



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5395 OF 2024

**Kadu Bhikaji Kanthe Died Through Lrs Ramesh Kadu Kanthe And Others
VERSUS
Collector And Others**

Mr. S. B. Kakde, Advocate for Petitioners
Mrs. M. N. Ghanekar, AGP for Respondent Nos. 1 to 3
Mr. B. R. Kedar, Advocate for Respondent Nos. 4, 6, 7, 11, 13, 14 to 17

CORAM : R. M. JOSHI, J.

DATE : 24th April, 2025

PER COURT :-

1. By consent of both sides heard finally at the stage of admission.
2. This petition takes exception to the orders passed by Tahsildar dated 16.05.2023 under the provisions of Section 5 of the Mamlatdar's Courts Act (for short "the Act") allowing the suit filed by the contesting respondents and confirmation of the said order by judgment and order dated 25.01.2024 by Sub-Divisional Officer in Revision No.95/2023.
3. The facts which led to the filing of this petitioner according to petitioner narrated in brief as under :

Petitioners are the owner and possessor of Gut No. 189 situated at village Shekta, Tq. Paithan, Dist. Aurangabad. It is his case that on 05.11.2008,

notice was issued by the Collector for acquisition of the petitioners land for the purpose of construction of percolation tank . Subsequently, area admeasuring 4 R came to be acquired from his land. It is his further contention that beyond his land the road which was earlier existed is no more in exists. Respondents filed application before Tahsildar on 08.06.2021 under Section 5(2) the Act with the allegation that the petitioner has closed/obstructed the customary way of the respondents. Circle Officer conducted panchanama on 02.07.2021 and submitted the same before Tahsildar. Relying upon the said report and also considering the village map, Tahsildar passed impugned order. Since, the revision filed against the said order was unsuccessful, present petition.

4. Learned counsel for petitioners submits that the Tahsildar has committed error in passing the order impugned by ignoring the fact that there is no road available now beyond the land of petitioners since there is acquisition of the said land for construction of percolation tank and in such circumstances for want of existing road, the Tahsildar had no jurisdiction to pass any order. To support his submission, he placed reliance on the affidavit filed by Tahsildar dated 19.04.2025 before this Court claiming that considering the fact that existing customary way has been acquired for the percolation tank, Tahsildar would have no power to grant road under Section 5 of the Act. He

has also raised objection with regard to the maintainability of the application on the ground that the application is ought not to have been entertained by Tahsildar since the same is filed beyond period of limitation. It is his submission that the application is vague and hence, on this count also the order impugned cannot sustain.

5. Learned counsel for contesting respondents supported the impugned order. According to him, arguments advanced by the learned counsel for the petitioners would at the most accepted to the extent of the creation of road beyond the land of the petitioner. According to him, there is sufficient evidence on record to indicate that there existed customary way for the public to approach through the land of petitioner. It is his submission that even this way is duly reflected in the map. Thus, according to him, in exercise of writ jurisdiction, orders impugned do not require interference.

6. Learned AGP was called upon to file affidavit of Tahsildar in order to explain the fact as to the nature of acquisition done for the purpose of construction percolation tank. From the affidavit filed by Tahsildar and panchanama, it is pointed out that there is acquisition of land beyond the land of petitioners and on account thereof no previous road exists where percolation tank is constructed.

7. At the outset, this Court would like to take note of the argument advanced with regard to the issue of limitation, so also, application filed by the respondents being vague. In this regard as rightly pointed out by the learned counsel for respondents that no objection in this regard was raised before Tahsildar. The Strict procedural rules which would be otherwise applicable to the suit under the Code of Civil Procedure may not apply to the proceedings under the Act. If any such objection was raised before the Tahsildar by petitioners, it was open for Tahsildar to adopt the procedure laid down under Section 9, 10 and 11 of the Act. Failure on the part of the petitioner to raise such objections before Tahsildar indicate that he has waived the same. Entertaining such objections at this stage would lead to denying opportunity to the applicant to adopt procedure as contemplated by the Act. This Court, therefore, does not find any substance in the contention now sought to be raised in this regard.

8. There is specific allegation against the petitioner by contesting respondents that the existing customary way has been obstructed by the petitioners. In this regard, the order passed by Tahsildar indicates that this is a way which is claimed by the respondents finds place in the village map. Though, now it is sought to be argued on behalf of the petitioners that no

consent was recorded by the petitioners at the time of conducting of spot panchnama however spot panchnama clearly indicates that no dispute was made by the petitioners with regard to the existence of the road. Even if, the said admission is kept aside, there is no more than enough evidence to conclude that through the land of the petitioners, customary way exists.

9. There would have been substance in the contention of the learned counsel for petitioners that any new way was sought to be created by respondents under Section 5(2) of the Act. However, here in this case, no way is sought to be created from the land of the petitioner. Similarly, merely because there is alternate way available, considering the provisions of Section 5 of the Act, the Authority is only required to consider the availability of the customary way and obstruction thereto. Existence of alternate way is immaterial for the decision of such application.

10. Having regard to the afore stated facts, in considered view of, the Tahsildar has rightly taken into consideration the relevant record and impugned order came to be passed. No interference, therefore, is called therein. Hence, petition stands dismissed.

(R. M. JOSHI, J.)

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