

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 4016 OF 2022.**

1. Bhivaji Santu Daware  
Age: Adult, Indian Inhabitant,
2. Karbhari Arjun Daware,  
Age: Adult, Indian Inhabitant,  
Both residing at and Post village  
Konambe,  
Taluka: Sinnar, District: Nashik .. Petitioners

versus

1. The State of Maharashtra
2. The Deputy Superintendent of Lands  
Record, having its office, Sinnar,  
District: Nashik.
3. The Tahasildar,  
Sinnar, District: Nashik.
4. The Sub Divisional Officer,  
Having its office situated at Niphad,  
District: Nashik.
5. The Additional Collector,  
Having its office situated at Nashik,  
District: Nashik.
6. The Divisional Commissioner,  
Having its office situated at Nashik,  
District: Nashik.

7. The Hon'ble Revenue Minister,  
Having its office situated at  
Mantralaya, Mumbai.
8. The Circle Officer,  
Sonambe, Taluka: Sinnar,  
District:- Nashik.
9. Sudam Nivrutti Daware,
10. Madhukar Nivrutti Daware,
11. Balu Nivrutti Daware  
Respondent Nos. 9 to 11 are all Adults,  
Having residing at and post Konambe,  
Taluka: Sinnar, District: Nashik.. .. Respondents

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**Ms. Poonam Bhosale**, for the Petitioners.  
**Mr. P.P Pujari, AGP**, for Respondent Nos. 1 to 8.  
**Mr. Pandit Kasar**, for Respondent Nos. 9 to 11.

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**CORAM: SANDEEP V. MARNE, J.**

**DATE : 31 AUGUST 2023.**

**ORAL JUDGMENT:**

1. By this Petition, Petitioners challenge order dated 15th December 2020 passed by the Hon'ble Minister, Revenue setting aside the orders dated 12th September 2017 passed by Additional Commissioner and confirming the order dated 29th June 2015 by

Sub Divisional Officer (“SDO”). Respondent Nos.9 to 11 had filed Application under Section 38 of the Maharashtra Land Revenue Code (“the Code”) for ejectment of Petitioners from the encroached portion of land. They relied upon measurement of the land carried on 29th April 2021. Relying on the said measurement, the SDO came to the conclusion that Petitioners had encroached upon the land and therefore directed their ejectment from encroached portion of the land. The Petitioners filed RTS Appeal No. 280 of 2015 before the Additional Collector, Nashik, which came to be allowed by order dated 20th June 2016 on the ground that Regular Civil Suit No. 220 of 2013 concerning the property in question was pending and therefore proceedings under Section 138 could not be conducted.

2. Aggrieved by the decision of the Additional Collector, Respondent Nos. 9 to 11 approached Additional Divisional Commissioner by filing RTS Appeal No. 304 of 2016 which came to be rejected by order dated 12th September 2017. Respondent Nos. 9 to 11 thereafter filed Revision Petition before the Hon’ble Minister under Section 257 of the Code, which came to be allowed by order dated 15th December 2020, setting aside the order of the Divisional Commissioner and Additional Collector and confirming the order passed by the SDO.

3. Ms. Bhosle, the learned counsel for the Petitioner would contend that the SDO erroneously relied upon the measurement allegedly finalised on 29th April 2011. She would invite my attention to application dated 21st November 2011 submitted by Shri Madhukar Nivruti Daware (Respondent No.10) by which he had requested deferment of the measurement proceedings. She would therefore submit that if the measurement were not finalised, it was erroneous on the part of SDO to assume that measurement between the parties has attained finality. She would, therefore, pray for setting aside the order passed by SDO.

4. *Per contra*, Mr. Kasar, the learned counsel appearing for Respondent Nos. 9 to 11 would oppose the Petition and support the order passed by the Hon'ble Minister. He would submit that the document being application dated 21st November 2011, is a forged document, which was never submitted by Shri Madhukar Nivruti Daware (Respondent No.10). He would rely upon the letter dated 23rd April 2012 of Shri Madhukar Nivruti Daware questioning authenticity of any such request made by him for discontinuing the measurement process. He would further submit that the Petitioners never relied upon letter dated 21st November 2011 in any of the proceedings before the Additional Collector,

Divisional Commissioner or the Hon'ble Minister. That, therefore, reliance on letter dated 21st November 2011 cannot now be placed for upsetting the order of the SDO.

5. I have also heard the learned AGP appearing for Respondent Nos. 1 to 8 who would submit that Petitioners have an alternate remedy of filing a Suit under provisions of sub-Section 4 of Section 138 of the Code.

6. After having considered the submissions canvassed by the learned counsels for the parties, it is seen that the SDO has passed order dated 29th June 2015 in exercise of power under Section 138 of the Code which provides for summary ejectment of any person who is found to be wrongfully in possession of any land which has been adjudged in the settlement of a boundary not appertain to his holding. Section 138 of the Code reads thus:

“138. (1) The settlement of a boundary under any of the foregoing

provisions of this Chapter shall be determinative—

(a) of the proper position of the boundary line or boundary marks, and

(b) of the rights of the landholders on either side of the boundary fixed in respect of the land adjudged to appertain, or not to appertain, to their respective holdings.

(2) Where a boundary has been settled as aforesaid, the Collector may at any time summarily evict any land holder who is wrongfully in possession of any land which has been adjudged in the settlement of a boundary not to appertain to his holding or to the holding of any person through or under whom he claims.

