

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9843 OF 2014**

M/s. Achala Resorts Pvt. Ltd. .. Petitioner

Versus

Ramchandra Maruti Khese and Ors. .. Respondents

Mr. Madhav Jamdar for petitioner.
Mr. S.R. Rajguru I/b Arun Kumar Ray for respondent No.11.
Mr. Vishwnath Patil for respondent No.13.

CORAM : K.K. TATED, J.

DATE : 28 JANUARY 2019.

P.C:-

. Heard learned Counsel for the parties.

2. By this writ petition under Article 227 of the Constitution of India, petitioner/original plaintiff No.12 challenges the order dated 16.06.2014 passed by 3rd Additional Judge, Small Causes Court and Joint Civil Judge, Senior Division, Pune below Exhibit-165 in Regular Civil Suit No.856 of 1999 rejecting their application to frame the additional two issues as under :

“(1) Do Defendants prove that the suit road is not public road as described by the plaintiff ?

(2) Do Defendants prove that the suit road is Air Force property and they are having exclusive right and title on the suit road ?”

3. The learned Counsel appearing on behalf of petitioner submits that in the present proceedings they filed Regular Civil Suit No.856 of 1999 for an order of declaration and injunction in respect of suit property, that is, the road and for other reliefs. He submits that on the basis of pleadings the trial Court framed the following issues on 02.02.2005 :

1. Do plaintiffs prove that they are having legal right to use the disputed way?
2. Do plaintiffs prove that the defendants have unauthorisedly closed the road ?
3. Are plaintiffs entitled for relief sought?
4. What order and decree ?

4. The learned Counsel for petitioner submits that as the trial Court failed to frame the issues about the ownership of the property from where the road passes. They filed application below Exhibit-165 for framing additional issues. He submits that in the present proceedings, the respondent/original defendant Nos. 1 and 4 filed their written statement dated 07.01.2003. He submits that these two defendants in their written statement in paragraph 4 specifically raised the issue that they are owner of the property from where the road passes. Paragraph 4 of the written statement reads thus :

“4. With reference to para 2 of the plaint these defendants say that the contents of the same are totally false and baseless therefore denied by these defendants. It is totally false to say that the aforesaid plaintiffs are using the aforesaid road continuously. It is further false to say that the plaintiffs and the

public at large from the village Lohgaon and others are using the said road as a public road since last 100 years. It is further false to say that the aforesaid road belongs to deft. no.2. It is further false to say that the responsibility of the said road is upon deft. no.3 as alleged by the plaintiffs. These defts. say that the said road is not public road as described by the plaintiffs. These defts. further submit that the said road is on defence land and the same passes through S.No. which are marked either side and is well within defence land. Hence these defendants have exclusively right, title and interest on the aforesaid road.”

5. Learned Counsel for the petitioner submits that on the basis of pleadings on record of defendant Nos. 1 and 4, they filed an application below Exhibit-165 for framing two additional issues. The trial Court without considering the pleading of the parties and particularly paragraph 4 of the written statement filed by defendant Nos. 1 and 4 rejected their application. He submits that the burden is on the defendant Nos. 1 and 4 to prove their case as stated by them in paragraph 4 of the written statement. Hence, it is necessary to frame additional two issues as per their application below Exhibit-165.

6. On the other hand learned Counsel appearing on behalf of defendant Nos. 1 and 4 vehemently opposed the present writ petition. He submits that there is no necessity to frame the additional issues considering the pleadings on record. He submits that to prove issue No.1 i.e. “Do Defendants prove that the suit road is not public road as described by the plaintiff ?” is already covered by the issues framed by the trial Court on 02.02.2005. In respect of the additional second issue, he submits that the burden

is casted upon the plaintiff to prove his case on his own. Therefore, there is no question of allowing the present writ petition.

7. I heard both the sides at length. It is to be noted that bare reading of paragraph No.4 of written statement shows that, defendant No.4 is claiming to be the owner of the suit property. Therefore, on the basis of pleadings, it is necessary that the trial Court ought to have partly allowed the petitioner's application for framing additional issue in respect of suit property, "Whether land is belonging to the Air Force or not" Hence, I am of the opinion that petitioner has made out case for allowing the present writ petition partly. Hence, following order :

- a) Order dated 16.06.2014 passed by 3rd Additional Judge, Small Causes Court and Joint Civil Judge, Junior Division, Pune below Exhibit-165 in Regular Civil Suit No.856 of 1999 is partly modified as under :

Issue No.2 i.e. **"Do defendants prove that the suit road is Air Force property and therefore they are having exclusive right and title on the suit road"** to be added as an additional issue at the time of hearing of Regular Civil Suit No.856 of 1999.

- b) Writ petition stands disposed of accordingly.
- c) No order as to costs.

(K.K.TATED, J.)