

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.772 OF 2019

PETITIONERS :-

Mahadeo Devaji Mahakulkar (dead)
through legal representatives:-

1. Tulsabai Mahadeo Mahakulkar, Aged 65 years, Occup. Agriculturist, R/o Vegaon, Tah. Maregaon, Dist. Yavatmal.
2. Purushottam Mahadeo Mahakulkar, Age 40 years, Occup. Agriculturist, R/o Vegaon, Tah. Maregaon, Dist. Yavatmal.
3. Tai Diwarkar Durge, Age 42 years, Occup. Housewife, R/o At Post Narsala, Tah. Maregaon, Dist. Yavatmal.
4. Lila Ramesh Virutkar, Age 48 years, Occup. Housewife, R/o Kanida, Tah. Maregaon, Dist. Yavatmal.
5. Shila Sadashiv Pimpalshende, Aged 40 years, Occup. Housewife, R/o Chichmandal, Tah. Maregaon, Dist. Yavatmal.

...VERSUS...

RESPONDENTS :-

1. Waman Uddhaorao Gaurkar, aged 60 years, Occup. Business, R/o Wegaon, Tah. Maregaon, Distt. Yavatmal.
2. Additional Commissioner, Amravati Division, Amravati.
3. Additional Collector, Collectorate Office, Yavatmal.

4. Sub Divisional Officer, Sub-Division Office, Wani Tah.Wani, Yavatmal Distt.Yavatmal.

5. Naib Tahsildar, Maregaon, Tah.Maregaon, Yavatmal, Dist.Yavatmal.

Mr.N.B.Bargat, counsel for the petitioners.
Mr.Abhay Bhide, counsel for respondent No.1.
Mr.S.M.Ghodeswar,AGP for respondent Nos.2 to 5.

CORAM : MRS.VRUSHALI V. JOSHI, J.

DATED : 23/02/2023

J U D G M E N T:-

(1) Heard Mr. N.B.Bargat, learned counsel for the petitioners, Mr. Abhay Bhide, learned counsel for respondent No.1 and Mr. S.M.Ghodeswar, learned Assistant Government Pleader for respondent Nos.2 to 5.

(2) **Rule.** Rule made returnable forthwith. Heard finally by consent of the learned counsel appearing for the parties.

(3) The original petitioner has challenged the order passed by the Additional Commissioner, Amravati in Revision Application No.13/RTS-62/Wegaon/2009-2010. The original petitioner is the owner of the property situated in Mouza Wegaon,

Tq.Maregaon, District Yavatmal, bearing survey No.33/1 (old) 225 (new) total area 3.00 H.R. The name of the father of the respondent No.1 is mutated by the Naib Tahsildar in the revenue record though the Regular Civil Appeal No.24 of 2003 filed by the original petitioner was in favour of the original petitioner. The father of the respondent No.1 tried to dispossess the original petitioner in the year 2003 and therefore, he has filed this Civil Suit and the injunction was granted in favour of the original petitioner. Naib Tahsildar has mutated the name of father of the respondent No.1 without conducting any enquiry and without giving any opportunity to the original petitioner. The name of father of respondent No.1 (Uddhao Gaurkar) is mutated for 1.79 H.R land out of total 3.00 H.R. land, bearing Survey No.225 and also mutated the name in Gao Namuna-12 of the revenue record. The said order was challenged by the original petitioner by filing Revenue Appeal No. RTS-64/13/2007-2008 before the S.D.O., Wani. After hearing both the parties, and observing specifically that father of respondent No.1 has no any right, title and interest in respect of the said land set aside the order passed by the Naib Tahsildar on 02.01.2008.

(4) Being aggrieved by the said order, the respondent No.1 had filed the revenue appeal before the Additional Collector Yavatmal bearing No.RTS No.62/14/2008-2009 Mouza Wegaon. The Additional Collector after hearing both the parties, dismissed the appeal on 19.11.2009. Thereafter, respondent No.1 had challenged the said order before the Additional Commissioner, Amravati Division, Amravati by filing Revenue No.13/RTS-62/Waygaon/2009-2010. In the review, contrary view was taken by the Additional Commissioner and allowed the review in favour of the respondent No.1.

(5) The learned counsel for the petitioners has urged that the learned Additional Commissioner has disturbed the concurrent findings given by the authorities below. The respondent No.1 has challenged the order passed by the Civil Judge Junior Division before the learned Ad-hoc District Judge-1 Kelapur, by filing RCA No. 9 of 2006. Leaned Ad-hoc District Judge-1 Kelapur has dismissed the said appeal. The judgments of the Civil Courts are in favour of the original petitioner. In Civil Suit and Civil Appeal, the observations are made that the original petitioner is in possession of the suit property. The order passed by the Naib Tahsildar is without conducting any enquiry, without giving any

opportunity of being heard and mutated the name of the respondent No.1 in Revenue Record. Hence, prayed to quash and set aside the order passed by the Additional Collector, Amravati in Revision Application.

