

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 7208 OF 2016

- 1] Satyanarayan s/o Surajmal Dargad
Age: 58 years, Occu. Business,
R/o. Yeldari Road, Jintur,
district – Parbhani
 - 2] Sau. Shivkanya w/o Satyanarayan Dargad
Age: 55 years, Occu. Household,
R/o. As above
Both the petitioners through their GPA
Holder Santosh s/o Shriram Dargad
Age: 40 years, Occu. Business,
R/o. Yeldari Road, Jintur,
Dist. Parbhani
- ... Petitioners
(Orig. Plaintiffs)

V E R S U S

- 1] Sagar s/o Sakharam Chidrawar
Age: 33 years, Occu. Business,
R/o. Market Yard, Jintur,
Tal. Jintur, Dist. Parbhani
 - 2] Jintur Municipal Council, Jintur
Dist. Parbhani
Through its Chief Officer
- ... Respondents

.....
Mr. Swapnil S. Rathi, Advocate for petitioners
Mr. M. M. Patil (Beedkar), Advocate for respondent No.1
.....

CORAM : SUNIL P. DESHMUKH, J.

DATE : 18th JULY, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard with
consent of the learned advocates of appearing parties, finally.

2. The petitioners-plaintiffs are before this court, aggrieved by order on application Exhibit-92 in Regular Civil Suit No. 75 of 2015 pending before Civil Judge, Junior Division, Jintur, District Parbhani, moved by petitioners-plaintiffs seeking re-framing of issues as have been contained in the application. Application Exhibit-97 was moved by the respondents-defendants for similar purpose has also been rejected along with application Exhibit-92 filed by the petitioners-plaintiffs.

3. After hearing learned counsel, the position emerges that the plaintiffs-petitioners have instituted suit seeking perpetual and mandatory injunction against defendants in respect of property described in the plaint and respondent No.1-defendant No.1 has lodged a counter claim, also seeking perpetual injunction against plaintiffs in respect of the property described in the counter claim.

4. The issues upon the pleadings of the parties have been framed at Exhibit-86 as have been annexed to this writ petition as Exhibit-"C" at page 29, which are seven in number.

5. The first issue is about encroachment by defendants over the property and making construction thereon. The second issue is with regard to entitlement of plaintiffs for

mandatory injunction. Third relates to plaintiffs' entitlement to recover of possession of the encroached portion. Fifth issue casts burden on the defendants, as to whether plaintiffs are causing interference in construction being made by them over the property described in the counter claim.

6. Mr. Rathi, learned counsel for petitioners submits that suit of the plaintiffs is absolutely not for recovery of possession and it is also not their case that defendants have caused encroachment upon their property, rather it is that the defendants are trying to cause encroachment and in the process, some activity was sought to be undertaken for construction over the property claimed by the plaintiffs and as such, it was the cause of action for the plaintiffs to institute a suit for perpetual and mandatory injunction.

7. Learned counsel submits that the pleadings by plaintiffs and the defendants would not give rise to the first and third issues instead the plaintiffs suggest an issue under Exhibit-92 as issue No.1, which is to the effect that whether plaintiffs prove that defendants are making encroachment over the area and making construction.

8. According to learned counsel, said issue would suffice the purpose of the plaintiffs instead of issues No. 1 and 3 as have been framed. He submits that the issues have been cast, giving indication that it is being assumed that the plaintiffs have accepted that they have lost possession and as such, against rejection of application the petitioners are before this court.

9. On the other hand, Mr. M. M. Patil (Beedkar), contends that the trial court has taken into account relevant factual position as is material, including photograph, which to quite some extent shows that some activity of construction has already taken place and iron work for pillars is clearly being depicted in the photographs. In the circumstances, the issues as have been framed in fact to a large extent would resolve the dispute. He submits that, as a matter of fact issues as are appearing may benefit the plaintiffs more rather than defendants, albeit, the plaintiffs, would be required to discharge burden.

10. The learned judge has reproduced the averments of the plaintiffs in plaint paragraph No.3, in the impugned order, which read thus;

“ रातोरत वादींच्या मालकी व ताब्याच्या वादमिळकतीच्या उत्तरेकडील असलेल्या १.८३ मीटर रुंद व ३३.५५ मीटर लांब एवढ्या मोकळ्या जागेवर जे.सी.बी मशीनच्या साह्याने पायाचे खोदकाम केले.”

11. Perusal of the impugned order shows that from the portion reproduced hereinabove, the court has considered that the plaintiffs are no longer in possession and as such will require to claim back the possession, coupled with further consideration that the photographs also depict that there is iron work for pillars being appearing and as such, the order has been passed.

12. Be that as it may, as far as framing of issues is concerned, one would have to consider that parameters as appearing in Order XIV of the Code of Civil Procedure will govern the situation, particularly, pleadings would give rise to issues, from material proposition of fact and law and their denial by the other side. The applications of the plaintiffs or defendants as such, would be required to be appreciated accordingly and order will have to be passed. It appears that averments in the plaint and as those appearing in the written statement along with counter claim will have to be re-appreciated having regard to the arguments as have been

advanced on either side by the learned counsel. For said purpose, the matter would be required to be remitted for re-consideration. In the circumstances, the impugned order is set aside.

13. Mr. M. M. Patil (Beedkar), learned counsel points out that District Court has directed early disposal of the *lis* pending between the parties, the suit and the counter claim.

14. In view of the same, applications Exhibit-92 as well as Exhibit-97 although there is no specific challenge to order on Exhibit-97, be re-considered afresh by giving proper opportunity to either side. Hopefully, the exercise would be completed within a period of fortnight from the date of receipt of writ of this order.

15. With aforesaid, writ petition is disposed of. Rule is made absolute, accordingly.

16. Needless to refer to that all contentions, submissions and objections of the parties, are kept open.

(SUNIL P. DESHMUKH, J.)

sms