



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.5049/2024

1. Uttam S/o Sakharam Ingole,  
Aged about 58 years, Occ. Agriculturist,  
R/o. Shirsala, Tq. Malegaon, Dist. Washim
2. Ganpat S/o Sakharam Ingole  
Aged about 60 years, Occ. Agriculturist,  
R/o. Shirsala, Tq. Malegaon, Dist. Washim

... PETITIONERS

...VERSUS...

1. Subhash S/o Mahadu Ingole  
Aged about 68 years, Occ. Agriculturist,  
R/o. Shirsala, Tq. Malegaon, Dist. Washim
2. Tahsildar, Malegaon,  
Tq. Malegaon, Dist. Washim
3. Sub – Divisional Officer,  
Washim

...RESPONDENT

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Mr. P.A. Deshpande, Advocate h/f Shri D.R. Khapre, Advocate for petitioners.  
Mr. O.A. Ghare, Advocate for respondent No.1  
Mr. H.D. Dubey, AGP for respondents/State.

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CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 27/01/2025

DATE OF PRONOUNCING THE JUDGMENT: 12/02/2025

## **JUDGMENT**

. **Rule.** Rule made returnable forthwith.

2. Heard learned Counsel for both the parties.

3. Being aggrieved by the order dated 12/07/2024, passed by the Sub-Divisional officer, Washim, in Revision Application No. रा.मा.क्र.एम.सी.ए-5/सिरसाळा/16/2022-2023, the petitioner filed the present petition.

4. That brief facts of the case are as under:-

Respondent No.1 filed an application before the Respondent No. 2 thereby claiming to be the owner of part of Sr. No. 100 and further claiming that there is a road which passes through the field of Petitioners on the southern side of the Sr. No. 100. It is the claim of the respondent No.1 that there is a road existing from the western side of the field of the petitioner No. 2 which flows from south to north and that the said road is the only way for the Respondent No.1 to approach his field.

5. Petitioner appeared before Respondent No.2 and filed detailed reply and pointed out there is no such road as is claimed by the Respondent No. 1. On 22/10/2021 a spot inspection was carried out on order of the Tahsildar and as per the said spot inspection it was recorded that there is a free road on the Eastern Side of the field of Petitioner no. 2 and the said road is available for Respondent No.1 to approach his field. On 27/8/2023 another spot Panchnama was also carried out in which it was specifically recorded that the road claimed by the Respondent No.1 does not exist and the Respondent No.1's claim that the road on the western side is the only road for Respondent No.1 to approach his road is baseless. That thereafter the Respondent No. 2 visited the suit field and prepared a panchnama in which it is categorically found that there is no evidence of any such road and hence the application filed by the Respondent No.1 is liable to be dismissed. Being aggrieved by the order of Tahsildar, Respondent No.1 preferred an revision application. Petitioner appeared before the Respondent No. 3 and filed a reply. During the pendency of the revision application Respondent No.3 made a communication to the water resources department as regards the encroachment near the water body

which was replied by the water works department vide communication dated 29/04/2024 and without affording any opportunity and without appreciating the documents on record, the Respondent No.3 allowed the revision filed by the Respondent No.1. The aforesaid order is the subject matter of challenge in the present writ petition.

6. Learned Counsel for the petitioner contended that the application filed under section 5 by the Respondent No.1 is not even supported by a proper affidavit and hence, there is non-compliance of the mandatory provisions of the Mamlatdars Act and hence, the entire proceedings stand vitiated. Similarly, the Respondent No.3 failed to consider that Respondent No.1 have not filed any proper documentary evidence in support of their application and except for a bare claim of existence of a road, there is nothing on record which supports the existence of the road claimed by Respondent No.1. it is further contended that Respondent No. 3 further failed to consider that the matter was never fixed for evidence of the parties before Respondent No.2 and hence the affidavits filed in support of their application are not

proven and hence could not have been relied by Respondent No.3. Hence, the impugned order needs interference by this court and needs to be set aside.

7. Learned Counsel for petitioner relied on following citations:

1) *Gaurakshan Sansthan, Murtizapur Vs. State of Maharashtra and Ors. 2019 (6) Mh.L.J. 473*

2) *Shalini Shyam Shetty and anr. Vs. Rajendra Shankar Patil 2010 (6) Mh.L.J. 661*

3) *Maria Thereza De Jesus alias Anne Fernandes and Ors. Vs. Maria Corinta Noronha E Fernandes . 2022 (4) Mh.L.J. 148.*

4) *Sudam Namdeo Madke Vs. State of Maharashtra and Ors. AIR Online 2021 Bom 2769*

5) *Ganesh Vasudev Chikte and anr. Vs. Dy. Collector and SDO, Daryapur, Dist. Amravati and Ors. in Writ Petition No. 5062 of 2023 decided on 01.04.2024.*

6) *Mahesh s/o Namdeorao Parbat and anr. Vs. Deputy Collector, Wardha and Ors. in Writ Petition No.985 of 2020 decided on 17.02.2022.*

8. Learned counsel for the respondent supported the order passed by the learned lower authorities and contended that the lower authorities has rightly taken into consideration the facts

and documents on record and passed an appropriate order which needs to be confirm and prayed for the dismissal of present petition.

