

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

WRIT PETITION NO.4089 OF 2017

Umesh Tanaji Tavar & ors. ... Petitioners

Vs.

Dnyanu Rama Mohite & Ors. ... Respondents

Mr.P.R. Arjunwadkar i/b P.U. Badadare for the Petitioners

Mr.G.N. Salunke i/b A.L. Dhumal for Respondent Nos.1 to 7

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JULY 11, 2017

P.C. :

1. Rule, returnable forthwith and by consent, heard finally.
2. This petition is directed against the order dated 16.3.2017 passed by the learned Adhoc District Judge, Sangi, in Miscellaneous Civil Appeal No.211 of 2016 thereby allowing the said appeal. The petitioners are the original plaintiffs, who have filed Suit for injunction simpliciter and a mandatory injunction that the defendants should not construct unauthorisedly on the road which is for the plaintiffs. It is also pleaded that the defendants

have encroached upon the land i.e., the road which is used by the plaintiffs. The trial Court has allowed the said application below exhibit 57 by order dated 22.9.2016 in Regular Civil Suit No.233 of 2012, against which the Miscellaneous Civil Appeal No.211 of 2016 was preferred by the defendants i.e., the present respondents, which is allowed.

3. The learned Counsel for the petitioners has submitted that the order passed by the learned trial Judge and the lower appellate Court is to be set aside. He submitted that there is a road between the property of the plaintiffs and the defendants. However, the defendants have encroached upon the said area i.e., the road, which is Gavthan land as per the map dated 29.1.2008, which was prepared by the Town Planning Authority. He further relied on the written statement of the defendant and has submitted that whatever construction was carried out by the defendants is illegal and it is to be removed. The learned lower appellate Court ought to have considered the observations of the trial Court in respect of encroachment and the construction.

4. The learned Counsel for the respondents, the original defendants, have opposed this Writ Petition. It is submitted that earlier, the application below exhibit 5 praying for some interim relief was under Order 39 Rules 1 and 2 was rejected by the trial Court against which the appeal was filed which was also rejected and thus, this is a second round of litigation taken out by the present plaintiffs. He further submitted that there is no encroachment and on the contrary, the plaintiffs have applied to the SDO for road and the SDO has directed the TILR to measure the suit premises and the road and there is a report of the TILR in 2011 that no road exists as on that date.

5. Heard submissions. Perused the documents. Perused the photographs produced by the learned Counsel for the petitioner. On perusal of the photographs or even the map of 2008, it is not *prima facie* proved by the plaintiffs that in the year 2016, there was an encroachment on the road which belonged to the public. Earlier, the application filed under Order 13 Rule 1 was rejected and in the appellate Court also, the earlier order was confirmed. No reason is pointed out to move the second application on a similar ground under Order 39 Rule 1. The learned Counsel for the petitioners

submits that the construction carried out by the defendants i.e., the respondents, is illegal and unauthorised. However, it is a different issue and cannot be dealt with in this petition.

6. The order passed by the learned Ad-hoc District Judge is well reasoned and it is not to be interfered with. Petition is accordingly dismissed.

(MRIDULA BHATKAR, J.)