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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7131 OF 2012
WITH
CIVIL APPLICATION NO. 6167 OF 2021

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| 1. | Awantikabai w/o Venkatrao Jadhav
Age – 79 years, Occ – Household | PETITIONERS |
| 2. | Balasaheb s/o Venkatrao Jadhav
Age – 56 years, Occ – Agril, | |
| 3. | Bhausahab s/o Venkatrao Jadhav
Age – 52 years, Occ – Agril, | |
| 4. | Raosaheb s/o Venkatrao Jadhav,
Age – 48 years, Occ – Agril, | |

All R/o Bhakaskheda (West)
Post Karadkhel, Taluka – Udgir,
District – Latur

VERSUS

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| 1. | Bapurao Kashiram Jadhav
(Died Through LRs) | RESPONDENTS |
| | 1-A. Kalawati w/o Bapurao Jadhav (Biradar)
Age – 68 Occ – Household | |
| | 2-B. Angad s/o Bapurao Jadhav (Biradar)
Age – 46, Occ – Agriculture | |
| | 3-C. Sugriva Bapurao Jadhav (Biradar)
Age – 43 Occ – Agriculture | |
| | 4-D. Usha w/o Vasant Mane
Age – 40, Occ – Household | |

All R/o Bhakaskheda (W)
Taluka – Udgir, District – Latur

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| 2. | Kalawati w/o Bapurao Jadhav | |
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Age – 57 years, Occ – Agril & Household

3. Angad s/o Bapurao Jadhav
Age – 43 years, Occ – Agril & Labour

All R/o Bhakaskheda, Post – Karadkhel
Taluka – Udgir, District – Latur

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Mr. Kedar Warad h/f Sunil Warad, Advocate for the petitioners
Mr. C. R. Thorat, Advocate for respondents No. 1 to 3

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 5th JANUARY, 2022
PRONOUNCED ON : 31st JANUARY, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the learned advocates for the parties.
2. This petition is directed against order dated 19th June, 2012 passed by learned Second Joint Civil Judge, Junior Division, Udgir below Exhibit-20 in Regular Civil Suit No. 175 of 2009 thereby rejecting the application filed by the petitioners under section 10 of the Civil Procedure Code (for short "CPC").
3. Factual matrix of the case is that, Venkatrao - predecessor of the the petitioners had filed Regular Civil Suit No. 69 of 1985 for recovery of possession of 35 *Are* land in Gut No. 15, which was merged in formation of Gut numbers from Gut No. 8. It was alleged that the defendants have encroached upon 35 *Are* land

from survey No. 2 Gut No. 15. The suit (RCS No.69 of 1985) came to be dismissed, so also the first appeal. The second appeal, preferred by the predecessor of the petitioners is admitted by this court and is pending.

4. The respondents thereafter filed Regular Civil Suit No. 175 of 2009 seeking possession of encroached portion by the defendants (present petitioners) over an area to the extent of 30 *Are* out of land Gut No. 8/1 towards western and eastern sides of land Gut No. 15 of the defendants-petitioners.

5. In the suit of 2009, the petitioners – defendants appeared and resisted the same by filing written statement. It is specifically contended that in the suit of 1985, under orders of the Trial Court, Taluka Inspector of Land Records (TILR) had conducted fresh measurement of lands survey No. 2 – Guts No. 15, 8, 9 and 11. Said measurement was effected on 13th February, 2001 and in that measurement, it is shown by the TILR that there is encroachment of 35 *Are* on Gut No. 15 by Bapurao – owner of Gut No. 8. Said measurement is conducted in presence of the parties by the TILR. Thus, in fact, the respondents have encroached upon the area of 35 *Are* land of the petitioner-defendants and ignoring this, the respondents are trying to place reliance on the measurement report dated 21st

December, 1999, which was disputed by Venkatrao – predecessor of the petitioners.

6. The petitioners - defendants filed application Exhibit-20 seeking stay to the proceedings of RCS No. 175 of 2009, in short contending that the matter in issue in RCS No. 175 of 2009 is directly and substantially an issue involved in the suit of 1985 and second appeal arising out of the same is pending in this court and, therefore, it was prayed that RCS No. 175 of 2009 be stayed in view of section 10 of the CPC.

7. Learned Trial Judge, rejected the application Exhibit-20 holding that the suit of 1985 was for recovery of possession of land to the extent of 1 *Acre* 32 *Guntha* out of Gut No. 15, whereas, the suit of 2009 is filed for possession of land admeasuring 30 *Are* out of land Block No. 8/1. Cause of action for filing suit of 2009 has been aroused in the year 2009. The Trial Court, therefore, came to the conclusion that suit of 1985 was filed for possession of different area of land and cause of action for the same was different from the cause of action for suit of 2009. Hence, the matter in issue in both the suits is not the same, so also the dates of cause of actions and areas of lands for which the two suits are filed are different. Hence, the application Exhibit-20 was rejected.

