

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**WRIT PETITION NO.3326 OF 2022**

KISAN DADA KATE SINCE DIED THROUGH LEGAL HEIRS TRIMBAK KISAN  
KATE AND OTHERS  
VERSUS  
BABASAHEB BHIVSEN KATE AND OTHERS

...  
Advocate for Petitioners : Mr. Nilkanth D. Batule  
Advocate for Respondent : Mr. Umakant U. Wagh  
...

**CORAM : MANGESH S. PATIL, J.**

**DATE : 18.07.2022**

**PER COURT :**

Heard.

2. This is a petition by the original plaintiffs who have filed a suit for removal of encroachment and claiming possession. The trial court by the order under challenge has deleted Issue No.2 pertaining to the factum of alleged encroachment.

3. I have heard the learned advocates of both the sides finally at the stage of admission.

4. The petitioners have filed the suit claiming to be the owner of the suit property which is alleged to have been encroached over by the respondents. The respondents *inter alia* raised the issue of *res judicata* in view of the decision in their counter claim filed in RCS No.168/1995. A specific Issue No.1 to the effect as to if the decision in RCS No.168/1995 operates as *res judicata* has been framed. The Issue No.2 was pertaining to

the alleged encroachment and its extent.

5. As can be seen from the order under challenge the trial court *suo moto* directed the petitioner to file a copy of the judgment in RCS No.168/1995 and as if he was called upon to and was deciding the Issue No.1 regarding *res judicata* he has laboured to point out as to how the question of encroachment does not survive in view of the earlier decision. By making such observation it has directed the Issue No.2 to be deleted.

6. *Ex facie*, in its zeal, without there being any necessity, the trial court seems to have undertaken some exercise which is nothing but an exercise to answer the Issue No.1 regarding *res judicata*. The whole reasoning demonstrates that he has reached to a conclusion that the decision in RCS No.168/1995 operates as *res judicata* vis a vis the dispute regarding the alleged encroachment.

7. This is not the course to be followed by the trial court. It was not the stage to decide the Issue No.1. There was no request to try and decide it as a preliminary one. Making any observation which would have effect on the subsequent decision of the suit, at an interlocutory stage, should have been avoided.

8. The suit was filed way back in the year 2011. It was decreed *ex parte*. The judgment and decree was challenged by the respondents defendants. The suit was remanded back and it is thereafter that the trial court has undertaken the aforementioned exercise and has passed the impugned order. If the Issue No.1 is to be decided it will have to be along

with the Issue No.2 and neither can be decided independently.

9. The Writ Petition is allowed. The impugned order is quashed and set aside. The Issue No.2 is restored. The trial court shall expedited hearing of the suit.

10. The observations made herein above are confined to the decision of the Writ Petition. Even the trial court shall not feel influenced by whatever observations made in the order under challenge. All the issues are kept open.

**(MANGESH S. PATIL, J.)**

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