

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4701 OF 2022

Paranavadiya Spinning Mills Limited ...Petitioner
vs.
Hemang Narendra Palan and Others ...Respondents

Mr. Pradeep Sancheti, Senior Advocate a/w. Mr. Sandesh Darade
i/b. Mr. Yuvraj Narvankar, for the Petitioner.
Mr. A.P. Vanarse, AGP for the State.
Mr. Prathamesh Bhargude a/w. Mr. Sumit Sonare, Mr. Sharad
Dhore, for Respondent Nos. 1 to 4.

CORAM : N. J. JAMADAR, J.
RESERVED ON : AUGUST 10, 2023
PRONOUNCED ON : JANUARY 11, 2024

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the stage of admission.

2. This petition under Article 226 of the Constitution of India takes exception to an order dated 26th March, 2021 passed by Sub Divisional Officer, Ichalkaranji in Revision Application No. 164 of 2020 whereby the Sub Divisional Officer was persuaded to dismiss the petition preferred under section 23(2) of the Mamlatdar's Courts Act, 1906 (the Act, 1906) by affirming the order dated 30th June, 2020 passed by the Mamlatdar/Tahsildar, Hatkangale under section 5 of the Act, 1906.

3. The petitioner is a public limited company. The petitioner had acquired lands bearing Gat Nos. 266, 271, 272/1, 277/1, 277/2, 280/1, 293, 268, 269, 270 and 272/2 at Aalte, Tal. Hatkanangale. The petitioner runs a spinning mill set up by one Harikisan Udani, the predecessor in title of the petitioner. In the year 1992, a 15 mtr. road was constructed after obtaining necessary permission from the Town Planning Authority and the petitioner claims the same is being used exclusively by the petitioner to have access to the factory premises from the main Hatkanangale -Kumbhaj road, which runs North-South.

4. The respondent Nos. 1 to 4, who are the holders of the adjoining lands filed an application on 8th November, 2012 alleging that on the northern side of the land bearing Gat No. 270 of the petitioner, their agricultural land bearing Gat No. 267 is situated. The respondent Nos. 1 to 4 had been using the 15 mtr. wide road to approach their fields. Few days prior to the filing of the application, the petitioner/ opponent in the application had obstructed their access by erecting barbed wire fencing. The respondent Nos. 1 to 4 had no other access to their fields. Hence, the respondents prayed to the Mamlatdar to remove the obstruction under section 5 of the Act, 1906.

5. The petitioner resisted the application. It was, inter alia, contended that the application was barred by limitation as it was not filed within six months of the date of the accrual of the cause of action as provided in section (3) and (4) of Section 5 of the Act, 1906. Secondly, respondent Nos. 1 to 4 had not asserted that the road was necessary to access their land for agriculture purpose. On that count also, the application was liable to be dismissed. Thirdly, the application was stated to be vague and sans necessary description of the alleged road with reference to area, boundaries and dimensions.

6. The petitioner further contended that the petitioner had constructed the road in the year 1992 in accordance with the conditions of NA permission granted on 10th January, 1992. The said road is private road and it has never been allowed for any public use. The 15 mtr. wide road is not reflected in the village map as it is a private road. It was further contended that the application was preferred with an ulterior design. The road was not to be utilized for any agricultural purpose but for the commercial utilization of the properties of respondent Nos. 1 to 4.

7. The Mamlatdar conducted an inquiry in Rasta Vahivat Case

No. 9 of 2012 on 31st January, 2013. The Mamlatdar had a site visit. The existence of a road in between Gat Nos. 267 and 270 was noticed and it was found that the petitioner had created obstruction by erecting a compound. Thus, by an order dated 31st January, 2013 the Tahsildar allowed the application under section 5 of the Act, 1906 and directed the removal of the obstruction and also restrained the petitioner from causing further obstruction to the said access under sub section (2) of section 5 of the Act, 1906.

