

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

WRIT PETITION NO.4105 OF 2018

Gram Panchayat, Akola, through its Secretary and another .Vs. Abdul Jahid Abdul Shahid and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri P.A. Deshpande, Adv. h/f Shri R.L. Khapre, Senior Adv. for the petitioners.

Ms H.N. Jaipurkar, A.G.P. for the respondent No.3/State.

CORAM : ANIL S. KILOR, J.

DATED : 04/07/2023

1. Heard.

2. The rejection of the application under Order VII, Rule 11 of the Civil Procedure Code (CPC) by the 3rd Jt. Civil Judge (S.D.), Akola vide impugned order dated 17.02.2018, is under challenge in this writ petition.

3. The learned counsel for the petitioners, has made following four submissions:

- a) The suit was arising out of a notice under Section 53 of the Maharashtra Village Panchayats Act, 1959 (hereinafter referred as "the Act of 1959") and as the appeal is provided, there is a specific bar to file a suit,
- b) the suit is not maintainable in view of provision of Order 2 Rule 2 of the CPC,

- c) The Court has not considered a plea as regards res judicata,

4. On the other hand, learned A.G.P. supports the order passed by the trial Court.

5. As far as the first submission is concerned, the learned counsel for the petitioners has relied upon the judgment of the Coordinate Bench of this Court in a case of ***Village Panchayat, Antora vs. Wasudeo Ramchandraji Mohod and another***,¹. The Coordinate Bench of this Court while holding that in the matter under Section 53 of the Act of 1959 the jurisdiction of Civil Court stands excluded, has observed thus:

“11... Sub-section (2) of Section 53 provides for a power of the Village Panchayat to remove any encroachment in any open site not being the private property whether such a site is vested in the panchayat or not. As found by me above, there is a total failure on the part of the non-applicants even prima facie for showing that the property is their private property. They have not been able to prove it even remotely except for showing some tax receipts and mutation made in the year 1994 in respect of Kuccha Kotha. However, whether there is an encroachment or not whether it is the private property of the non-applicants; the burden would certainly be on the non-applicants to prove that the suit property is their private property and that it is not an encroachment. That being so, in my opinion, sub-section (2) of section 53 of the said Act gives a power and duty to the applicant Village Panchayat to remove the encroachment. In fact, proviso to sub-section (2) of section 53 was added by amending Act No.38 of 2006 to provide for compulsion on the

1 2014(5) Mh.L.J. 189

Village Panchayat to remove the encroachments. By the amendment, appellate power was conferred on the Commissioner in place of 'Standing Committee' of Zilla Parishad for obvious reasons. It is in this background the letter dated 17.2.2011 notice dated 26.4.2011 were issued to the non-applicants so also resolutions were passed in the Gram Sabha on 25.4.11 and 26.4.2011. Sub-section (3-A) above clearly shows that any person if aggrieved by the action taken under sub-section (2) of section 53, he may within thirty days from the date of exercise of such power, appeal to the Commissioner and after making such enquiry, the Commissioner may pass such orders as it deems necessary. The notices as well as resolutions made by Gram Sabha would clearly "exercise of such powers" occurring in sub-section (3-A) of the Act. Thus, it is clear that the remedy provided by sub-section (3-A) is an appellate remedy against any action taken under sub-section (2) of section 53 of the said Act. It will be also pertinent to note that the Act does not provide for any remedy thereafter i.e. after the exercise of the appellate power by the Commissioner and, in my opinion, the remedy of sub-section (2) of section 53 is in order to check the menace of encroachment everywhere including the villages and that is why the power is given to the Panchayat to follow the procedure and remove the encroachment. The procedure under section 53 of the said Act clearly appears to be summary in nature but still there is remedy provided by sub-section (3-A) of section 53. I have perused the said notice dated 17.2.2011 and 26.4.2011 as well as resolutions dated 25.4.2011 and 26.4.2011. In my opinion, the notices and the resolutions clearly fall within the purview of sub-section (2) of section 53 of the said Act. It is thus clear that provisions of section 53 (2) and (3-A) are squarely attracted in the instant case and, therefore, the jurisdiction of the Civil Court stands excluded."

6. On perusal of the above referred observations, there is no element of doubt that this Court has categorically held that, the jurisdiction of the Civil Court stands excluded in view of the provisions of Sections 53(2) and 53(3-A) of the Act of 1959.

7. At this stage, therefore, it would be appropriate to refer to Section 53 of the Act of 1959 which reads thus:

“53. Obstructions and encroachments upon public streets and open sites. -

(1) Whoever, [within the limits of the gaathan area of the village]:-

(a) builds or sets up any wall, or any fence, rail, post, stall, verandah, platform, plinth, step or structure or thing or any other encroachment or obstruction, or

(b) deposits, or causes to be placed or deposited, any box, bale, package or merchandise or any other thing, or

(c) without written permission given to the owner or occupier of a building by a panchayat, puts up, so as to protect from an upper storey thereof, any verandah, balcony, room or other structure or thing.

in or over any public street or place, or in or over upon any open drains, gutter, sewer or aqueduct in such street or place, or contravenes any conditions, subject to which any permission as aforesaid is given or the provisions of any by-law made in relation to any such projections or cultivates or makes any unauthorised use of any grazing land, not being private property, shall, on conviction, be punished with fine, which may extend to fifty rupees and with further fine which may extend to five rupees for every day on which such obstruction, deposit, projection, cultivation or unauthorized use continues after the date of first conviction for such offence.

