

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1294 OF 2015

Dr. Kamlesh Chandra J.
Shrivastava

Petitioner

Vs

Jaysram Shantaram Bhagat,
since deceased, through LRs
1/1. Leela jayram Bhagat and
Ors.

.. Respondents

Mr. Dhairyasheel Sutar, Advocate for the petitioner.
Mr.Prashant Bhavake, Advocate for respondents no.3 and 4.

CORAM : R.G.KETKAR,J.
DATE : 06/08/2015

PC:

1. Heard Mr. Dhairyasheel Sutar, learned counsel for the petitioner and Mr. Prashant Bhavake, learned counsel for respondents no. 3 and 4 at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the Judgment and order dated 10.11.2014 passed by the learned 5th Jt. Civil Judge, Sr. Dn., Thane, below Exhibits 113 and 115 in Regular Civil Suit No. 725 of 2003. By that order, the learned trial Judge allowed the applications Exh.113 filed by respondent no.3 and Exhibit-115 filed by respondent no.4 under Order I, Rule 10(2) of C.P.C. for adding them as party in the suit.

3. In support of this Petition, Mr. Sutar submitted that the petitioner, hereinafter referred to as 'plaintiff' has instituted suit,

inter alia, praying for declaration that defendant no. 2- Thane Municipal Corporation has no right, title and interest in the property more particularly described in paragraph 1 of the Plaint (for short, 'suit property') and for deleting its name and inserting the name of the plaintiff in Municipal Record as a lawful occupier; for declaration that the defendant has no right to interfere with the possession of the plaintiff and restraining defendant no.1 from dispossessing the plaintiff from the suit property; for perpetual injunction restraining defendant no.1 from dispossessing the plaintiff from the suit property. He submitted that respondent no.3 filed application Exhibit 113 on 18.1.2014 under Order I, Rule 10(2). In paragraph 3, it was contended that the applicant is the interested and affected party in the suit as she is owner of portion of suit property. The plaintiff purposefully and intentionally did not make her party in the suit. Respondent no.4 also filed application on the same day at Exhibit 115 on similar lines.

4. Mr. Sutar submitted that after considering the documents referred in paragraph 7, the learned trial Judge held that the applicants are having interest in the suit property since respondent no.4 has interest in the suit property since his grand father. However, the learned trial Judge failed to consider application dated 29.6.2000 made by respondents no.3 and 4 and the order passed by Tahasildar, Thane. He submitted that

respondents no. 3 and 4 made application for removal of encroachment on survey no.104, admeasuring 3299 sq.meters. During the course of inquiry, respondent no.3 accepted the amount of Rs. 57,905/- by cheque and withdrew her complaint and to that effect her statement was also recorded. The Tahasildar also held that Section 4 of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 is not applicable and that the land belongs to State Government and not tribals. The inquiry initiated in pursuance of the application dated 29.6.2000 was closed. Mr. Sutar submitted that as respondents no.3 and 4 withdrew their complaint after accepting the amount, they have no longer any interest in the suit property. The learned trial Judge, therefore, was not justified in allowing their applications. In any case, the plaintiff is dominus litis and if he does not implead necessary party, the Court will pass appropriate orders and even on this ground, the impugned order is liable to be set aside.

5. On the other hand, Mr. Bhavake supported the impugned order. He submitted that after considering the documents placed on record, the learned trial Judge has observed in paragraph 7 that respondents no.3 and 4 have interest in the subject matter of the suit and accordingly has allowed the application. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. 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, the plaintiff has prayed for reliefs indicated earlier and in particular prayer clause (a) which reads as under :

(a) It be decreed and declared that the defendant no.2 delete the name of defendant no.1 from municipal record as defendant no.1 has no right, title interest is vested in the suit property and insert the name of plaintiff on the Municipal record as a lawful occupier;"

7. Perusal of prayer clause (a) shows that the plaintiff has sought declaration that defendant no.2-Thane Municipal Corporation has no right, title and interest in the suit property and for inserting his name in the municipal record as lawful occupier. It is also material to note that respondents 3 and 4 made application on 29.6.2000 and in pursuance of that application, Circle Officer, Mumbra conducted the inquiry and submitted report dated 11.10.2002. Tahasildar passed order on 11.10.2010. It is not in dispute that the petitioner's name appears at sr. no.5 and 6 in respect of Jairam Bhagat Chawl as also the name of predecessor-in-title of respondent no.4 appears in that order. Likewise, name of respondent no.3 also appears in respect of Manoj Niwas. Thus, in the order passed by Tahasildar, it is recorded that plaintiff and respondents no.3 and 4 also have constructed premises. Mr. Sutar submitted that the inquiry was

closed as the application made by respondents no.3 and 4 was withdrawn after receiving monetary consideration. Even accepting the case of the plaintiff that the complaint made by respondents no.3 and 4 was withdrawn after receipt of monetary consideration, that will not divest them of their interest. In the inquiry, Tahasildar held that the land belongs to the State Government.

8. In paragraph 7 of the impugned order, the learned trial Judge has considered the documents produced by respondents no.3 and 4 and held that these documents show that they have interest in Survey No.104. In view thereof as also the enquiry report dated 11.10.2002 and order dated 11.10.2010, I do not find that the learned trial Judge has committed any error in passing the impugned order. It cannot be said that the impugned order is perverse, being based upon no material or is contrary to the material on record. While considering the application under Order I, Rule 10(2) what is required to be seen is whether the applicant has some semblance of interest. At this stage, Court is not expected to conduct mini trial. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a

ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)