(6) The learned counsel for respondent No.1 has stated that the suit filed by the original petitioner is for injunction, it is not for declaration. The Additional Commissioner has rightly observed that considering the spot inspection. The respondent No.2 has observed that the respondent No.1 was found in possession of the suit property. It is not the case for consideration of title. The appeal filed by the respondent No.1, which is dismissed, is challenged before the High Court. The substantial question of law is framed. The order passed by the Appellate Court is stayed. In such a situation, it is not proper to disturb the revenue entry, which is already taken by the Additional Commissioner. Hence, prayed to reject the application.

(7) On perusal of the order passed by the Tahsildar, it appears that the Tahsildar has not followed the procedure before taking the entry of the respondent No.1 in revenue record. Respondent No.1 is permissive possessor of the suit property.

According to him, since, 2003-2004, his name is mutated in revenue record and therefore, he is in possession and owner of the suit property.

(8) Learned counsel appearing for the petitioners has placed reliance upon the judgment in the case of ***Narayan Laxman Patil Vs. M/s.Gala Construction Co.PLtd. and ors. reported in 2015(6)ALL MR 928(S.C.)***, wherein, the Hon'ble Supreme Court in paragraph Nos.18 and 19 has observed as follows:

“18. It is thus clear that to exercise the right under section 148 read with Sections 149 and 150 of the Code for entering one's name in the Record of Rights, the applicant has to be a holder, occupant, owner, mortgagee or tenant. Such a right is also available to a person acquiring interest in the property by succession, survivorship, inheritance, partition, purchase mortgage, gift, lease or otherwise. We fully approve the view taken by the Bombay High Court in the aforesaid decision. The appellant claimed that he along with others is in possession of the suit land for the last 15-20 years and, therefore, his claim was required to be entered in the “Other Rights” column. This contention has been rejected by the Sub-Divisional Officer as well as by the Deputy Collector (Appeals) but confirmed by the Additional Commissioner. Merely a holder or occupant does not meet the requirements of law for exercising such a right. Section 2(12) of the Code, as

reproduced hereinabove, makes it clear that to be a “land holder” or “holder of land” means to be lawfully in possession of land, whether such possession is actual or not and as per Section 2(23) “occupant” means a holder in actual possession of unalienated land. It was, therefore, necessary for the appellant to prove that his possession or occupation over the suit land was lawful or he had come in possession by a legal conveyance/title or any other instrument like receipt etc. to which the Respondent No. 1 was a party or at its instance. It is also not the case of the appellant that he has perfected his title over the land in question by way of adverse possession.

19) Merely saying that the Respondent No. 1 or the original owner did not object at any time to the possession, does not make his possession lawful, even if it is accepted that he was in possession. The appellant has to prove his title of possession by pointing out that it was lawful and if such requirement could not be proved, mutation entry is required to be cancelled. Recording the name of the appellant along with six others in the other rights column merely on the basis of possession is nothing short of perversity and unless the officer concerned was satisfied that the said possession was lawful such an entry could not have been made irrespective of whether the original owners appeared and contested the plea and more so when the officer was performing a statutory duty. When the statute states that a duty has to be performed or an enquiry has to be conducted in a particular manner, it is well settled, it has to be done in that manner alone and it was necessary for the Tehsildar to ensure that the requirements

of the Code were satisfied by the petitioners' predecessor".

(9) In view of the observations made by Hon'ble Apex Court, the respondent No.1 has to produce on record something to prove that he is in lawful possession.

(10) The ownership of the original petitioner by virtue of gift deed is not denied by the respondent No.1. The orders passed by the S.D.O. and the Additional Collector are in favour of the original petitioner. Moreover, the Civil Court is also in favour of the original petitioner. Both the Courts below observed that the original petitioner is in possession of the suit property. Though the Additional Commissioner has observed about the spot report, but when the inspection was taken is not mentioned. The initial order passed by the Naib Tahsildar is without any spot inspection. He relied only on the entries in cultivator clause. The opportunity was not given to the original petitioner. Considering the concurrent findings in favour of the original petitioner, the order passed by the Additional Commissioner allowing the Review is required to be quashed and set aside. Hence, the Writ Petition is allowed and the following order is passed:-

The order passed by the Additional Commissioner, Amravati on 21.04.2012 is hereby quashed and set aside and the order passed by the Naib Tahsildar dated 02.01.2008 is also quashed and set aside.

Rule is made absolute in the above terms with no order as to costs.

JUDGE