

Anand

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

WRIT PETITION NO.1659 OF 2016

Dattatray Hari Kadam & anr.

.Petitioners

Vs.

Uttam Khanderao Bhosle & ors.

.Respondents

Mr.S.S.Koregave, Advocate, for the Petitioner

Ms M.S.Bane, AGP “B” Panel Counsel, for the Respondents No.2 & 3 -
State

CORAM : R.G.KETKAR, J.

DATE : 14.03.2017

P.C.

. Heard Mr. Koregave, learned counsel for the Petitioners
and Ms Bane, learned AGP for the Respondents No.2 & 3 – State.

2. By Order dated 25.02.2016, notice was issued to the Respondent No.1 for final disposal of the Petition. It was also made clear that despite service if the Respondents fail to appear, the Court will decide the Petition on its own merits. Office remark dated 02.04.2016 shows that the Respondent No.1 is duly served through his daughter-in-law. Despite service, Respondent No.1 has not entered appearance. None appears on behalf of Respondent No.1.

3. Rule. Ms Bane waives service on behalf of the Respondents No.2 & 3. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the constitution of India, the Petitioners have challenged the Judgment and Order dated 25.06.2015 passed by the learned 2nd Jt.C.J.S.D., Kolhapur below Exh.14 in R.C.S.No.291 of 2015. By that order, the learned trial Judge rejected the Application made by the Petitioners under Order I, Rule 10 of the Code of Civil Procedure, 1908 (For short “CPC”) for impleadment.

5. Mr.Koregave submitted that the property in dispute is their ancestral property as is evident from 7/12 extract at page No.62 of the Petition. The Petitioners have made several complaints to Engineer of Public Works Department, Kolhapur on the ground that the Respondent No.1 among others is encroaching upon the open space on the Eastern side of Survey No.403 belonging to the Government. The learned trial Judge, however, rejected that Application. He further submitted that the Plaintiffs have instituted suit for declaration that they have become

owner by adverse possession of the suit premises more particularly described in paragraph 1A of the plaint. He relied upon the decision of the Apex Court in the case of ***GURDWARA SAHIB Vs. GRAM PANCHAYAT VILLAGE SIRTHALA AND ANOTHER, (2014)1 SCC 669*** in support of his submission. He submitted that the suit instituted by the Plaintiffs for declaration of ownership by adverse possession is not maintainable.

6. As noted earlier, none appears for the Respondent No.1 despite service.

7. In view thereof as also having regard to the fact that the Petitioners have claimed ownership over the suit property, in my opinion, the learned trial Judge was not justified in rejecting the Application. Hence, I proceed to pass the following order.

O R D E R

(i) The impugned Judgment & Order dated 25.06.2015 passed by the learned 2nd Jt.C.J.S.D., Kolhapur below Exh.14 in R.C.S.No.291 of 2015 is set aside and the Application Exh.14 stands allowed;

(ii) The Petitioners herein shall be impleaded as Defendants in the suit;

(iii) Amendment shall be carried within two weeks from the production of the authenticated copy of this Order in the trial Court;

(iv) In the event of Respondent No.1 not carrying out amendment, it will be open to the Petitioners to carry out amendment in the suit and thereafter, file Written Statement.

8. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R.G.KETKAR, J.)