IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 406/2022.

1.Shri Suryabhan s/o Chindhabaji
Khubalkar, Aged about 69 years,
Occupation Cultivator,

2.Shri Chandrabhan s/o Chindhabaji
Khubalkar, Aged about 71 years,
Occupation Cultivator,

Both residents of Isapur, Tahsil Saoner,
District Nagpur. ….. **APPELLANTS.**
Ori. Plaintiffs.

VERSUS

Shri Shrikrishna s/o Yadeorao Falke,
Aged Major, Occupation – Cultivator,
Resident of Patansawangi, Tahsil Saoner,
District Nagpur. …… **RESPONDENT.**
Ori. Defendant.

Shri V.D. Muley, Advocate for the Appellants.
Shri V.K. Umre, Advocate for the Respondent.

CORAM : ROHIT W. JOSHI, J.

DATE : MAY 02, 2025.

ORAL JUDGMENT.

The appellants who are the original plaintiffs have preferred this appeal being aggrieved by the concurrent judgment and decrees passed against them. Plaintiffs have filed a suit being Regular Civil Suit No.204/2012, in sum and substance questioning the order passed by the Tahsildar under Section 143 of the Maharashtra Land Revenue Code, granting right of way to the respondent/original defendant over the dhura i.e. field boundary between field Survey Nos.44 and 45. Plaintiff is the owner of field survey no.45. The learned Trial Court has placed reliance on the entries in Wajib-ul-arz, which is at Exh.36, while dismissing the suit filed by the plaintiffs. It is recorded that right of way over the said dhura is recorded in Wajib-ul-arz. Aggrieved by the said judgment and decree, the plaintiffs preferred appeal being Regular Civil Appeal No.159/2016 which came to be dismissed vide judgment and decree dated 17.10.2022.

2. Shri Muley, the learned Counsel for the appellants has raised the following contentions :-

(i) The learned First Appellate Court was in error in dismissing the appeal on the ground that the order passed by the Tahsildar was not challenged in the suit.

(ii) A new right, which was not in existence earlier, cannot be created for the first time by passing order under Section

143, thereby granting a right of way which was not available earlier or in existence.

(iii) In absence of a counter claim, the learned trial Court could not have issued directions in following terms :

(a) Plaintiffs are also hereby directed to take note that right to use dhura can be used by all farmers as mentioned in Nistar Patrak and Wajib-ul-arz (Exh.36). Any person who fails to observe any rules or custom entered in the Wajib-ul-arz or commits a breach of any entry entered in the Nistar Patrak will invite upon himself penalty under Section 167 of the Maharashtra Land Revenue Code.

(b) Defendant being farmer is permitted to use north-south dhura towards eastern side of suit property S.No.45 and towards western side of S.No.44 vide rights protected reserved under Nistar Patrak and Wajib-ul-arz (Exh.36). Plaintiffs are directed not to obstruct defendant and farmers from use of north-south dhura towards eastern side of suit property S.No.45 and towards western side of S.No.44.

3. As regards the first contention raised by the learned Counsel for the appellants, it is true that in sum and substance the suit challenges the order passed by the Tahsildar granting right of way. It

is his submission that the challenge to the order was explicit in the suit. It is not necessary to deal with the said contention since, the appellants have failed to make out a case for interference in the matter on merits.

4. The second contention is with respect to power of Tahsildar under Section 143 of the Maharashtra Land Revenue Code. The learned Counsel for the appellants contends that under Section 143 of the Code, a new right cannot be created for the first time by passing order under the said provision. His contention is that unless right of easement is made out and existence of a right of way and its user in the past is proved and established, order under Section 143 cannot be passed. He has placed reliance on the judgment of this Court in the matter of **Krushna Damaji Choudhari and another .vrs. Additional Commissioner, Nagpur Division and others** reported in **2012 [1] Mh.L.J. 795** and in the matter of **Keshav Vithoba Khatdeo and others .vrs. Gopal Sakharam Mundare and others** reported in **2014 [3] Mh.L.J. 612,** in support of his contentions.

5. As against this, Shri Umre, learned Counsel for the respondent has placed reliance on the judgment of this Court in the matter of **Pandurang Chandrabhan Bauche and another .vrs. Jalindhar Sarandhar Tupe and others** reported in **2009 [3] Mh.L.J. 467** to

contend that order under Section 143 can be passed independent of any proof on easement of way either by prescription or otherwise.