(2) The panchayat shall have power to remove any such obstruction or encroachment and to remove any crop unauthorisedly cultivated on grazing land or any other land, not being private property, and shall have the like power to remove any unauthorized obstruction or encroachment of the like nature in any open site not being private property, whether such site is vested in the panchayat or not, provided that if the site be vested in Government the permission of the Collector or any officer authorized by him in this behalf shall have been first obtained. The expense of such removal shall be

paid by the person who has caused the said obstruction or encroachment and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter IX [It shall be the duty of the panchayat to remove such obstruction or encroachment immediately after it is noticed or brought to its notice, by following the procedure mentioned above.]

[(2A) If any panchayat fails to take action under sub-section 2 [* *] the Collector suo motu or on an application made in this behalf, may take action as [provided in that sub-section, and submit the report thereof to the Commissioner]. The expense of such removal shall be paid by the person who has caused the said obstruction or encroachment or unauthorised cultivation of the crop and shall be recoverable from such person as an arrear of land revenue.]*

(3) The power under [sub-section (2) or sub-section (2A)] may be exercised in respect of any obstruction, encroachment or [unauthorised cultivation of any crop] referred to therein whether or not such obstruction, encroachment or [unauthorised cultivation of any crop] has been made before or after the village is declared as such under this Act, or before or after the property is vested in the panchayat.

[(3A) Any person aggrieved by the exercise of the powers by the panchayat under sub-section (2) or (3) may, within thirty days from the date of exercise of such powers, [appeal to the Commissioner and the Commissioner, after making such enquiry as he thinks necessary, shall pass such orders as he deems necessary] after giving such person a reasonable opportunity of being heard.]

[(3B) Any order made by the Collector in exercise of powers conferred on him under sub-section (2A) or (3) shall be subject to appeal and revision in accordance with the provisions of the Maharashtra Land Revenue Code, 1966.]

(4) Whoever, not being duly authorised in that behalf removes earth, sand or other material from, or makes any encroachment in or upon an open site which is not private property, shall, on conviction, be punished with fine which may extend to fifty rupees, and in the case of

an encroachment, with further fine, which may extend to five rupees for every day on which the encroachment continues after the date of first conviction.

(5) Nothing contained in this section shall prevent the panchayat, from allowing any temporary occupation of, or erection in, any public street on occasions of festivals and ceremonies, or the piling of fuel in by-lanes and sites for not more than seven days, and in such manner as not to inconvenience the public or any individual or from allowing any temporary erection on, or putting projection over, or temporary occupation of, any such public street or place for any other purpose in accordance with the by-laws made under this Act.”

8. Thus, it is evident that, Section 53 of the Act of 1959 relates to obstructions and encroachments upon public streets and open sites. Under Sub-Section 2 of Section 53, the panchayat has power to remove any such obstruction or encroachment and to remove any crop unauthorisedely cultivated on grazing land or any other land, not being private property, and also have the power to remove any unauthorized obstruction or encroachment in any open site not being private property.

9. Sub-Section 2 of Section 53 of the Act of 1959 says that, if panchayat fails to take action under Sub-Section 2 the Collector *suo motu* or on an application made may take action of removal of such obstruction or encroachment.

10. Sub-Section 3 of Section 53 deals with appeal to the Commissioner against exercise of powers by the panchayat by Sub-Section 2 or 3.

11. In the circumstances, with due respect, I am not agreeable with a view taken by the Co-ordinate Bench of this Court in the case of *Village Panchayat Antora* (Supra) for the reasons that, in case, a person claims ownership over the land in dispute and on issuance of such notice under Section 53 of the Act of 1959, the jurisdiction of the civil Court will be outstayed and the appellate authority under Section 53(a) of the Act of 1959 also cannot decide the title. Thus, holding that the jurisdiction of civil court stands excluded in view of provision of Section 53(2)(3-a) of Act of 1959 would amount to taking away the right to claim title over the land in dispute and get it adjudicated through the Civil Court.

12. Section 59 of the Act of 1959 deals with decision of claims to property by or against panchayat. Sub-Section 1 says that, in any village where any property or any right in or any property is claimed by or on behalf of panchayat, or by any persons against the panchayat, it shall be lawful for the Collector to pass an order to decide the claim after formal enquiry.

13. Sub-Section 2 of Section 59 of the Act of 1959 says that, any suit instituted after one year from the date of communication of such order of the Collector or the order passed by final appellate authority shall be dismissed.

14. Similarly, language of Section 180 of the Act of 1959 which relates to bar of action against panchayat etc, and previous notice before institution, does not suggest or indicates exclusion of jurisdiction of the Civil Court in view of provision of Section 52 and 53(3-a) of the Act of 1959.

15. Undisputedly, the above referred provisions have not taken into consideration by the Co-ordinate bench in the case of *Village Panchayat Antora* (Supra).

16. As far as, the ground raised as regards the Order 2 Rule 2 of the CPC is concerned, it is pointed out by the petitioners that, the said ground was raised in Paragraph No.4 of the application. However, after going through the Paragraph 4 and the language of the Order 2 Rule 2 of the CPC, it cannot be said that there was any ground raised by the petitioners in his application as regards Order 2 Rule 2 of the CPC.

17. Further the submission of the petitioner is that, the point of res-judicata was not properly decided. Whereas, in Paragraph 12 of the impugned order, the Court has categorically observed that, in earlier suit and the present suit, the relief claim and cause of action are different. Thus, the Court has rightly rejected the submission of the

petitioner that the suit is not maintainable as res-judicata will not apply to the present suit.

18. In the circumstances, I do not find any merit in the present petition, the writ petition is **dismissed**.

JUDGE