

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

WRIT PETITION NO. 5765/2010

1. Krushna s/o Damaji Choudhari,
aged about 65 years, Occ. Agriculturist
2. Vilas s/o Krushna Choudhari,
aged about 40 years Occ. Agriculturist

Both residents of Pohna, Tah. Hinganghat,
District Wardha.

PETITIONERS

...VERSUS...

1. Additional Commissioner, Nagpur Division,
Nagpur.
2. Nana s/o Mahadeorao Zade,
aged adult, Occ. Agriculturist,
3. Mahadeorao s/o Laxmanrao Charde,
aged adult, Occ. Agriculturist.
4. Sou. Pushpa Ramdasji Jawade,
aged 45 years, Occ. Agriculturist,

Nos. 2, 3 and 4 are resident of Pohna,
Tah. Hinganghat, Distt. Wardha.

RESPONDENTS

Shri P.V.Thakre, Advocate, for petitioners.
Shri K.L.Dharmadhikari, AGP, for Respondent No.1
Shri P.P.Kotwal, Advocate, with Shri N.D.Jain, Advocate for R-2
None for respondent nos. 3 and 4

CORAM: R. K. DESHPANDE, J.
DATE : 12th OCTOBER, 2011.

ORAL JUDGMENT

1] Rule was granted in this matter on 19th April, 2011. Except respondent no. 3, all other respondents are served. The learned AGP appears for respondent no.1. Shri Kotwal, Advocate with Shri Jain, Advocate, appears for respondent NO. 2. The learned counsels appearing for the parties submit that the respondent no. 3 though not served, is not the contesting party and hence, the decision of the matter need not wait for him.

2] The respondent no. 2 filed an application before the Tahsildar, claiming right of way over the boundaries of field Survey No. 427 and 429. The respondent no. 2 is the owner of survey No. 424, whereas the petitioners are owner

of survey no. 429. The petitioners had objected to the right of way claimed by the respondent no. 2. The Tahsildar, Hinganghat treated this to be an application under Section 143 of the Maharashtra Land Revenue Code (for short MLR Code) and accordingly registered the same as Case No. 12/LND 30/2006. After enquiry, an order came to be passed on 10th August, 2006, holding that there exists a right of way for the respondent no. 2 from the boundaries of Survey No. 427 and 429. The Tahsildar passed further order directing removal of obstruction and to clear southern road for use of it, by the respondent no.2.

3] This order was the subject matter of challenge before the Sub Divisional Officer, ("SDO") Hinganghat. The SDO recorded the finding that there subsists a way on the boundaries of Survey No. 427 and 429, however, the finding is recorded that the said way was not available to the respondent no. 2. The SDO also recorded the finding that there exists an alternate way for respondent no. 2 and on this

ground, the order of Naib Tahsildar was set aside by an order dated 16th October, 2006.

4] The respondent no. 2 preferred an appeal before the Additional Collector, Wardha. By an order dated 21st August, 2010, he has set aside the order of SOD and restored the order of Naib Tahsildar, passed on 10.08.2006. The revision preferred by the petitioners before the Additional Commissioner challenging the order of the Additional Collector was also dismissed by order an dated 20th November, 2010. Hence this writ petition.

5] Shri Thakare, the learned counsel appearing for the petitioners does not dispute that under Section 143 of the MLR Code, it is open for the Tahsildar to make an enquiry into and decide the claim by persons holding land in a survey number to a right of way over the boundaries of other survey numbers. He submits that the order of the Tahsildar to the extent it declares that there subsist a way over the

boundaries of Survey Nos. 427 and 429 cannot be faulted with. He, however, submits that under Section 143 of the MLR Code, there is no power conferred upon the Tahsildar to pass an order of removal of obstruction. He has relied upon the decision of the learned Single Judge of this Court reported in 2002 (4) Mh.L.J. 73 [Union of India and others vs. Maruti Madhav Kerulkar and others] wherein it has been held that such power is conferred upon the Mamlatdar under Section 5 of the Mamlatdars Courts Act, 1906. He, therefore, submits that there is a bar of jurisdiction created under the Mamlatdars Courts Act and hence, such a power could not have been exercised under Section 143 of MLR Code.

