

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8685 OF 2015
WITH
WRIT PETITION NO. 8746 OF 2015

SANDU SATWA HIWALE AND OTHERS
VERSUS
KESHAV TRIMBAK HIWALE

...
Advocate for Petitioners : Mr. D.K. Kulkarni
Advocate for Respondents : Mr. Kakasaheb B. Jadhav
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CORAM : V. K. JADHAV, J.
DATED : 28th JANUARY, 2016

PER COURT:-

By consent of learned counsel for the parties, heard finally at admission stage.

1. The petitioners in writ petition No. 8685 of 2015 instituted a suit for perpetual injunction in respect of their agricultural land Gat No.51. They are the absolute owners and in lawful possession of land admeasuring 2H 71 R. During pendency of suit, the petitioners had filed an application Exh.5. The respondents-defendants have strongly resisted the said application by filing their say at Exh.11. The trial court by its order dated 24.4.2015 below Exh.5 in R.C.S. No. 963 of 2014 rejected the said application. Being aggrieved by the said order dated 24.4.2015, the petitioners-plaintiffs preferred Misc. Civil Appeal No. 87 of 2015 before the District court. The Ad-hoc District Judge-3, by order dated 22.6.2015 dismissed the Misc. Civil Appeal No. 87 of 2015 and

confirmed the order passed by the trial court.

2. In writ petition No. 8746 of 2015, the respondent-original plaintiff instituted a suit being R.C.S. No. 982 of 2014, for perpetual injunction. The respondent-plaintiff filed an application Exh.5 for issuance of order of temporary injunction. The petitioners-original defendants strongly resisted the application. The learned Judge of the trial court has allowed the said application at Exh.5. The said order was challenged before the District Court and learned District Judge also confirmed the order passed by the trial court.

3. Learned counsel for the petitioners in both the writ petitions, submits that the respondents-defendants put the petitioners-plaintiffs in possession of the encroached portion of area admeasuring 36 R. Even though the petitioners-plaintiffs have produced before the trial court affidavits and photographs, the trial court in para 7 of the impugned order has observed that there is no evidence to show that possession of the encroached portion came to be delivered by the respondents-defendants to the petitioners-plaintiffs. Learned counsel further submits that since the trial court as well as the district court have recorded a finding that the petitioners-plaintiffs is not in possession of the area admeasuring 36 R and the respondent-defendant is in possession of the same, the petitioners-plaintiffs constrained to file application for amendment in the pleadings by way of inserting relief of recovery of

possession. Learned counsel submits that those observations are required to be treated as observations at the stage of deciding application Exh.5 and that should not cause any prejudice in the trial of the suit.

4. Learned counsel for respondents-original defendants in writ petition No. 8685 of 2015 and original plaintiff in writ petition No. 8746 of 2015 submits that the trial court has rightly granted application Exh.5 and the learned District Judge has confirmed the said order. There are concurrent findings of the courts below. There is no substance in the writ petitions and the same therefore, are liable to be dismissed.

5. The petitioners-plaintiffs have approached the Court with a grievance that as per the measurement, the respondents-defendants are having possession over 36 R land from Gat No. 51 which is owned and possessed by the petitioners-plaintiffs. It is further case of the petitioners-plaintiffs that after finding out the alleged encroachment, in a meeting of respectable senior members of the family, the respondents-defendants put the plaintiffs in possession of encroached portion of 36 R and since then the plaintiffs are having possession over the said land. In the light of these pleadings, the trial court has rightly observed that there is absolutely no material on record to show that the respondents-defendants delivered the possession of 36 R land to the petitioners-plaintiffs. The learned District Judge has also taken pains to look into

the affidavit of the witnesses on which the petitioners-plaintiffs place reliance. The learned District Judge in para 8 of the impugned order observed that the wordings of both the affidavits of the witnesses are so similar and that itself creates a doubt of its authenticity. It appears from the observations of the trial court as well as the appellate court that the petitioners-plaintiffs failed to file affidavit of independent adjacent owners, who would be in a position to state as to who are in possession of the disputed portion of land.

6. In the light of above observations, no interference is called for in the impugned orders. Needless to state that the observations made by the trial court as well as the appellate Court while deciding application Exh.5 are prima facie in nature and the court below, after appreciating the evidence adduced by the parties during the course of trial, may come to an independent and different conclusion.

7. In the result, both the writ petitions are hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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