

(2009) 04 BOM CK 0131
In the Bombay High Court
Case No : Writ Petition No. 531 of 2008

Mr. Vernon Rodrigues

APPELLANT

Vs

Hanumant Govind Candolakar and 7 Others

RESPONDENT

Date of Decision : 17-04-2009

Acts Referred:

Mamlatdars Court Act, 1906 — Section 18, 18(1)(f), 4, 4(1)(f), 4(2)

Citation : (2009) 04 BOM CK 0131

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Valmiki Menezes, for the Appellant; N. Sardesai, Advocate for the respondent Nos. 1 to 5, Mr. M. Salkar, Additional Government Advocate for the respondent Nos. 7 and 8, for the Respondent

Final Decision : Dismissed

Judgement

Smt. R.S. Dalvi, J.—Rule. By consent heard forthwith. The petitioner has challenged the order of the Mamlatdar dated 20.8.2008 as having been passed without jurisdiction. The order is passed u/s 4(1)(f) and (2) of the Mamlatdar's Court Act. The respondents herein were the applicants in an application filed before the Mamlatdar bearing M.C.A. No. 4/2008.

2. The respondents therein claimed that they had a right of way through a very tiny portion of the plaintiff's property. That right of way was exercised by the respondents herein for the immersion of idol of Lord Ganesh during the Ganapati Festival. The respondents claimed that the defendant in that application being the petitioner herein had put up an obstruction to the right of way and sought orders with regard to right of way.

3. It will be useful to set out section under which the Mamlatdar exercised his jurisdiction under Mamlatdar's Court Act i.e. Section 4(1)(f) which runs thus :

Section 4(1)(f) - to restore or cause to be restored any right of way which has been obstructed or encroached upon otherwise than under due authority of law.

The Mamlatdar has powers to restore or cause to be restored any right of way, which was obstructed or encroached upon otherwise than by due authority of law. The obstruction that was stated to have been placed by the petitioner herein was by way of fencing or compound wall. The obstruction was stated to have put up some time prior to the application being made. The Mamlatdar restored, by a mandatory order, that right of way. The mandatory order sets out the access claimed by the plaintiff in their application and the affidavits of about six persons filed by the them. The Court can order to remove that obstruction and maintain peace in the village and avoid law and order problem. The Mamlatdar ordered demolition / removal/ clearance of the encroachment and to restore access claimed by the plaintiffs in the application u/s 4(1)(f).

4. u/s 4(2), the Mamlatdar is also shown to have certain other powers. Under that section, he has power inter alia to pass an order in respect of right of way with regard to dwelling house. The order mentions that it has passed the order inter alia also u/s 4(2), though the order shows that it is essentially passed u/s 4(1)(f) of the said Act.

5. It is contended that the Mamlatdar passed an ex-parte order. The petitioner herein was not heard. No evidence was adduced. No issues were framed. Hence, it is contended that the order was without jurisdiction. My attention is drawn to Section 18 of the Act, which lays down the procedure and powers of the Mamlatdar's Court. The Mamlatdar is indeed required to hear all evidence and frame issues as laid down under sub clause (f) of subsection (1) of Section 18, which runs thus :

Section 18 (1)(f)-If the plaintiff avers that he is entitled to a right of way and that the defendant has obstructed or has encroached upon it

(i) whether the plaintiff or any person or his behalf was in beneficial enjoyment of the right of way;

(ii) whether the defendant has obstructed or encroached upon it otherwise than under due authority of law;

(iii) whether the suit was filed within the time allowed by sub-section (3) of section 4.

6. The Mamlatdar has to consider the averments of the plaintiffs about whether they are entitled to a right of way, whether the plaintiff was in beneficial enjoyment of the right of way, the defendant has obstructed it and whether the suit was within time. It has to be seen whether the Mamlatdar has considered these aspects in passing the ex-parte order of mandatorily removing the part of the fencing / compound wall of the petitioner.

7. The affidavits before the Mamlatdar showed the right of way of the plaintiffs in their application. That was beneficial enjoyment of the plaintiffs. They use the access each year for immersion of the idol of Lord Ganesh. It was contended that the defendant in that application (the petitioner herein) obstructed and

encroached upon such beneficial enjoyment.

