

(2015) 02 RAJ CK 0080
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1759/2015

Man Khan and Others

APPELLANT

Vs

Taj Bano and Others

RESPONDENT

Date of Decision : 06-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Rajasthan Land Revenue Act, 1956 — Section 27 (c), 27(c)
Rajasthan Tenancy Act, 1955 — Section 221, 230, 251, 27(c)

Citation : (2015) 3 WLN 45

Hon'ble Judges : Alok Sharma, J.

Bench : Single Bench

Advocate : K.K. Mehrishi, Senior Advocate and Gulam Nazmi Farooqi, for the Appellant

Final Decision : Dismissed

Judgement

Alok Sharma, J.—This petition has been filed against the judgment dated 9.1.2015 passed by the Board of Revenue, Rajasthan, Ajmer (hereinafter "the Board") whereby it has allowed the revision petition under section 230 read with section 221 of the Rajasthan Tenancy Act, 1955 (hereinafter "the Act of 1955") filed by the respondent-non-applicant (hereinafter "the non-applicant") and set aside the judgment dated 26.6.2014 passed by the Revenue Appellate Authority, Sikar Camp Jhunjhunu (hereinafter "the RAA") upholding the judgment of the SDO, Jhunjhunu passed on 3.6.2014 under section 251-A of the Act of 1955 on an application under section 251-A of the Act of 1955 at the instance of the petitioner-applicant (hereinafter "the applicant").

2. The Board by the impugned order has held that from the case laid before the SDO, Jhunjhunu by the applicants under section 251-A of the Act of 1955 was not maintainable as it was the applicants own case that they had a right of way of 14 ft. wide lane in 300 ft. in length running South of the non-applicant's field in Khasra No. 55 which the non-applicant No. 1 Taj Bano had obstructed. The

Board held that in view of the applicants own averments the issue evidently was not with regard to opening of a new right of way in terms of section 251-A of the Act of 1955 conferring jurisdiction for the purpose on the SDO, Jhunjhunu but a clear case of removing the obstruction over a preexisting right of way under section 251 of the Act of 1955 conferring power for the purpose on the jurisdictional Tehsildar. In the circumstances the Board set aside the judgment dated 3.6.2014 passed by the SDO, Jhunjhunu purportedly in the exercise of his powers under section 251-A of the Act of 1955 as affirmed by the RAA, Sikar on 26.6.2014 and keeping in mind the nature of a dispute i.e. alleged obstruction of a preexisting way remitted the matter to the Tehsildar, Chirawa to exercise his powers under section 251 of the Act of 1955 after due inquiry.

3. Mr. K.K Mehrishi learned Sr. Counsel with Mr. Gulam Nazmi Farooqi appearing for the applicant submits that the Board committed a gross error in interfering with the judgments passed by the SDO, Jhunjhunu and the RAA, Sikar Camp Jhunjhunu in as much as albeit a preexisting way with 14 ft. wide to the Southern side with a length of 300 ft. was indeed averred to in the application, yet the way in issue was not recorded in the revenue records nor reflected in the revenue maps. He submits that in this view of the matter the proceedings under section 251 of the Act of 1955 were not statutorily warranted and the only remedy which the applicants had was under section 251-A of the Act of 1955. Sr. Counsel has further submitted that in any event the ground with regard to the purported lack of jurisdiction of the SDO, Jhunjhunu to exercise his powers under section 251-A of the Act of 1955 was not raised in the reply to the application filed and was only subsequently agitated in an application under section 151 CPC. But that application was dismissed and no further proceedings were taken there-against. Consequently the Board ought to have concluded that the non-applicants submitted to the jurisdiction of the SDO, Jhunjhunu and his lack of jurisdiction therefore would not be made a ground of challenge before the Board. Senior Counsel also submits that in any event the Board ought to have found jurisdiction with the SDO, Jhunjhunu even under section 251 of the Act of 1955 as in terms of section 27 (c) of the Rajasthan Land Revenue Act, 1956 (hereinafter "the Act of 1956"), the SDO had all the powers of the Assistant Collector or the Tehsildar. And in this view of the matter the judgment dated 26.6.2014 passed by the SDO could have been construed as one under section 251 of the Act of 1955 by the Tehsildar.

4. Heard. Perused the impugned judgment dated 9.1.2015 passed by the Board as also the underlying judgments of the SDO, Jhunjhunu and the RAA, Sikar Camp Jhunjhunu. For facility of reference sections 251 and 251-A of the Act of 1955 are reproduced here-in-below:

"251. Rights of way and other private easement--(1) In the event of any holder of land, in actual enjoyment of a right of way or other easement of right, having, without his consent, been disturbed in such enjoyment otherwise than in due course of law, the Tehsildar may, on the application of the holder of land so

disturbed and after making a summary inquiry into the fact of such enjoyment and disturbance, order the disturbance to be removed or stopped and the applicant-holder to be restored to such enjoyment, notwithstanding any other title that may be set up before the Tehsildar against such restoration.

(2) No order passed under this section shall debar any person from establishing such right or easement as he may claim by a regular suit in a competent civil court."

