

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3623 OF 2009

1. Chandrakant Pramod Patil,
Aged : 45 years, Occu. Agriculture,
R/o Saundane, Tal. & Dist. Dhule.
2. Grampanchayat Saundane,
(through Shri. Sudhakar Shalikgram Patil)
Age : Major, Occu. Gramsevak,
R/o Saundane,
Tal. & Dist. Dhule.
3. Shri. Madukar Bhaurao Patil,
Age : Major, Occu. Daily wager,
R/o Saundane,
Tal. & Dist. Dhule. ... **Petitioners.**

Versus

Ashok Gaindal Patil,
Age : 50 years, Occu. Agriculture,
R/o Saundane,
Tal. & Dist. Dhule. ... **Respondent.**

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Advocate for Petitioners : Mr. S.S.Patil.
Advocate for Respondent : Mr. C.C.Deshpande h/f Mr.
C.R.Deshpande.

...

WITH

CIVIL APPLICATION NO.16901 OF 2010

IN

WRIT PETITION NO.3623 OF 2009

Ashok Gendalal Patil,
Age : 50 years, Occu. Agriculture,
R/o Saundane, Tal. & Dist. Dhule. ... **Applicant.**

Versus

1. Chandrakant Pramod Patil,
Aged : 45 years, Occu. Agriculture,
R/o Saundane, Tal. & Dist. Dhule.
2. Grampanchayat Saundane,
(through Shri. Sudhakar Shaligram Patil)
Age : Major, Occu. Gramsevak,
R/o Saundane, Tal. & Dist. Dhule.
3. Shri. Madhukar Bhaurao Patil,
Age : Major, Occu. Daily wager,
R/o Saundane, Tal. & Dist. Dhule. ... **Respondents.**

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Advocate for Applicant : Mr. C.C.Deshpande h/f Mr.
C.R.Deshpande.
Advocate for Respondents : Mr. S.S.Patil.
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CORAM : V. K. JADHAV, J.
DATE : 17.02.2020

ORAL JUDGMENT :-

1. Heard both the sides.
2. The petitioners are the original defendants. The respondent – plaintiff has instituted Regular Civil Suit No.418 of 2004 for mandatory injunction to remove the alleged construction of Gram Panchayat house No.530. Petitioner No.1

– original defendant No.5, on his appearance filed his written statement so also the counter claim and denied the claim of respondent – plaintiff for mandatory injunction and contended that the respondent – plaintiff has made illegal encroachment on the land Gut No.94 to the extent of 21.84 square meters and sought the mandatory injunction against the plaintiff for removal of encroachment to that extent. The respondent – plaintiff filed his affidavit of examination-in-chief but after filing of the said affidavit, the respondent – plaintiff found that due to oversight, the contention about the denial of the counter claim were not mentioned in the affidavit of examination-in-chief. The respondent – plaintiff has therefore filed an application Exh.46 in Regular Civil Suit No.418 of 2004 requesting therein to allow him to file the additional affidavit. By impugned order dated 02.01.2009, the trial court has allowed the said application Exh.46. Hence, this Writ Petition.

3. The learned counsel for the petitioners – original defendants submits that there is no provision of filing of additional affidavit and even though the respondent – plaintiff has prayed for filing of the additional affidavit of evidence, the

Trial Court has allowed the respondent – plaintiff to file on record the fresh affidavit of examination-in-chief. The learned counsel submits that the respondent – plaintiff had already filed an affidavit of evidence and thereafter also the additional affidavit denying the contents of the counter claim. Thus there are two affidavits of evidence already filed on record and in terms of the impugned order passed below Exh.46, the respondent – plaintiff has filed a fresh affidavit of examination-in-chief. The learned counsel submits that as such there are three affidavits of evidence on record which are contrary to the provisions of the Civil Procedure Code. The order impugned in this Writ Petition is thus liable to be quashed and set aside.

4. The learned counsel for the respondent – plaintiff submits that inadvertently in the first affidavit of evidence the respondent – plaintiff have failed to say anything on counter claim. The learned counsel submits that the Trial Court has also observed in the impugned order that the additional affidavit of evidence placed on record which pertains to the denial of the counter claim and in the said additional affidavit, only denial is there. The learned counsel submits that instead of two affidavits filed on earlier occasion, the Trial Court has

permitted the respondent – plaintiff to file a fresh affidavit of evidence. The learned counsel, on instructions, makes a statement that the first affidavit and the additional affidavit of evidence shall not be read and those affidavits may be ignored and in terms of the impugned order passed below Exh.46, the fresh affidavit, which has already been filed by the respondent – plaintiff shall be considered as affidavit of evidence. The petitioners – defendants would get the opportunity to cross-examine the respondent – plaintiff and in any case there is no likelihood of any prejudice caused to the defence of the petitioners – defendants. The impugned order calls for no interference. The Writ Petition is thus liable to be dismissed.

5. I have carefully gone through the order passed below Exh.46 and the contents of the application Exh.46 it appears that the respondent – plaintiff has inadvertently not mentioned the denial of the counter claim in his first affidavit of evidence. After filing of the additional affidavit of evidence, the respondent – plaintiff has denied the contents of the counter claim, as observed by the Trial Court in the impugned order i.e. a simple denial and nothing has been added by filing the additional affidavit. It appears that instead of having two

affidavits of evidence, the Trial court has directed the respondent – plaintiff to file fresh affidavit of evidence, which includes his examination-in-chief in terms of his pleading in the original suit so also denial about the counter claim. The learned counsel appearing for the respondent – plaintiff also made a statement on instructions that his earlier two affidavits be ignored and the fresh affidavit in terms of the order passed below Exh.46 shall be considered as the affidavit of evidence. In view of the same, I proceed to pass the following order :

ORDER

- (i) Writ Petition is hereby partly allowed.
- (ii) Order impugned stands confirmed.
- (iii) The Trial Court shall not consider the first two affidavits of evidence Exh.36 and Exh.48 respectively filed by the respondent – plaintiff.
- (iv) The Writ Petition is accordingly disposed off.
- (v) Rule made absolute in the above terms.

(vi) In view of disposal of the Writ Petition,
nothing survives in the Civil Application.
Civil Application is accordingly disposed
off.

(V. K. JADHAV, J.)

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vmk/-