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wp 11135.21.odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11135 OF 2021

Shantappa s/o. Gurunathappa Tolmare,
Age 58 years, Occ. Agri.
R/o. Taka, Tq. Ausa,
Dist. Latur.

.. Petitioner.

1. The State of Maharashtra
through
Sub-Divisional Officer, Ausa Renapur,
Taluka Ausa, Dist. Latur.
2. The Tahsildar,
Tahsil Office, Ausa, Tq. Ausa, Dist. Latur.
3. Annarao s/o. Kashinath Patil,
Age 68 years, Occ. Agri.
R/o. Chincholi (Kajale) Tq. Ausa,
Dist. Latur.

Respondents.

Mr. C.D. Birajdar, Advocate for petitioners
Mr. S.P. Urgunde, Advocate for respondent No.3
Mr. K.B. Jadhavar, AGP for respondent Nos. 1 and 2.

CORAM : S.G. CHAPALGAONKAR, J.

DATE :- 20th AUGUST, 2024.

JUDGMENT :-

The petitioner impugns the order dated 23.4.2019 passed by the Mamlatdar/Tahsildar in case No. 2017/JAMA/KAVI-357, as well as judgment and order dated 18.8.2021 passed by the Sub Divisional Officer, Ausa-Renapur, in case No. 2019/ROR/A-30.

2. Mr. C.D. Birajdar, learned advocate for the petitioner submits that the esp No.3 approach the Mamlatdar/Tahsildar under Section 5 of the Mamlatdar Courts Act claiming that he holds agricultural land in Gat No. 39. There is customary way to access his land from petitioner's land bearing Gat. No.38 situated at village Chincholi (Kajale) Taluka AUSA, Dist. Latur. According to respondent No.3, petitioner has created obstruction in use of said customary way. Hence, cause of action arose to approach the Mamlatdar. Mr. Birajdar would submit that learned Tahsildar allowed said application in absence of any material to accept the contention of respondent No.3. He would submit that the learned Tahsildar relied upon the affidavits of the witness relied upon by the respondent No.3, without giving opportunity to the petitioner to cross examine them. He would further submit already civil court has adjudicated rights of respective parties in R.C.S. No. 280 of 2004. The decree of perpetual injunction has been passed in favour of the petitioner thereby restraining the respondent No.3 from causing obstruction in peaceful possession of the petitioner on the land Gat No. 38. The Mamlatdar has ignored the decree and passed a cryptic order thereby granting application of respondent No.3.

4. Mr. S.P. Urgunde, learned advocate for respondent No.3 would support the impugned order. He would submit that in pursuance of the application filed by respondent No.3, the Tahsildar had caused spot inspection which records existence of customary way from Gat No. 17 and 38 up to Gat No. 39 and same has been disturbed by owners of Gat NO. 38 and 17. Further, they have raised construction to obstruct the way. Mr. Urgunde would submit that the decree in civil suit is passed long back in the year 2008. The present proceeding is lodged on the

basis of fresh cause of action claiming right to use customary way. Therefore, said decree would not be an impediment to exercise jurisdiction under Section 5 of the Mamlatdar Courts Act.

5. Having considered submissions advanced, and after going in to the documents tendered into service, it can be observed that the respondent No.3 filed application under Section 5 of the Mamlatdar Courts Act dated 11.7.2017 and claimed customary way from Gat No. 37 and 38. Pertinently, the application is not duly verified and same is also not in conformity with the provisions of Mamlatdar Courts Act. It is true that Tahsildar is empowered to record verification of the applicant and require rectification of defects. However, no such efforts appears to have been taken by the Mamlatdar, in terms of Section 7 to 15 of the Mamlatdar Courts Act. The Mamlatdar is required to personally cause spot inspection. However, from the panchanama, it is not discernible that inspection is personally caused by the Mamlatdar/Tahsildar. Panchanama specifically records that the respondents have refused to sign the panchanama as they were not in agreement with the contents.

6. Perusal of the impugned order dated 23.4.2018 refers to spot inspection report as well as affidavits of several persons relied upon by respondent No.3. However, statements of said persons are not recorded in proceeding nor they were permitted to cross-examined by the petitioner. Even the effect of decree passed in R.C.S. No. 280 of 2004 is not considered while granting relief under Section 5. The S.D.O. also reiterated and affirmed the conclusions drawn by the tahsildar without application of mind. In that view of the matter, the impugned orders can not be sustained in law, being not in conformity with the procedure prescribed under the Mamlatdar Courts Act.

6. At this stage, Mr. Birajdar relies upon the judgment of this Court in the matter ***Sudhir Yashwant Dhangade vs. Ankush Kashiram Bole and others reported in 2019(1) All. M.R. 825***, particularly, in para. 10 and 11, which read thus :-

“10. It is thus evident that the Act specifically confers powers on the Mamlatdar to record evidence. Hence, the Court presided over by the Mamlatdar, would be a 'Court' within the meaning of [Section 3](#) of the Indian Evidence Act and provisions of [Section 135](#), [136](#), [137](#) and [138](#) of the Indian Evidence Act would be applicable to the proceedings under [Section 5](#) of Mamlatdars Court Act.

11. In the instant case, the records reveal that the Mamlatdar has recorded statements of the respondent no.1 and his witnesses. In view of applicability of the provisions of [Section 135](#), [136](#), [137](#) and [138](#) of the Indian Evidence Act to the proceedings under [Section 5](#) of the Mamlatdars Court Act, the petitioner had right to cross examine the respondent no.1 and his witnesses. The records reveal that the learned Mamlatdar had not given an opportunity to the petitioner to cross examine the respondent no.1 and his witnesses. Suffice it to say, right of cross examination being legal right, the petitioner was not required to file any application but it was the obligation of the statutory authority recording the evidence to afford such opportunity. In the instant case, no such opportunity was given.

7. Applying the aforesaid principles of law, it was obligatory on the part of the Mamlatdar to permit cross-examination of witnesses relied upon by respondent No.3 to the petitioner. In present case, it appears that the Mamlatdar has failed to adhere with the aforesaid requirement. Therefore, it is necessary to remit the matter back to the Mamlatdar, to decide the application submitted by respondent no.3 afresh by following due process of law in conformity with Sections 5 to 15 of the Mamlatdar Courts Act.

8. Hence, the following order :-

ORDER

[a] Writ petition is partly allowed;

[b] Impugned order dated 23.4.2019 passed by the Mamlatdar/Tahsildar in case No. 2017/JAMA/KAVI-357, as well as judgment and the order dated 18.8.2021 passed by the Sub Divisional Officer, Ausa-Renapur, in case NO. 2019/ROR/A-30, are quashed and set aside;

[c] The matter is remitted back to the Tahsildar/Mamlatdar to take afresh decision on the application filed by respondent no.3 in tune with Sections 7 to 15 of the Mamlatdar Courts Act, keeping in mind the observations made above.

[d] Parties to appear before the Mamlatdar on 30th August, 2024.

[e] The Mamlatdar shall decide the proceeding within a period of six months from the date of appearance of parties before him, in accordance with law.

[f] Pending hearing and final disposal of the application before the Mamlatdar, the parties shall maintain status-quo as on today.

[S.G. CHAPALGAONKAR]
JUDGE

grt/-