8. It is the case of the petitioner that he has a compound wall over around his property, which is under survey No. 136/10 and 136/4 and that the respondents herein have demolished the part of the wall. It has to be seen since when the petitioner had enclosed his property by such compound wall. The permission of the Goa Coastal Zone Management Authority granted to the daughter of the petitioner is for proposed wire mesh fencing on Survey No. 136/4 and 136/10 and 139/11 of Candolim village. The approval has been granted subject to condition that only live fencing and wire fencing with vegetative cover is permitted in lieu of the compound wall and that traditional access if any would not be blocked and would be maintained to the satisfaction of the local authority. The permission is granted on 26.11.2007. Hence, it is seen from the said permission annexed to the petition itself that the petitioner had no compound wall prior to November 2007. The petitioner could have had only a wire fencing after 26.11.2007. The petitioner has produced certain photographs during the arguments. The photographs show certain wall around the structure. That wall is made of laterite stones placed one on the top of the other. It is not a concretized compound wall.

9. The obstructions stated by the defendants in the application before the Mamlatdar was, therefore, seen by the Mamlatdar. It is seen that the obstructions could have been put up only after November 2007. It was the case of the plaintiffs before the Mamlatdar's Court that it was put up just before the application was made and urgency was sought to be made out on the ground that the cause of action accrued only on 15th August, 2008 and the application was dated 19.08.2008.

10. Consequently, it must be further seen that the suit was filed within time i.e. within one year of the obstructions being put up and in fact in the case of the plaintiffs before the Mamlatdar's Court it was filed within few days of the obstructions being made.

11. The powers of the Mamlatdar's Court u/s 18(1)(f) are, therefore, correctly exercised. The procedure of the Mamlatdar's Court is stated to be not exercised correctly in as much as he had to hear all the evidence, frame issues and proceed with the application before it. The Mamlatdar having exercised the powers in emergent situation, it has to be seen whether he could have exercised those powers at the relevant time. The power of passing the orders, includes mandatory orders by way of restoration of a right of way. It implicitly includes ex parte orders of mandatory nature to be passed without notice if the case of urgency is made out. My attention has been drawn to the order dated 28.06.2006 of this Court, which deals with the powers of the Mamlatdar's Court relying upon the judgment of the Supreme Court in the case of the Union of India and another Vs. Paras Laminates (P) Ltd., , in which it is held that an authority having jurisdiction has all incidental and ancillary powers, which are necessary to make statutory powers fully effective.

12. It can be seen that upon the case of the plaintiffs in the Mamlatdar's Court the Mamlatdar saw that the right of way which the plaintiffs enjoyed over the area was sought to be obstructed by putting of the wall by the defendants therein a few days before the application was made. The plaintiffs' beneficial enjoyment of right of way was obstructed. The application was moved within the period of limitation and in fact by way of urgency. The mandatory order to demolish/ remove/ clear the suit access and to remove the obstructions has been granted to the extent of 50 C.Ms. of the obstructions. The police protection has also been sought and granted. The order is not seen to be without jurisdiction. In fact, the mandatory nature of the order upon urgency being made out is the only requirement to make the powers of the Mamlatdar under Sections 4(1)(f) and 18(1)(f) effective.

13. The Mamlatdar has also passed an order restraining the defendant (petitioner herein) from creating any obstructions or blockage or impediment in the suit access otherwise than by due process of law. That is followed. A day after the respondents herein moved the Mamlatdar's Court and on the date of the order of the Mamlatdar's Court itself the petitioner has filed a civil suit No. 136/2008/D for an injunction against the respondent No. 1 from interfering with his possession. The due legal process has been followed by the petitioner. The interference, if any, by the respondent No. 1 shall be decided on merits in the civil suit. Hence, the relief in terms of the prayer (b) granted by the Mamlatdar shall be subject to that legal process. It is seen that the order having been passed not without jurisdiction cannot be challenged. The writ petition is dismissed. It is hoped that the parties in the civil suit shall see reason and come to an amicable end to the dispute, which otherwise need not be agitated.