



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11821 OF 2022

Arun Gorakshanath Tambe And Another

VERSUS

Rajendra Janardan Tambe And Others

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Mr. V. S. Palsikar, Advocate for the Petitioner

Mr. N. D. Sonavane, Advocate for Respondent Nos. 1 & 2

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CORAM : R.M. JOSHI, J

DATE : JULY 04, 2024

PER COURT :

1. Original Defendants in RCS No. 468/2021 take exception to the order passed by the District Judge – 1, Vaijapur in MCA No. 12/2022 whereby following order is passed:

- (i) The M.C.A. No. 12/2022 is hereby allowed.
- (ii) The impugned order dated 20-01-2022 passed below Exh.5 in R.C.S. No. 468/2021 passed by the learned Jt. Civil Judge Sr. Division, Vaijapur, is hereby set aside.
- (iii) The temporary injunction application Exh.5 in R.S.C. No. 468/2021 pending on the file of Jt. Civil Judge Sr. Division, Vaijapur, is hereby allowed.
- (iv) The defendants are hereby restrained from creating new way from the area of

suit property gut no. 166 belongs to plaintiffs till disposal of suit R.C.S. No. 468/2021.

- (v) The R & P. be returned back to learned Trial Court.

2. The facts as they appear from the record indicate that Petitioners since decades are using customary way through Nalah (stream) which is situated to western side of their lands. It is alleged that said obstruction has been called by digging way with help of JCB. Initially an application is filed on 25.06.2019 before Tahsildar to claim that way is from stream. Petitioners have moved an application before Tahsildar for the way to go to his land bearing Gut no. 165. Thereafter detailed application came to be filed in Rasta case no. 23/2019 contending that there is way from the western side of nala for going gut no. 165. This proceeding is entertained by Tahsildar under Section 5 of the Mamlatdar's Courts Act, 1906. This application was opposed by the Respondents by filing say. Panchnama was drawn of the spot. On the basis of the contentions of both sides, panchnama drawn. Tahsildar passed order dated 18.10.2021 whereby it is

held that the Respondents herein have caused obstruction to the way available for the Petitioners and it was directed to remove the said obstruction. Thereafter, Respondents filed R.C.S. No. 468/2021 making grievance that under the guise of order passed by Tahsildar dated 18.10.2021, new way is sought to be created by Petitioners herein. It is also alleged that owner of Gut No. 166 was not joined as party to the said proceedings. Similarly, prayer is made in the suit to declare order passed by Tahsildar to be illegal. An injunction was sought against creating new way from Gut No. 166. The said application Exh. 5 was dismissed by the Trial Court. Against the said order, MCA No. 12/2022 is filed which has resulted into passing of the impugned order whereby during the pendency of RCS No. 468/2021 Defendants i.e., Petitioners herein are restrained from creating new way from the area of suit property gut no. 166.

3. Learned Counsel for the Petitioners submit that having regard to the contention of the Respondents before the Trial Court it is clear that the intention of the Respondents is to restrain Petitioners from

using the way which is advisable and used by them for years together. It is his submission that Respondents would abuse the order of injunction granted by the District Court whereby the Defendants are restrained from creating new way. It is his submission that initial application filed by the Petitioners before Tahsildar stating that the road goes through nala is not retracted in the application filed subsequently and it is only explained that the Petitioners are using the said road which is towards western side of the nala. It is his further submission that if the order impugned is allowed to continue, prejudice and irreparable loss will cause to them. It is also argued that the order passed by Tahsildar has already been executed and hence, there is no question to grant injunction against Petitioners.

4. Learned Counsel for Respondents submitted that stands taken by the Petitioners with regard to the exact way which he claims through the agricultural land of Respondents are inconsistent. It is his submission that initially way is claimed through nala and later on it is changed to be way from the west side of nala. On

this amongst other submissions, impugned order is supported by Respondents.

5. At the outset, it needs to be recorded that the learned District Judge – 1 while passing impugned order has restrained Defendants from creating new way from suit property bearing Gut No. 166. The said order is passed on the basis of apprehension of the Respondents that taking disadvantage of the order passed by the Tahsildar dated 08.10.2021 the Defendants are likely to create a new way illegally from the suit property.

6. At this stage, it would be necessary to consider provisions of Mamlatdar's Courts Act. Section 5(1)(a) of the Act provides for empowering Tahsildar to remove any impediment/obstruction caused to the flow of channel of water to give possession of agricultural land to dispossessed illegally or to restore use of water. Sub-section (2) enables Tahsildar to pass order of injunction against person who causes obstruction to use of land etc. It is thus clear that unlike provisions of Section 143 of Maharashtra Land Revenue

Code Tahsildar cannot direct creation of way even from boundaries of agricultural lands of others.

7. In the instant case, order passed by Tahsildar shows that it was directed to remove obstruction caused on the way used by Petitioners from going to their land bearing Gut No. 165. Learned District Judge after taking into consideration the procedure adopted by the Tahsildar as well as on going through the panchnama drawn for that purpose, have recorded *prima facie* findings that the Tahsildar, Vaijapur has passed order directing to remove obstructions of Plaintiff from the way of Defendants. It is also recorded that Tahsildar himself visited spot on 16.07.2021 and panchnama was prepared. It is further observed that the copy of the panchnama is not produced on record but panchnama dated 02.09.2021 is made part of the record while passing of the said order. It is further observed that perusal of the panchnama shows that during the visit of Tahsildar did not notice any obstruction from the side of Plaintiffs/Respondents herein with JCB as alleged.

8. Learned District Judge has also taken note of

the fact initially on 25.06.2019 application was made to Tahsildar with averment that way is through river and later on it is changed to be from eastern side of the land of Respondents. Thereafter, photographs placed on record were considered to observe that from western side of stream there are big trees and that there is no material to show that the way is obstructed with use of JCB.

9. While passing impugned order District Judge has taken into consideration law laid down by this Court in the judgments referred therein to the effect that orders passed by Authority under Mamlatdar's Courts Act are not final and Civil Court is not bound by these orders. It is also held that while passing order Tahsildar has not followed principles of natural justice. Finally it is held that *prima facie* Petitioners herein have failed to show that from eastern boundary of Plaintiffs/Respondents herein, there is old way which was obstructed with help of JCB.

10. From order impugned, this Court fails to understand as to how the right of Petitioners in

respect of any existing way is affected. In the facts and circumstances of the case, learned District Court was perfectly justified in restraining the parties from creating any new way. As such, no interference is called for in the order impugned in exercise of writ jurisdiction for want of any perversity therein.

11. In view of the above, Petition stands dismissed.

(R. M. JOSHI, J.)

Malani