9. Learned Counsel for respondents relied on following citations

***1) Mohommad Khan s/o Rahim Khan Vs. Shankar s/o Maroti Dhage and anr. 20157(3) Mh.L.J. 135***

***2) Paribalana Sabai and ors. Vs. Tuticorin Educational Society and Ors. 2019 (9) SCC 538***

10. Heard both the parties. Perused documents and impugned order and considered citations relied on by the parties. Respondent No. 1 has filed an application before the Tahsildar/respondent No.2, thereby claiming to be the owner of part of Survey No. 100 and also claimed that there is road which passes through the field of petitioner on the southern side of the Survey No. 100. It is claimed that there is a road existing from the western side of the field of the petitioner No. 2, which flows from south to north and the said road is the only way for respondent No.1 to approach his field. In spot inspection, it is concluded that

the road claimed by the respondent No.1, does not exist and the respondent No.1 claimed that the road of the western side is the only road for respondent No.1 to approach his field. It is recorded that there is a free road on the eastern side of the field of the petitioner No. 2 and the said road is available for respondent No. 1 to approach his field. Therefore, Tahsildar rejected the application No. रा.मा.क्र.एम.सी.ए-५/शिरसाळा/२५/२०२१.२०२२ vide order dated 12/10/2022. The application was filed under Section 5 of the Mamlatdar's Courts Act. As such, revision is carried out by the respondent No.1, before the Sub Divisional Officer No. रा.मा.क्र.एम.सी.ए-५/शिरसाळा/१६/२०२२-२०२३. The Sub Divisional Officer in Revision set aside the order passed by the Tahsildar and Revision Application was allowed.

11. It is the contention of the petitioner that the application under Section 5 was not supported by proper affidavit as per the requirement, therefore, SDO respondent No. 3 ought not to have relied on such application. There was no documentary evidence to support the claim of the respondent No. 1. Matter was

never fixed for evidence of the parties on the affidavits filed in support of their applications and are not proved and could not have been relied by respondent No. 3, SDO. In all inspection report, it is consistently held that there was no way as claimed by the respondent No.1. While filing revision application, the respondent No.1 raised ground that the judgment is passed without following due procedure as contemplated in Section 5 to 11 and Section 12 to 26 in Mamlatdar's Courts Act. There is no reasoning given for such finding. There is no consideration by the Tahsildar to the documents, evidence and map, filed along with the application. No issues were framed as per Section 19 of the Act. It is also contention of the petitioner herein that suit is filed beyond limitation.

12. It is also contented by the respondent that the Tahsildar without appreciating the documents on record which includes 35 years old sale deed, it is recorded that no evidence is produced by the respondent No.1 herein. There is no proper opportunity granted to the applicant/respondent No.1, to place his contention on record. The spot panchanama, though written in roznama that it is carried out on 14/10/2021, but it appears that it was conducted on

22/10/2021, behind the back of the applicant respondent No.1.

13. The respondents contention before the SDO, that though there is reference in the sale deed of 1989 about the right of way, the Tahsildar denied it to consider on the ground that whether it was continued till 2021 is required to be proved by the applicant. The learned SDO set aside the order passed by the Tahsildar after perusal of document placed on record. It was observed that the spot inspection was carried out in presence of all the parties. It is also concluded that there is a way from Tandali to Shirsala adjacent to it there is a lake belonging to Water Resource Division, Minor Irrigation, as the land was encroached by the respondent No.2 petitioner herein as mentioned in letter by District Water Resource Officer, dated 20/04/2024. There was reference that the road adjacent to lake is closed and old way was opened for agricultural purpose. It is observed by learned SDO that Tahsildar has not verified that the road going from Shirsala to Tandali is submerged in the water, from which road earlier the petitioner respondent herein was using to reach his field.

14. The learned Counsel for petitioner relied on ***Gaurakshan Sansthan*** (supra), wherein, it is held that as under in paragraph No.5:

*“5. The provisions of section 7 of the said Act require the proceedings to be commenced by way of a plaint. The particulars to be stated therein have been stipulated in section 7. Under section 9 of the said Act when the plaint does not contain the particulars specified in section 7 then the Mamlatdar has to examine the plaintiff on oath and ascertain from him whether the particulars stated are correct. These aspects have to be reduced in writing in the form of an endorsement on or annexure to the plaint. Under section 10 of the said Act, the Mamlatdar has to require the plaintiff to subscribe and verify the plaint in his presence in the manner specified. Section 12 thereafter empowers the Mamlatdar to reject the plaint if the plaintiff fails to furnish particulars as required by section 7 within the time fixed under section 9 of the said Act. These provisions therefore indicate the mandatory nature of the compliance to be done as stipulated by section 7 of the said Act. It is only when the plaint is found to be admissible that the Mamlatdar can proceed with the adjudication on merits.”*

and held that order passed by Tahsildar is not sustainable and set aside.