8. The matter was carried in revision. By an order dated 28th March, 2013 the order dated 31st January, 2013 passed by the Mamlatdar was set aside and the matter was remitted back to Mamlatdar for a fresh inquiry. Post remand, by an order dated 4th July, 2013 the Mamlatdar again allowed the application purportedly on the basis of a concession made on behalf of the petitioner vide pursis dated 15th December, 2017 expressing willingness to set apart a 10 ft. wide strip from its land to facilitate an access of about 20 ft, upon the respondents also setting apart 10 ft strip from their land. The said order dated 4th July, 2013 was challenged by the respondents. By an order dated 14th August, 2015 the matter was again remanded back to the Court of Mamlatdar.

9. The petitioner assailed the said order of the Sub Divisional Officer in Writ Petition No. 2956 of 2018. By an order dated 16th December, 2019 this Court found no ground to interfere with the impugned order of remand. Keeping all rival contentions open, this Court directed the Mamlatdar to decide the application expeditiously preferably within a period of three months from the date of the appearance of the parties.

10. Post second remand, the Tahsildar, Hatkanangale was persuaded to again allow the application and direct the removal of obstruction in respect of the suit road which was stated to be 15 mtr. wide. The Tahsildar was of the view that in the first order passed by the Mamlatdar the width of the road was mentioned as 15 ft. instead of 15 meter, inadvertently.

11. Being aggrieved, the petitioner again preferred revision before the Sub Divisional Officer, Ichalkaranji. The latter found no ground to interfere with the order passed by the Tahsildar. Hence, the Revision Application came to be dismissed by the impugned order. Being further aggrieved, the petitioner has invoked the writ jurisdiction.

12. I have heard Mr. Pradeep Sancheti, learned senior advocate for the petitioner, and Mr. Prathamesh Bhargude, learned counsel for respondent Nos. 1 to 4. With the assistance of the learned counsel for the parties, I have perused the pleadings, material on record before the authorities below as well as the documents tendered for the perusal of this Court.

13. Mr. Sancheti, learned senior counsel for the petitioner canvassed a two pronged submission. First, the authorities under the Act, 1906 have committed a grave error in law in not deciding the jurisdictional fact as to whether the application was preferred within the prescribed period of limitation. A specific ground that the application was barred by limitation was raised in as much as there is no reference in the application as to the date of the accrual of the cause of action. Sub section (3) of section 5 of the Act, 1906 contains an interdict against entertaining an application for relief under section 5 of the Act, 1906 unless it is brought within six months from the date on which the cause of action arose. Mr. Sancheti submitted that the impugned orders proceed on a incorrect premise that the period of limitation was to be computed from the date of the order passed by this Court. Secondly, Mr. Sancheti would urge the respondents have not been cultivating the

lands to which the access was allegedly obstructed. The authorities below have not at all adverted to the fact that there was evidence to indicate that 15 mtr. wide road has all along being used as a private road by the petitioner. Under no circumstances, according to Mr. Sancheti, the said private road can be used as a public road without following the process of acquisition. Therefore, the impugned orders deserve to be quashed and set aside.

14. Mr. Prathamesh Bhargude, learned counsel for respondent Nos. 1 to 4 joined the issue of limitation by canvassing a submission that in the application, respondent Nos. 1 to 4 have specifically averred that their access was obstructed prior to 'few days'. In the affidavit of evidence dated 14th December, 2022 it was specifically affirmed that the petitioner had erected a fencing prior to two months. Mr. Bhargude would urge that the absence of specific date of obstruction in the application does not detract materially from the claim of the petitioner. Mr. Bhargude, submitted with tenacity that the claim of the petitioner that 15 mtr. road is a private road is wholly unsustainable. Inviting the attention of the Court to the NA order dated 10th January, 1992 especially condition No. 12(a) thereof, it was submitted that the permission was granted subject to a specific condition that 15 mtr. wide road connecting the subject

land to Hatkanangale-Kubhaj road be constructed within one year thereof and for the use of the said road due NA permission be also obtained. Mr. Bhargude urged that the Tahsildar by order dated 30th June, 2020 has directed to open the very same 15 mtr road which the respondents had been using. Reliance was placed on the panchanama dated 5th February, 2020 which adverts to the said fact.