(3) An order of ejectment under sub-section (2) shall, subject to the provisions of sub-sections (4) and (5), be subject to appeal and revision in accordance with the provisions of this Code.

(4) Where any person has been ejected or is about to be ejected from any land under the provisions of sub-section (2), he may, within a period of one year from the date of the ejectment or the settlement of the boundary, institute a civil suit to establish his title thereto :

Provided that, the State Government or the Collector, or any Revenue or Survey Officer as such, shall not be made a party to such suit.

(5) Where a civil suit has been instituted under sub-section (4) against any order of ejectment, such order shall not be subject to appeal or revision.

(6) The Collector may at any time make an order for redistribution of land revenue which, in his opinion, should be made as a result of the decision of the appeal or revision, or as the case may be, the suit, and such redistribution shall take effect from the beginning of the revenue year following the date of the order.”

7. Thus, settlement of a boundary is a *sine qua non* for exercise of jurisdiction under Section 138 of the Code. It appears

that before the SDO, Petitioners had not appeared and therefore their defence could not be recorded. In absence of defence on the part of the Petitioners, SDO assumed that the measurement dated 29th April 2021 was finalised. It is on this assumption about settlement of boundaries that the SDO proceeded to exercise the jurisdiction under Section 138 of the Code and passed order dated 29th June 2015 ordering summary ejectment of Petitioners from alleged encroached portion of the land.

8. Aggrieved by the order of the SDO, Petitioners filed RTS Appeal No. 280 of 2015. The main contention raised by Petitioners before the Additional Collector was about pendency of Regular Civil Suit No. 220 of 2013. It is on account of pendency of the said Suit, the Additional Collector proceeded to allow the Appeal by relying upon provisions of sub-Section 5 of Section 138 of the Land Revenue Code. Now it is common ground that RCS No. 220 of 2013 is in respect of the different land altogether. Therefore, mere pendency of RCS No. 220 of 2013 could not have been a ground for the Additional Collector to set aside the order of the SDO. In that view of the matter, the order of the Hon'ble Minister in setting aside the orders of the Additional Collector and Divisional Commissioner cannot be found fault with.

9. However, perusal of the order of the Additional collector would indicate that Petitioners had specifically relied upon letter dated 21st November 2011 (22nd November 2011) in support of their contention that Shri. Madhukar Nivruti Daware had requested for discontinuation of measurement proceedings. Thus, a specific defence was taken before the Additional Collector that there is no settlement of boundries. However, the Additional Collector did not take into consideration the said ground as he proceeded to set aside SDO's order on erroneous ground of pendency of RCS No.220 of 2013. It appears that the issue of submission of letter dated 21st November 2011 was also raised by Petitioners before the Divisional Commissioner as well as the Hon'ble Minister. But the same has not been taken into consideration by both the Authorities essentially because pendency of RCS No.220 of 2013 became the sole determinative factor for both the Authorities while testing the orders of the lower Authorities.

10. It thus appears that there is absolutely no consideration by any of the Authorities about the effect of letter dated 21st November 2011 allegedly addressed by Respondent No.10. It is Mr. Kasar's case that the said letter has been forged and was never submitted by Respondent No.10. This dispute is something which is

required to be determined by the SDO. If indeed Respondent No.10 had submitted a letter dated 21st November 2011, the same would indicate that the measurement proceedings were not finalised. Even otherwise, the SDO is required to institute an enquiry as to whether the boundaries of land have indeed been settled or not. The power of ejectment is drastic in nature and cannot be exercised in a routine manner. It entails serious consequences of dispossessing a person from his/her land. It is therefore axiomatic that power under Section 138 is used in a careful manner after reaching a definitive finding that there is a valid settlement of boundaries. Settlement of boundaries cannot be presumed and the Applicant needs to produce a concrete evidence of a valid order of settlement of boundaries. In the present case, a doubt is cast on the measurement allegedly conducted on 29th April 2021. Therefore the SDO must first reach a satisfaction about valid settlement of boundaries by considering the effect of letter dated 21st November 2011.

11. In this view of the matter, the proceedings are required to be remanded to the SDO. For that purpose, the orders passed by the Additional Collector, Divisional Commissioner and the Hon'ble Minister are required to be set aside.

12. I accordingly proceed to pass the following order:

- a] The order passed by the Hon'ble Minister dated 15th December 2020 as well as the orders passed by the Divisional Commissioner on 12th September 2017 and by the Additional Collector on 20th June 2016, so also the order passed by the SDO dated 29th June 2015, are set aside;
- b] The proceedings bearing Encroachment Application No. 29 of 2013 are restored on the file of SDO, Niphad.
- c] The SDO, Niphad shall institute an enquiry as to whether there has been any settlement of boundaries for the purpose of exercise of jurisdiction under Section 138 of the Code. While doing so, the SDO shall accord due opportunity of hearing to both the sides and follow the principles of natural justice.
- d] Considering the pendency of proceedings for a longtime, it would be appropriate that the SDO decides the issue in an expeditious manner preferably within a period of four months from today;

e] Petitioners as well as Respondent Nos. 9 to 10 shall appear before SDO, Niphad on 12th September 2023 with a copy of this order and it shall not be necessary for the SDO to issue fresh notice of the proceedings to both sides.

13. With the above directions, the Writ Petition is disposed of.

**SANDEEP V. MARNE, J.**