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wp 15493.23 .r odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 15493 OF 2023

1. Uttam S/o. Baburao Bhadange,
Age 67 years, Occ. Agril,
R/o. Rampur, Tq. Shrirampur,
Dist. Ahmednagar.

2. Dipak S/o. Uttam Bhadange,
Age 24 years, Occ. Agril.
R/o. Rampur, Dist. Shrirampur,
Dist. Ahmednagar.

.. PETITIONERS.

VERSUS

1. The State of Maharashtra
through its Sub Divisional Officer,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

2. Tahsildar, Shrirampur,
Tq. Shrirampur, dist. Ahmednagar.

3. Sakharam @ Sakhahari s/o. Baburao Bhadange,
Age 65 years, Occ. Agril.
R/o. Rampur, Tq. Shrirampur,
Dist. Ahmednagar.

4. Dinkar s/o. Baburao Bhadange,
Age 63 years, Occ. Agril.
R/o. Rampur, Tq. Shrirampur,
Dist. Ahmednagar.

5. Sulochana W/o. Uttam Bhadange,
Age 63 years, Occ. Agril.
R/o. Rampur, Tq. Shrirampur,
Dist. Ahmednagar.

.. RESPONDENTS.

Mr. K.N. Shermale, Advocate for the petitioners.
Mr. K.B. Jadhavar, AGP for respondent Nos. 1 and 2.

Mrs. S.M. Zaware, Advocate for respondent Nos. 3 and 4.

CORAM : S.G. CHAPALGAONKAR, J.

RESERVED ON : 3rd JULY, 2024.

PRONOUNCED ON : 15th JULY, 2024.

JUDGMENT:-

1. Heard. Rule. Rule made returnable forthwith. Heard finally by consent of learned advocates appearing for the parties. The petitioner impugns the order dated 14th August, 2023 passed by S.D.O. Shrirampur in Revision Application No. 348 of 2022, thereby confirming the order dated 3rd October, 2022 passed by Tahsildar Shrirampur in Rasta Case No. 223 of 2021.

2. Mr. K.N. Shermale, learned advocate for the petitioners submits that petitioners are holding agricultural land in Gat No. 33. Respondent Nos. 1 and 2 are also claiming ownership of part of land in Gat No.33. They filed application under Section 5 of the Mamlatdar Courts Act raising the claim that they holds 2 Hectare 73 R land, which is the ancestral property. According to them joint family property is yet to be partitioned by metes and bound among family members. The Regular Civil Suit filed by them is pending for partition and separate possession. Respondent Nos. 3 and 4 claims that they are having a cart road to approach their lands from petitioner's land but petitioner has closed access by creating obstruction. The learned Tahsildar, without evidence as regards existence cart way and alleged obstruction by petitioner, mechanically allowed the application granting cart way, as claimed. The

learned S.D.O. confirmed the order without appreciating the objections raised by the petitioner.

3. Mr. Shermale submits that respondents are asking way from the center of the land and not from the boundary of Gat number. Neither such road was in existence at any point of time, nor can such road be granted. He would further point out that the petitioners have filed R.C.S. No. 168 of 2023. The civil court granted temporary injunction and directed parties to maintain status-quo vide order dated 28.6.2023. Said order is intact till this date as no challenge is raised by the respondents. He further points out that respondent Nos. 3 and 4 have also filed R.C.S. No. 160 of 2020 claiming relief of partition and separate possession in respect of the very same property and claimed joint possession over the suit property. In these circumstances, their case as regards to the existence of customary way can not be accepted.

4. Per contra, Mrs. S.M. Zaware, learned advocate for respondent Nos. 3 and 4 submits that although partition by metes and bounds was not effected, petitioner and respondent Nos. 3 and 4 are cultivating their independent shares as per the family arrangement. The cart way was available for ingress and egress of respondent Nos. 3 and 4 to approach Naur Hadgaon Road, which is on eastern side of the land of the petitioners. Enraged by claim of respondent Nos. 3 and 4 for partition, petitioner closed the existing cart way and sown Maize seeds. The concurrent findings have been recorded by authorities holding obstruction by the petitioners. Petitioners have already filed suit challenging the order of Mamlatdar. Therefore, no interference is called for in exercise of writ jurisdiction of this Court.

5. Having considered submissions advanced and after going through the documents tendered into service by the respective parties, apparently, respondent Nos. 3 and 4 have filed proceeding invoking jurisdiction under Section 5 of the Mamlatdar Courts Act 1906, seeking removal of alleged obstructions created by the petitioners on customary way, which takes them to Naur-Hadgaon Road through land Gat No. 33. Respondent Nos 3 and 4 claims that the customary way from East West direction was available. However, petitioner has closed such road and sown maize. In pursuance of the application submitted by Respondent Nos 3 and 4, Tahsildar, caused a spot inspection, which records presence of maize crop abutting to East-West Road. However, the map attached to such panchanama depicts that stipulation as to existence of way is based on contention of respondents. No independent finding is arrived by panchas. Except this particular evidence, there is nothing on record to show existence of customary way. The statement of witnesses are not recorded on oath. No independent inquiry is made regarding existence of the customary way. The particulars of the obstruction on existing cart way are not noted. Pertinently, respondents are asking customary way from the middle of Gut number which is in the joint ownership of petitioner and respondent Nos. 3 and 4. If such is the scenario, then existence of customary way can never be presumed. The finding recorded by Mamlatdar is merely an inference which is based on surmises. Further the civil court directed parties to maintain status-quo vide order below Exh.13 in R.C.S. No. 167 of 2023 pending before Civil Judge (Senior Division) Shrirampur. Admittedly, the respondents have not challenged said order or moved civil court for modification or revocation of the order. It is, therefore, clear that the dispute is now subject matter of a

civil proceeding pending before the competent civil court.

6. Mrs. S.M. Zaware learned advocate for respondent Nos. 3 and 4 submits that civil suit filed by the petitioner would not be maintainable since it is filed after passing of the order by the Mamlatdar. She relies upon the judgment of this court in the case of ***Vinit Bhalerao vs. Usha Kasbe reported in 2011(3) Bom.C.R. 322***, to contend that filing of subsequent suit would not take away jurisdiction of the authorities under the Mamlatdar Courts Act. There cannot be any quarrel to the proposition of law that remedy before the civil Court is on higher pedestal and bar under Section 26(2) would not operate if the party proceeded in the Mamlatdar Court wish to invoke remedy of a suit before the civil court or that orders passed by the Mamlatdar can be made subject to the conclusions drawn by the Civil Court. However, the issue raised before this Court is, as regards to the propriety of jurisdiction exercised by the authorities under the Mamlatdar Courts Act.

7. For the reasons as stated above, this court finds that the Mamlatdar as well as S.D.O committed error while invoking jurisdiction under Mamlatdar Courts Act in absence of foundational material i.e. evidence indicating existence of customary way. Mere panchanama which is bereft to draw definite conclusion as regards to the existence of customary way cannot form basis to grant any relief. In present case, the authorities relied upon cryptic material while passing the impugned orders. Consequently, the writ petition deserves to be allowed

8. Hence, the following order :-

ORDER

- [i] The writ petition is allowed in terms of prayer clause (C) (D) and (E).
- [ii] It is made clear that parties shall be governed by the final outcome of the civil suits and civil courts shall render independent finding without influenced by any observations made in this order.
- [iii] Civil application no. 2361 of 2024 stands disposed of.
- [iii] Rule made absolute in above terms. No costs.

**[S.G. CHAPALGAONKAR]
JUDGE**

grt/-