15. Mr. Bhargude submitted that there is no alternate road for respondent Nos. 1 to 4 to access their agricultural land apart from the suit road. Since the authorities below have recorded finding of facts, Mr. Bhargude urged they are not open for interference in exercise of writ jurisdiction. In the circumstances, no interference is warranted in the impugned order submitted Mr. Bhargude.

16. In the backdrop of the aforesaid submissions, the challenge to the impugned order on the ground of bar of limitation, deserves to be appraised at the first instance. Sub section (3) and (4) of the section 5 of the Act, 1906 read as under:-

(3) Suits to be filed within six months: No suit shall be entertained by a Mamlatdars' Court unless it is brought within six months from the date on which the cause of action arose.

(4) Cause of action : The cause of action shall be deemed to have arisen on the date on which the

[impediment to the natural flow of surface water or the] dispossession, deprivation or determination, of tenancy or other right occurred, or on which the [impediment,] disturbance or obstruction, or the attempted [impediment or] disturbance or obstruction, first commenced.

Explanation: The exercise by a joint owner of any right which he has over the joint property is not a dispossession, or disturbance of possession of the other joint owner or owners within the meaning of this section.

17. Evidently, sub section (3) prescribes six months period for institution of the suit from the date of accrual of cause of action. Sub section (4) explains as to when the cause of action can be deemed to have arisen. It provides that the cause of action shall be deemed to have arisen on the date on which the impediment to the natural flow of surface water or the dispossession, deprivation or determination, of tenancy or other right occurred, or on which the impediment, disturbance or obstruction, or the attempted impediment or disturbance or obstruction, first commenced.

18. A conjoint reading of sub section (3) and (4) of section 5 would indicate that the filing of the suit within six months of the accrual of the cause of action is peremptory. The legislature has designedly used negative terminology to emphasis that such suit must be instituted within six months of the accrual of the cause of action. A perusal of the provisions contained in section 5 of the Act,

1906 would indicate that to sustain a suit thereunder, the following conditions must be fulfilled.

- 1} The existence of a road/way.
- 2} An obstruction at the hands of the opponent for the use of such road.
- 3} Such obstruction having taken place within six months from the date of the institution of the suit before Mamlatdar.

19. Mr. Sancheti would urge that institution of the suit within six months being the jurisdictional condition, the proceeding before the Mamlatdar was clearly untenable and barred by the provisions of sub section (3) of section 5 of the Act, 1906. To lend support to the aforesaid submission, Mr. Sancheti placed a strong reliance on the decision of this Court in the case of **Vishnu Sukhdev Ghanvat and Others vs. Collector, Ahmednagar and Others**¹. In the said case, it was enunciated that the provisions of sections 19 and 5(3) of the Act show that the suit needs to be brought within six months from the date of cause of action and this is mandatory in nature. If it is not established that the cause of action took place within six months of the date of the plaint then the Mamlatdar is bound to dismiss the plaint.

¹ 2017(1) Mh.L.J. 811.

20. In the case at hand, the plaint in Rasta Vahivat Case No. 9 of 2012 no specific date of accrual of the cause of action is furnished. However, it is averred that since few days prior to the institution of the said suit, the petitioner had erected a barbed wire fencing. It would be contextually relevant to note that in the affidavit filed before the Tahsildar, it was affirmed that the obstruction was caused prior to two months of 14th December, 2012.

21. The original application under section 5 of the Act, 1906 was filed in the year 2012. Repetitive remands, which one encounters in revenue proceeding, serve no purpose. I was, therefore, initially inclined to hear and decide the matter as before this Court also it is a second round.

