

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 8222 OF 2014

1. Haribhau s/o. Kundalik Ghule,
Age 71 years, Occu. Agri.,
R/o. Plot No. 204, N-3, CIDCO,
Aurangabad.
2. Anita w/o. Anil Avhad,
Age 41 years, Occu. Household,
R/o. Motiram Park, Flat No. 44-A,
Kothrud, Pune.

(Substituted as plaintiff No. 1 & 2
in place of original plaintiff namely
Sarjerao s/o. Dattu Patil as per order
dated 16.1.2013 below Exh. 69)

**....Petitioners.
(Ori. Plaintiffs)**

Versus

1. Sow Kavita w/o. Gopikishan Ghodele,
Age 41 years, Occu. Household,
R/o. Bansilal Nagar, Aurangabad.
2. Gopikishan s/o. Radhakishan Ghodele,
Age 47 years, Occu. Politics,
R/o. Bansilal Nagar, Aurangabad.
3. Nandu s/o. Radhakishan Ghodele,
Age 52 years, Occu. Politics,
R/o. Bansilal Nagar, Aurangabad.

**....Respondents.
(Ori. Defendants)**

Mr. N.K. Kakade, Advocate for petitioners.

Mr. S.V. Adwant, Advocate for respondent Nos. 1 to 3.

**CORAM : T.V. NALAWADE, J.
DATED : APRIL 13, 2018.**

JUDGMENT : [PER T.V. NALAWADE, J.]

- 1) Rule. Rule made returnable forthwith. By consent, heard
both the sides for final disposal.

2) The petition is filed to challenge the order made by the learned Civil Judge, Junior Division, Aurangabad in Regular Civil Suit No. 624/2006. The suit is filed for relief of injunction simplicitor. Initially the suit was filed by one Sarjerao Patil. Then the present petitioners joined as plaintiffs by deleting Sarjerao Patil as property is sold by Sarjerao Patil in their favour. The defendants have filed written statement and they are respondents of the present matter.

3) The defendants filed an application before the Trial Court and requested to frame preliminary issue about the tenability of the suit on the ground that there was no cause of action for the suit. It appears that it is the contention of defendants that when the suit was filed by Sarjerao Patil and Sarjerao Patil is prosecuting the matter, the purchasers from Sarjerao Patil cannot prosecute the suit which was filed by Sarjerao Patil for relief of injunction. The Trial Court unfortunately accepted the contention made by the defendants that the new owners cannot prosecute the suit which was filed for relief of injunction. The contents of the written statement show that the defendants are disputing the right of plaintiffs in respect of the property which is situated on northern side. In this regard, it can be said that it is a matter of evidence and only by evidence, the parties can show that there was cause of action on the date of suit and

cause of action continued. However, the entitlement of the plaintiffs in respect of the said disputed portion can be decided only after leading evidence by both the sides. Thus, in a suit like present one, it is necessary to allow both the sides to lead evidence on all issues and suit cannot be decided on preliminary issue like the existence of cause of action. This Court holds that the order of the Trial Court cannot sustain in law. So, the order made by the Trial Court to hold that, " Is suit is maintainable in the present form ?" is preliminary issue and the order made by the Trial Court that the issue needs to be tried first as preliminary issue, needs to be set aside.

4) In the result, the petition is allowed. Both the orders are set aside. Interim relief, if any, granted by this Court is vacated. The observations are for the present purpose only. Rule is made absolute in aforesaid terms.

[T.V. NALAWADE, J.]

ssc/