15. Learned Counsel for petitioner also relied on ***Shalini Shyam Shetty and Maria Thereza De Jesus alias Anne Fernandes and others***, (supra), in support of his contention that jurisdiction

under Article 227 is not original nor it is appellate. The jurisdiction of superintendence under Article 227 is for both administrative and judicial superintendence. High Court under Article 227 apart from analyzing the proceeding can also substitute the impugned order by the order which the inferior tribunal should have made. Power of superintendence available to High Court under Article 227 cannot be curtailed by provisions of any statute.

16. Learned Counsel for the petitioner also relied on ***Sudam Namdeo Madke*** (supra), however, facts involved in the said matter are different than the facts involved in the present matter. As in the said matter Mamlatdar has not carried out spot inspection, here, Mamlatdar carried out spot inspection personally. However, in the said matter also no opportunity was granted to cross examine.

17. Learned Counsel also relied on order in **Writ Petition No. 5062/2023** and **Writ Petition No.985/2020**, wherein, reliance is placed on judgment in ***Gaurakshan Sansthan*** (supra) and interim orders were set aside.

18. Learned Counsel for respondent submitted that the petitioner is having remedy to file civil suit. He relied on ***Mohammad Khan S/o Rahim Khan and Paribalana Sabai*** (supra), wherein, it is held as under :

*"6. In fact, the question of jurisdiction of the Civil Court to entertain, try and decide the suit challenging the order passed under section 5 of the Mamlatdars Courts Act is no longer res integra in view of the decision of the learned Single Judge of this Court in the case of Rajendra Sheshrao Shendge vs. Smt. Shobhatai S. Ravate and anr., reported in 2007(3) Mh.L.J. 431 AIR 2007 Bombay 90. Paras 11, 12 and 13 of the said decision being relevant, are reproduced below:*

*"Objections as to bar of suit due to Mamlatdars' Courts Act:*

*11 Court has perused entire Mamlatdars' Courts Act, 1906. It is seen that Mamlatdars' Courts Act presupposes and recognizes existence and continuation of powers and jurisdiction of Civil Court. The scheme provides for a summary jurisdiction and powers and a bar of suit to make orders of Mamlatdar or Collector etc., to be immune from scrutiny in a Civil Suit."*

*"12. It is seen that there is no express bar of suit. According to Mr. Bhattad, bar is implied. There is no room left by virtue of totality of provisions and scheme as to how implied bar should be inferred. Argument of learned Advocate Mr. Bhattad that implied bar can be read from the provision to Clause (b) of sub-section (1) of section 5 amounts to reading in a provision of legislation, such words and such scheme which is totally nonexistent."*

*"13. The Courts cannot forget the wide compass of section 9 of Civil procedure Code. Exclusion and bar of jurisdiction cannot be read or inferred just for the sake of asking in the manner in which present petitioner*

*wants. Existence of jurisdiction has to be presumed and not the bar.”*

19. I have gone through the principles laid down in the above referred citation. Petitioner in the present petition as well as respondent before SDO made a grievance that mandatory provisions were not followed by the Tahsildar, while passing the order. The learned SDO though come to the conclusion that Tahsildar ought to have verified that if the way from Shirsala to Tandali is in sub submerged area, the applicant is having only road passing from which road applicant was using to approach his land. When SDO come to the conclusion that proper opportunity was granted while spot inspection. However, from going through the order passed by the Tahsildar, it does not appear that he has complied with the mandatory provisions of Mamlatdar's Courts Act. It does not reflect that there was any opportunity to lead evidence and cross examine was granted to the parties. Even there appears to be no consideration of the documents placed by the applicant/respondent on record. Though, he has made reference of the road passing from old Shirsala to Tandali, which is submerged

in the lake (pazartalao) and petitioner herein purchased the said land by misrepresentation. As such, which is the road which applicant/respondent No.1 was using to approach his field is required to be ascertained by the Tahsildar, even by appreciating 35 years old sale deed. However, no mandatory provision followed by the Tahsildar as per Mamlatdar's Courts Act. SDO also instead of remanding the matter back only set aside the order passed by the Tahsildar, which does not solve the question for determination in the application. Both the Courts below committed error in passing the order. As such, both the orders are liable to be set aside. Accordingly, I process to pass the following order :

### **ORDER**

- (i) Writ Petition is partly allowed.
- (ii) The order passed by Sub Divisional Officer, Washim, dated 12/07/2024, in Revision Case No. रा.मा.क्र.एम. सी.ए-5/सिरसाळा/16/2022-2023 and order passed by Tahsildar, Malegaon, dated 12/10/2022, on application No. रा.मा.क्र.एम.

सी.ए-५/शिरसाळा/२५/२०२१-२०२२, are hereby quashed and set aside.

(iii) The matter is remanded back to the Mamlatdar/Tahsildar to decide the same afresh after seeking compliance of Section 7 of the said Act and after granting due opportunity to both the parties.

(iv) Both the parties are directed to appear before Mamlatdar/Tahsildar on **24/02/2025**.

(v) The Mamlatdar/Tahsildar, shall decide the matter afresh within 3 months from the date of appearance of the parties.

(vi) In the meantime, the parties are directed to maintain **status quo**, as on today.

Petition stands disposed of accordingly.

**(SMT. M.S. JAWALKAR, J.)**

*Jayashree..*