"251-A. Laying of underground pipeline or opening a new way through another Khatedar's holding or enlarging the existing way.--(1) Where-

(a) a tenant intends to lay an underground pipeline through the holding of another khatedar for the purpose of irrigation of his holding; or

(b) a tenant or a group of tenants intend to have a new way, or enlargement or widening of an existing way, through the holding of another khatedar to have access to his holding or, as the case may be, their holdings and the matter is not settled by mutual agreement, the tenant or the tenants, as the case may, may apply for such facility to the Sub Divisional Officer concerned, and the Sub-Divisional Officer, if he is satisfied after a summary inquiry, that-

(i) the necessity is absolute necessity and it is not for mere convenient enjoyment of holding; and

(ii) particularly in case of a new way through another khatedar's holding, that absence of alternative means of access is proved may, by order, allow the applicant, to lay pipeline, at least three feet beneath the surface of the land, along the line demarcated or pointed out by the tenant who holds that land, or to have a new way, not wider than thirty feet, through the land on such track as pointed out by the tenant who holds that land, and if no such track is pointed out, through the shortest or nearest route, or to enlarge or widen the existing way, not exceeding up to thirty feet, on payment of such compensation as may be determined by the Sub-Divisional Officer, in the prescribed manner, to the tenant who holds the land through which the right to lay pipeline or have a new way or enlarge or widen an existing way is granted.

(2) Where a right to have a new way or enlarge or widen an existing way is granted under sub-section (1), the tenancy in respect of the land comprising such way shall be deemed to have been extinguished and the land shall be recorded as rasta in the revenue records.

(3) The persons permitted to avail any of the facilities referred to in sub-section (1) shall not, by virtue of the said facility, acquire any other right in the holding through which such facility is granted."

5. A perusal of the aforesaid two sections indicates that they deal with different facts-situations. Section 251 of the Act of 1955 deals with situations where actual enjoyment of a preexisting right of way or private easement is disturbed

and its enjoyment otherwise diluted contrary to law. In such situations the jurisdictional Tehsildar has been empowered, on an application of the aggrieved person, to make a summary inquiry as to the fact of enjoyment and its disturbance and thereafter to direct removal of the disturbance ensuring the applicant is restored to such enjoyment notwithstanding any other title that may be set up before the Tehsildar against such restoration. A reading of section 251 referred above shows that it is not necessary that the right of way obstructed must be a sanctioned way reflected in the revenue records and the revenue map as was sought to be argued by Sr. Counsel for the applicant. And no authority was cited in support of the contention. Section 251-A of the Act of 1955 on the one hand deals with an absolutely different fact-situation from the one set out in section 251 of the Act of 1955. It provides inter-alia for creating a right of way through a khatedar's land to the extent absolutely necessary where there is absence of alternate means to access his khatedari land by the applicant--and it is so proved in an enquiry made by the SDO. In that eventuality failing a mutual agreement between the khatedars of the land through which a way is sought, as of necessity, the SDO has been empowered to determine the shortest route to facilitate the access sought by the applicants before him and direct payment of compensation to the khatedars of the land utilised. This results in the extinguishment of the khatedari right of the tenant to the extent of compensation received.

6. In my considered opinion in the context of the case set up by the applicants themselves before the SDO with regard to a preexisting way 16 ft. wide with a length of 300 ft. to the Southern side of Khasra No. 55 belonging to the non-applicants and it then being obstructed, the case fell squarely within the jurisdiction of the Tehsildar under section 251 of the Act of 1955. It was not the applicants' case that there was no existing way to their khatedars consequent to which resort to section 251-A was necessary. It is no-doubt true that the non-applicants did not raise the question of lack of jurisdiction of the SDO under section 251-A of the Act of 1955 in the facts of the case in the first instance. But the fact remains that subsequently they so did by moving an application under section 151 CPC. The dismissal of the said application and no further challenge to the dismissal to my mind would be of no event as the question of jurisdiction is purely a legal issue going to the root of the matter and can be agitated at any stage. I also find no force in the contention of Sr. Counsel Mr. Mehrishi that the SDO in terms of section 27(c) of the Act of 1956 having powers also of the Tehsildar could exercise the Tehsildar's power under section 251 of the Act of 1955--while treating an application under Section 251A as one under Section 251 of the Act of 1955. In my considered opinion such a construction would be a prescription for intermingling of two separate jurisdictions one under section 251 of the Act of 1955 and the other under section 251-A thereof. It is well settled that the Forums for adjudication of legal rights are the creation of the legislature and conferment of jurisdiction for the purpose has to be strictly construed. Section 251 of the Act of 1955 specifically empowers the Tehsildar alone to

address the issue of obstruction of a preexisting right of way to agricultural lands and by resort to section 27(c) of the Act of 1955 such jurisdiction cannot be extended to the SDO.

7. Sr. Counsel has finally submitted that the Hon''ble Apex Court has looked with disfavour on unwarranted remands as a remand only in results extending the life of the case to the gross disadvantage of the contesting parties- both the applicants/plaintiffs and the non-applicants/defendants. In my considered opinion there is no force in the submission of Sr. Counsel in the facts of the case obtaining. The issue before this Court is, as was before the Board, as to whether the SDO could, in the exercise of his powers under section 251-A of the Act of 1955 address an application where the claim was not with reference to absence of access to khatedari land but one of obstruction of a preexisting way to agricultural fields of a khatedar. In my considered opinion in the circumstances obtaining the Board having concluded that the SDO did not have the jurisdiction to address the application under section 251-A of the Act of 1955 as laid, it had no option but to remit the matter to the jurisdictional Tehsildar to exercise his powers in respect of the dispute raised by the applicants with reference to section 251 of the Act of 1955. Hence the impugned judgment dated 09.01.2015, passed by the Board is not one of remand to the authority which earlier decided the case, but of referring the case to the empowered jurisdictional statutory authority. The Tehsildar, Chirawa District Jhunjhunu is however directed to decide the issue of obstruction of the applicants on an allegedly existing right of way through the Southern side of the non-applicants' field in Khasra No. 55 within a period of two months from the receipt of certified copy of this order.

8. The writ petition is without force. Dismissed.