

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

WRIT PETITION NO.3045 OF 2022

(GANGADHAR NAYARANRAO GAWHALE..VS.. SUB-DIVISIONAL OFFICER, NAGPUR (RURAL) &
OTH.)

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

Court's or Judge's orders

Shri M.P.Kariya, Advocate for Petitioner.
Ms Shamsi Haider, A.G.P. for Respondent Nos.1 and 2.
Shri N.S.Khubalkar, Advocate for Respondent No.3.

CORAM : ANIL S. KILOR, J.

DATED : APRIL 18, 2023.

1. Heard.
2. This matter pertains to right of approach way to the agricultural field. The petitioner made an application to the Tahsildar for removal of obstruction, which he has considered under Section 143 of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as "the MLR Code") and allowed the same in favour of the respondent No.3 vide order dated 23/11/2020.
3. The petitioner, feeling aggrieved by the same, preferred an appeal under Section 23(2) of the Mamalatdar's Courts Act, 1906 (hereinafter referred to as "the Act of 1906"), which came to be dismissed vide impugned order dated 31/05/2022 on the ground that the Tahsildar has exercised powers under Section 143 of the MLR Code and remedy by way of appeal is provided under the MLR Code. Hence, this petition.

4. Shri Kariya, learned counsel for the petitioner submits that the application moved by the respondent No.3 was under the provisions of the Act of 1906. However, it was wrongly considered under Section 143 of the MLR Code. He submits that as the application was under the Act of 1906, the appeal was filed under the Act of 1906. However, the Sub-Divisional Officer has wrongly dismissed the appeal observing that it is not maintainable. He, therefore, submits that the impugned order needs to be quashed and set aside.

5. On the other hand, the learned A.G.P. submits that the Sub-Divisional Officer has not committed any illegality or infirmity in law in dismissing the appeal filed under the Act of 1906. It is submitted that as the Tahsildar has exercised the powers under Section 143 of the MLR Code and has observed to that effect in his order, the petitioner ought to have filed an appeal under the provisions of the MLR Code. He, accordingly prays for dismissal of the writ petition.

6. Shri Khubalkar, learned counsel for the respondent No.3 submits that mentioning of wrong provision does not take away the jurisdiction of the authority if the said authority has jurisdiction to entertain such prayer as made in the application. He submits that the Tahsildar has rightly exercised the powers under Section 143 of the MLR Code and is granted right of way to the respondent No.3. It is submitted that the Sub-

Divisional Officer has therefore, rightly held that the remedy of appeal is available to the petitioner under the provisions of the MLR Code and not under the Act of 1906. He, therefore, prays for dismissal of the present writ petition.

7. In light of the rival contentions of the parties, and considering the limited scope of the present writ petition i.e. whether the order passed by the Sub-Divisional Officer, dismissing the appeal filed by the petitioner under the provisions of the Act of 1906 on the ground that it is not tenable, is just and proper, I am not going into the merits of the matter.

8. The Hon'ble Supreme Court of India in the case of *J. Kumaradasan Nair ..vs.. Iric Sohan*, reported in **(2009) 12 SCC 175** has observed that it is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not.

9. In the present matter, though it appears that the application was moved under Section 5 of the Act of 1906, considering the prayer the Tahsildar has rightly treated it under Section 143 of the MLR Code and passed the order in favour of the respondent No.3.

10. Thus, considering the fact that the Tahsildar has treated the said application under Section 143 of the MLR Code, the petitioner ought to have filed an appeal under the provisions of the MLR Code i.e. under Section 247 of the MLR Code. However, the petitioner has filed an appeal under Section 23 of the MLR Code.

11. Under the circumstances, I am of the opinion that the Sub-Divisional Officer has not committed error in dismissing the appeal. Accordingly, I pass the following order.

The Writ Petition is **dismissed**. No order as to costs.

12. If any appeal under the provisions of the MLR Code is filed, while considering the issue of limitation, the Sub-Divisional Officer, shall exempt the time consumed by the petitioner in pursuing this writ petition.

13. At this stage, learned counsel for the petitioner prays for continuation of the interim relief granted by this Court for two weeks more.

14. The learned counsel for the respondent No.3 strongly opposed the said request.

15. Considering the fact that the interim order is in operation since 08/06/2022, it be continued for further two weeks from today and it shall come to an end automatically on expiry of the period of two weeks.

JUDGE

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