

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2200 OF 2016

Hindurao Yashwant Madane and anr. .. Petitioners
Vs.
Rajaram Pandurang Madane and ors. .. Respondents

Mr.Sandeep S.Salunkhe, for the Petitioners.
Mr.Mahendra B.Deshmukh, for Respondents No. 1 to 26.

CORAM : M.S.KARNIK, J.
DATE : 23rd OCTOBER, 2018

P.C. :

. This Petition is filed by the Petitioners challenging the judgment and order dated 26/08/2015 in Misc. Civil Appeal No. 6 of 2015. By the impugned order, the Appeal filed by the Petitioners is dismissed and order passed below Exh.5 in Regular Civil Suit No. 38 of 2014 decided on 15/12/2014 was confirmed.

2. It is the case of the Petitioners that they are the owners and in possession of the Suit property. According to

them, there is no road running along the border of the field. The Respondents had filed an application under Section 5 of the the Mamlatdar's Courts Act, 1906 contending that there was an old road in existence for approaching the field of the Respondents which was obstructed by the Petitioners. The Tahsildar was pleased to allow the Application and permitted the Respondents to use the road. Revision against the said order dated 21/02/2014 came to be filed by the Petitioners before the Revisional authority. The said Revision was also dismissed.

3. Thereafter the Petitioners filed Regular Civil Suit No. 38 of 2014 for declaration and injunction contending that they are the owners of the Suit property and the road was not in existence from the said gat. It was contended that the road was not open for the public nor for the present Respondents.

4. An Application Exhibit 5 under Order 39 Rules 1 & 2 of CPC was filed for restraining the Respondents from using the said road. The said application was dismissed by the trial Court. Even the Civil Miscellaneous Appeal filed against the order

passed by the trial Court is rejected. Learned Counsel for the Petitioner contends that there was no road in existence. According to him, the Tahsildar has passed the order under Section 5 without giving any notice to the Petitioners. He further submits that in an Appeal filed against the order passed under Section 5, the Appellate Court has observed that the Suit itself is not maintainable. He submits that such an observation will prejudice his rights and contentions in the Suit.

5. I have gone through the orders passed by the learned trial Judge as well as learned Appellate Court. It is a matter of record that Tahsildar has allowed application filed by Respondents under Section 5 of the Mamlatdar's Courts Act, 1906 and even the Revision filed by the Petitioners against the said order has been rejected. The contention of the Petitioners that the Tahsildar passed order without issuing notice to the Petitioners is a contention which is the subject matter of the Suit which is pending before the trial Court and would be examined on its own merits in accordance with law during trial. However,

in my opinion, it was not necessary for the Appellate Court to have made any observation that the Suit itself is void and the same is hit by Section 41 of the Specific Relief Act, 1963. This observation is made against the Petitioners in an Appeal filed by the Petitioners.

6. Though I do not find any reason to interfere in the concurrent orders passed by the Courts below, however, I am inclined to observe that the observations made by the Appellate Court in the impugned order shall not come in the way of the trial Court deciding the Suit on its own merits. The learned trial Judge is free to decide the Suit on its own merit without being in any manner influenced by the order passed by the Appellate Court.

7. With these observations, the Writ Petition is dismissed.

(M.S.KARNIK, J.)