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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5284 OF 2015

Shri Baliram Dadu Gaikwad and anr. ... Petitioners

Vs.

Shri Laxman Mahadeo Gaikwad and others ... Respondents

Mr.Dilip Bodke, Advocate for Petitioners.

Mr.R.V.Bansode i/b Ms.Aparna P.Bhosale, Advocate for Respondents.

CORAM : R. G. KETKAR, J.

DATE : 02nd JULY, 2015

P.C. :

. Heard Mr.Dilip Bodke, learned Counsel for the petitioners and Mr.R.V.Bansode, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners hereinafter referred to as defendants have challenged the judgment and order dated 18/07/2014 passed by the learned 6th Joint Civil Judge, Junior division, Satara below Exhibit 5 in Regular Civil Suit No. 459 of 2013 as also the judgment and order dated 02/05/2015 passed by the Ad-hoc District Judge-1, Satara in Misc. Civil Appeal No. 123 of 2014. By these orders, the Courts below allowed the application filed by the respondents hereinafter referred to as plaintiffs and restrained defendants No. 1& 2 from disturbing the possession of the plaintiffs over the suit properties till

the decision of the Suit or without following due procedure of law, whichever is earlier.

3. In support of this Petition, Mr.Bodke submitted that defendants herein had earlier instituted Regular Civil Suit No. 372 of 1979 for perpetual injunction. During the pendency of the suit, defendants No. 1 to 8 therein illegally and forcibly dispossessed the defendants in May 1983. He submitted that in view of this development, defendants herein amended the plaint and incorporated paragraph 7A as also prayer 1A and sought possession from the plaintiffs herein. Defendants No.1 & 2 thereafter came in possession. He submitted that defendants are in possession and the said fact is substantiated by mutation entry No. 637 which was certified in the year 1996. Aggrieved by that decision, the plaintiffs preferred R.T.S. Appeal No. 13 of 1996. Sub-Divisional Officer (for short S.D.O.), Wai dismissed the Appeal on 23/04/1998. He submitted that the plaintiffs did not challenge the order of the S.D.O and thus, the said order attained finality. He submitted that the Courts below failed to appreciate that the plaintiffs came with the case that the property are joint family property therefore no injunction could be issued against the co-owners. In view thereof, the Courts below could not have issued injunction restraining co-owners from enjoying the suit properties.

4. On the other hand, Mr.Bansode supported the impugned

orders. He submitted that on 13/06/2013, defendants herein filed pursis for withdrawal of the suit. The plaintiffs filed say opposing the withdrawal of the suit. On the same day i.e. on 21/06/2013 Regular Civil Suit No. 372 of 1979 was withdrawn. He submitted that the defendants herein did not proceed with the suit qua relief in terms of prayer clause 1A viz. perpetual injunction, assuming that they were in possession of the property in dispute. In fact in 2013, they had withdrawn the suit simplicitor. He further submitted that the Courts below have concurrently found that plaintiffs are in possession of the suit property. Having regard to the assertions made in paragraph 7A of plaint read with prayer clause 1A of Regular Civil Suit No. 372 of 1979, defendants cannot claim to be in possession and consequently, cannot claim that injunction can not be issued against co-owner.

5. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendants herein had instituted Regular Civil Suit No. 372 of 1979. Initially, Suit was instituted only for perpetual injunction. Defendants amended the plaint and contended that in the month of May 1983, defendants No. 1 to 8 therein had forcibly and illegally dispossessed them. Accordingly, paragraph 7A was incorporated along with prayer clause (1A) seeking possession of the suit property from the plaintiff herein.

Thus, by amending the plaint in Regular Civil Suit No. 372 of 1979, defendants herein admitted that they are not in possession, rather plaintiffs who were defendants No. 1 to 8 therein were in possession of the suit property. It is no doubt true that mutation Entry No. 637 was certified in favour of defendants in the year 1996 as also R.T.S. Appeal No. 13 of 1996 preferred by the plaintiffs was dismissed by S.D.O. on 23/04/1998 and the said order was not challenged by the plaintiffs. It is however, significant to note that defendants herein had withdrawn Regular Civil Suit No.372 of 1979. If at all they are claiming to be in possession of the suit property, surely, they would have proceeded with that suit qua prayer clause (1A) viz. perpetual injunction. However, the Suit was withdrawn. The Courts below after appreciating the material on record have concurrently found that plaintiffs are in possession and defendants are not in possession. In view thereof, I do not find that the Courts below committed any error in allowing Exhibit 5. Hence, Petition fails and the same is dismissed. The learned trial Judge will decide the Suit on the basis of the evidence on record and on its own merits, uninfluenced by the observations made herein.

6. At this stage, Mr. Bodke states that status-quo granted by the learned District Judge on 02/05/2015 may be continued for a period of 8 weeks from today as the petitioners have cultivated the crop. Mr.Bansode opposes this application on the ground that the

trial Court found that respondents-plaintiffs are in possession and the status-quo would mean that defendants are in possession and not the plaintiffs. In view thereof, oral application made by Mr.Bodke is rejected.

(R. G. KETKAR, J.)