte decree had been passed and the Supreme Court held that "the inherent power of the Court could not override the express provisions of the Law. "If there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Courts or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code."

In view of above ratio, the impugned order cannot be sustained.

16. Learned advocate for respondents No. 1 and 2 supported the impugned order by placing reliance on the decision of learned Single Judge in Writ Petition No. 4359 of 2021, wherein it is held that *'powers exercised under Section*

151 and 152 of the Code of Civil Procedure are for the purpose of rectifying the errors and are meant to advance real and substantial justice to the parties.' There cannot be any dispute about the said proposition, however, in view of ratio of the division bench, the impugned order cannot be sustained.

17. For the aforesaid reasons, the writ petition is allowed in terms of prayer clause 'A'.

18. The impugned order dated 27.11.2021, passed by Civil Judge Junior Division, Raver, below Exhibit-9 in Regular Civil Suit No. 82/2021 is hereby quashed and set aside.

19. At this stage, learned advocate for respondents No. 1 and 2 submits that his clients intend to challenge the order passed below Exhibit-6 by preferring miscellaneous civil appeal to the District Court. They may do so.

20. In view of disposal of writ petition, civil application stands disposed of.

[NITIN B. SURYAWANSHI, J.]