6] The learned counsel Shri Kotwal appearing for the respondent no. 2 has, however, disputed the contention raised on behalf of the petitioners. He has urged that the power under Section 143 of MLR Code and Section 5 of the Mamladars Courts Act can be exercised by the same

authority i.e. the Tahsildar. He submits that the application filed by the respondent no.2 was essentially under Section 143 of MLR Code read with Section 5 of the Mamlatdars Courts Act. According to him, though Section 143 of the MLR Code does not confer power upon the Tahsildar to remove the obstruction, such power can be exercised by invoking Section 5 of the Mamlatdars Courts Act. He has relied upon the decision of this Court reported in 2006 (6) ALL MR 542 [Smt. Vidya Vijay Karandikar and another vrs. State of Maharashtra and others].

7] It is not disputed by the learned counsel for the parties that the question as to whether there subsist right of way over the boundaries of survey numbers can be enquired into and decided under Section 143 of the MLR Code. Any person aggrieved by the decision under Section 143(1) of MLR Code can prefer an appeal and revision in accordance with the provisions of the Code or can institute civil suit against the decision of the Tahsildar within a period of one

year from the date of such decision in terms of sub-section (4) of Section 143.

8] The learned counsel for the respondent no. 2 could not point out from the provisions of Section 143 of MLR Code that the power of removal of obstruction can be exercised under the said provision. The reliance was placed upon the decision of this Court in **Smt. Vidya's case** (cited supra), which was a case where a composite application one under Section 143 of MLR Code read with Section 5 of Mamlatdars Courts Act was filed. The order passed under Section 143 of MLR Code in the said judgment was not challenged either before any of the authorities in appeal or revision or by filing a civil suit. This court has held that the relief of injunction is an ancillary relief to the main relief and when the main relief granted in the order was not challenged, it was futile to challenge the ancillary or consequential orders. The question of jurisdiction under Section 143 of MLR Code to direct removal of obstruction

was not decided in that case. Hence, the said judgment is not an authority for the proposition that while exercising powers under Section 143 of MLR Code, a power under Section 5 of the Mamlatdars Courts Act can also be invoked or exercised.

9] There is a definite distinction between the powers conferred under the Mamlatdars Courts Act upon the Tahsildar and the powers conferred upon the Tahsildar under Section 143 of the MLR Code. Section 143 of the MLR Code deals with the right of way over the boundaries. There is no limitation prescribed for filing such application, nor any details regarding contents of such application are provided. The remedies are provided against this order either of appeal or revision under the provisions of MLR Code or a civil suit under sub-section (4) of Section 143 of MLR Code. As against this, the application under Section 5 of the Mamlatdars Courts Act is treated as plaint in a suit and the power of grant of injunction to remove obstruction is

specifically conferred upon the Mamlatdars Courts. Sub-section (3) of Section 5 therein provides a period of limitation for filing such a suit and Section 7 of the said Act provides for the contents of plaint. There is revision provided under Section 23 of the Mamlatdars Courts Act to the Collector and there is specific bar of an appeal. In view of this, the application under Section 143 of the MLR Code cannot be treated as a suit under Section 5 of the Mamlatdars Courts Act and the Tahsildar exercising powers under Section 143 cannot direct removal of obstruction.

10] In view of this, the order passed by the Tahsildar to the extent it directs removal of obstruction created by the respondent no. 2 over the boundaries of Survey Nos. 427 and 429 cannot be sustained. The authorities below have committed an error in maintaining the said order. However, no fault can be found with the order passed by the authorities under Section 143, declaring that there subsist a way on the boundaries of Survey Nos. 427 and 429.

11] In the result, the writ petition is allowed. The orders passed by the authorities below are quashed and set aside only to the extent that it directs the removal of obstruction in the way through boundaries of Survey No. 427 and 429. The parties are at liberty to adopt all such proceedings as are available to them in law and the observations by the authorities below on the question of removal of obstruction shall not come in the way of authorities.

No orders as to costs.

JUDGE

Rvjalit