6. Section 143 of the Maharashtra Land Revenue Code confers powers on the Tahsildar to make enquiry and decide claims by persons holding agricultural lands to claim right of way through boundaries of survey numbers i.e. agricultural land. For deciding such claim, the Tahsildar is required to have regard to need of the cultivators for reasonable access to their agricultural land. Perusal of the provision does not demonstrate that there is any restriction on the power of the Tahsildar to grant relief only with respect to a pre-existing right. Existence of right or user of the same is not a condition precedent for passing order regarding grant of way under Section 143 of the Code. Contention of Shri Muley, can be accepted with respect to power of Mamlatdar under Section 5 of the Mamlatdar Courts Act. Under said provision, a Mamlatdar is empowered to recognize a pre-existing right of way and pass an order for removal of obstruction on such way/road. It is well settled by catena of decisions that a Mamlatdar while entertaining a proceeding under Section 5 of the Mamlatdar Courts Act cannot create new way by passing order under the said provision. The scheme of legal provision indicates that

whereas under Section 5 of the Mamlatdar Courts Act power is conferred for removal of obstruction over pre-existing road/way, under Section 143 of the Maharashtra Land Revenue Code, jurisdiction is conferred to pass orders granting way for access to fields over boundaries of fields even if such road/way was not earlier in existence.

7. The learned Counsel for the respondent has rightly placed reliance on the judgment of Pandurang Bauche [supra], where this Court has categorically held that the power to pass order under Section 143 is not dependent upon the claim of easement either by way of necessity or by way of prescription, as provided under the Easement Act. It is clearly held that the power to grant way under Section 143 is independent of easementary right.

8. As regards the judgment in the matter of Krushna Damaji Choudhari [supra], on which reliance is placed by the learned Counsel for the appellants, the same indicate that the petitioner in the said matter did not question the order passed by the Tahsildar to the extent of declaration of right between survey numbers of two lands. The objection was with respect to powers of the Tahsildar to pass orders for removal of obstruction on the road. This contention that unlike power

vested with the Mamlatdar under Section 5 of the Mamlatdar Courts Act, a Tahsildar exercising jurisdiction under Section 143 does not have power to remove obstruction, is upheld. The said decision does not lay down any ratio that power to pass order under Section 143 is dependent upon existence of a preexisting road or user thereof.

9. As regards the judgment in the matter of Keshav Khatdeo [supra], it is held that the civil Court ought not to have granted a new right of way to the defendant for the first time. In this context, perusal of paragraph no.3 of the said judgment will indicate that in the said case there was no documentary evidence in the form of revenue record or otherwise regarding right of way over dhura. In the present case, Wajib-ul-arz at Exh.36 specifically records right of way through dhura.

10. It is necessary to refer to Section 165 of the Maharashtra Land Revenue Code in order to appreciate the binding efficacy in Wajib-ul-arz. Section 165[1] of the Maharashtra Land Revenue Code provides that the Collector shall ascertain and record customs in each way in record to the right of irrigation or right of way or other easement and fishing rights. Section 165[2] provides that the record of rights made under sub-section[1] shall be published by the Collector

and subject to decision of the civil Court in a suit instituted under sub-section [3] to challenge the same, the record created under section 165 shall be final and conclusive. Power to remove entries in Wajib-ul-arz is conferred on the Collector under Section 165[4]. Section 167 provides for consequences of contravention of failure to observe the right, conferred by the provisions under Sections 161 to 166 of the Code. It is thus clear that entries in Wajib-ul-arz are binding on all parties unless the same are challenged and set aside in a civil suit. The entry at Exh.36 has attained finality and is binding on the plaintiffs. It is not the case of the plaintiffs that this entry is set aside by any competent civil Court or any other authority.

11. The contention of learned Counsel for the appellants with respect to the power of the Tahsildar under Section 143, is therefore, rejected.

12. As regards the contention that there is no power to remove obstructions under Section 143 of the Code, it goes without saying that the authorities shall take appropriate action if needed, in accordance with law.

13. As regards the third contention with respect to directions

issued under Clauses [4] and [5] of the operative part of the decree, it is apparent that the learned civil Court has taken due care and caution while issuing such directions. The learned civil Court while confirming the order passed by the Tahsildar, has only taken due care to ensure that the rights are enjoyed strictly in accordance with the Wajib-ul-arz. The said directions cannot be said to be in conflict with the interest of the plaintiff. The directions issued are just and proper and will ensure that the right conferred are not exercised in defiance of the entries by which rights are vested.

14. In that view of the matter, in my opinion no substantial question of law arises for adjudication in this Second Appeal, the same is dismissed. No costs.

JUDGE