22. Mr. Sancheti would urge that the limitation is a mixed question of law and facts and, therefore, the said issue ought to have been decided by the authorities below. Reliance was placed on the judgment of the Supreme Court in the case of **ITW Signode India Limited vs. Collector of Central Excise**² wherein it was enunciated that the question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined

2 (2004) 3 Supreme Court Cases 48

having regard to both fact and law involved therein.

23. Mr. Sancheti also placed reliance on an order passed by this Court in the case of **Vijay Digambar Bhirad and Others vs. Additional Collector, Akola and Others**³. In the said case, this Court found that the authorities under the Act 1906 had committed gross error by not advertng to the issue of limitation. As there was nothing on record to ascertain the date on which the cause of action had arisen in favour of respondent Nos. 3 to 8 to invoke the jurisdiction of Tahsildar under section 5 of the Act, 1906, the orders impugned in the said petition were held to be unsustainable in law.

24. In the case at hand, both the Tahsildar, Hatkanangale as well as the Sub Divisional Officer have proceeded on the premise that since this Court had directed a fresh determination of the suit by an order dated 16th December, 2019 in Writ Petition No. 2956 of 2018, within a period of three months, the suit was within the period of limitation. The authorities have completely misdirected themselves. In fact the Sub Divisional Officer was expected to delve into the legality and correctness of the aforesaid finding of the Tahsildar, Hatkanangale on the aspect of limitation. However, the Sub Divisional Officer also fell in error in not only not correcting the said

3 WP No. 2913 of 2019 Dt.19-06-2019

error but also reiterating the same view as a justification for holding that the suit before the Mamlatdar was within the limitation.

25. As noted above, having regard to the fact that there were already two remands to the authorities below, this Court initially considered it expedient to decide the issue on merits. However, as the question of limitation has not at all been examined by the authorities below, despite the same having been specifically raised in the written statement and, in fact, the authorities have proceeded on a completely incorrect premise of computation of period of limitation and in complete disregard to the provisions contained in sub section (4) of section 5 of the Act, 1906, it would not be appropriate to delve into the said aspect as a Court of first instance would do in exercise of writ jurisdiction. Moreover, that constitutes a jurisdictional fact. Had the authorities examined the matter in the light of the pleadings and evidence and recorded a finding that the suit was instituted within the stipulated period of limitation, different considerations would have come into play. It is not to lay down that accrual of cause of action must be with reference to a particular date only. It can be with reference to an event which fixes the time of accrual of cause of action. What is of

significance is the examination of the said aspect, when a specific ground is raised, in the face of the pleading that obstruction was caused prior to “few days”, a relative term.

26. In the circumstances, the impugned orders deserve to be quashed and set aside. Per force, the application under section 5 of the Act, 1906 is required to be remitted to the Mamlatdar for fresh decision after providing an effective opportunity of hearing to the parties. The Mamlatdar shall specifically decide the question as to whether the suit under section 5 was instituted within the period of limitation prescribed under sub sections (3) and (4) of section 5 of the Act, 1906, apart from other questions which warrant determination under section 19 of the Act, 1906. The petition, therefore, deserves to be allowed.

Hence, the following order.

ORDER

1] The petition stands allowed.

2] The impugned order dated 26th March, 2021 passed by Sub Divisional Officer, Ichalkaranji and the order dated 30th June, 2020 passed by the Mamlatdar/Tahsildar, Hatkangale are quashed and set aside.

3] Rasta Vahivat Case No. 9 of 2012 is remitted back to the Court of Mamlatdar for a fresh decision.

4] The Mamlatdar shall decide the suit as expeditiously as possible after providing an efficacious opportunity of hearing to the parties and preferably within a period of four months from the date of appearance of the parties.

5] The Mamlatdar shall specifically decide the question as to whether the suit under section 5 was instituted within the period of limitation prescribed under sub sections (3) and (4) of section 5 of the Act, 1906, apart from other questions which warrant determination.

6] The parties shall appear before the Mamlatdar on 25th January, 2024.

7] Rule made absolute in the aforesaid terms.

8] No costs.

(N. J. JAMADAR, J.)