8. Heard learned advocate for the petitioners and learned advocate for the respondents at length. Perused the record.

9. Learned advocate for the petitioners has drawn my attention to Civil Application No. 6167 of 2021 filed on 9th July, 2021, pursuant to the orders passed by this court in order to bring on record the relevant additional documents. He submits that though reference of Regular Civil Suit No. 82 of 1974, filed by Venkatrao against his father and brothers for declaration of ownership and possession in respect of land survey No. 2 - Block No. 8, is already given in the petition memo, said suit was compromised, and compromise decree was passed in the same and a copy of the said compromise decree is placed on record in the civil application. So also the map drawn by the TILR in the year 2001 along with copy of *Panchanama* conducted on the date of drawing the map, on 13th February, 2001. By placing reliance on these documents, learned advocate for the petitioners strenuously submitted that the fact in issue between previous suit of 1985 and present suit of 2009 is directly and substantially the same and since second appeal filed by the petitioners challenging judgment and decree passed in RCS No. 69 of 1985 is admitted by this Court, the Trial Court ought to have allowed the application Exhibit-20 and stayed the

subsequent suit i.e. RCS No. 175 of 2009 filed by the respondents. The Trial Court has misread and misconstrued the provisions of section 10 of the CPC. In view of the compromise as well as the map drawn by the TILR in 2001, it is clear that the respondents have, in fact, encroached upon the land of the petitioners i.e. Gut No. 15. The map has not been disputed by Bapurao – predecessor of the respondents. As per the amended prayer clause in RCS No. 69 of 1985 (Venkatrao V/s Bapurao), Venkatrao claimed to be owner of land survey No.2 (Gut No.15). Both the suits are between the same parties and the matter in issue in the present suit (RCS No. 175 of 2009) is also directly and substantially the matter in issue in previous suit (RCS No. 69 of 1985). Therefore, according to him, application Exhibit-20 ought to have been allowed by the Trial Court. He, therefore, urges to allow the writ petition.

10. On the other hand, learned advocate for the respondents vehemently opposed the petition. According to him, the Trial Court is justified in rejecting the application Exhibit-20. He would urge that the petitioners are entitled to bring to the notice of the Trial Court that Bapurao has in fact encroached in the property of the respondents. According to him, mere pendency of second appeal arising out of the suit of 1985 cannot be a ground for

staying the subsequent suit of 2009. Section 10 of the CPC has no application in the peculiar facts of the present case. He, therefore, supported the order passed by the Trial Court, by submitting that the cause of action as well as the area of lands in both the suits are different.

11. Perusal of the record reveals that compromise decree was passed in RCS No. 82 of 1974, which was instituted by Venkatrao -predecessor of the petitioners against his father and brothers. Defendant No. 5 in that suit is respondent No.1 in the present writ petition. As per the compromise decree, father and brothers got their respective shares. Venkatrao – predecessor of the petitioners and Bapurao – predecessor of the respondents got their respective shares from land survey No. 2.

12. It is a matter of record that RCS No. 69 of 1985 was for recovery of 35 *Are* land from Gut No. 15. The cause of action for the same had arisen on 1st May, 1981 and 15th August, 1984. RCS No. 175 of 2009 is filed seeking removal of encroachment and for possession of land admeasuring 30 *Are* out of land block No. 8/1 and cause of action for the same had arisen on 1st August, 2009. In the previous suit of 1985 the issues framed were -

I. Is the plaintiff owner of the suit land (Gut No. 15)?

II. Is the plaintiff entitled to recovery of possession of the suit land?

In the subsequent suit RCS No. 175 of 2009, issues are -

I. Do the plaintiffs prove their exclusive title of the suit land (Block No. 8/1)?

II. Do the plaintiffs prove that the defendants are in illegal possession of the suit land?

III. Are the plaintiffs entitled to recovery of suit land?

13. It is, therefore, clear that previous suit of 1985 was filed seeking removal of encroachment to the extent of 35 *Are* land from gut No. 15 belonging to Venkatrao – predecessor of the petitioners for which cause of action had arisen on 1st May, 1981 and 15th August, 1984. Whereas, in subsequent suit of 2009, cause of action has arisen on 1st August, 2009 and removal of encroachment from the land bearing Block No. 8/1 to the extent of 30 *Are* land belonging to Bapurao – predecessor of the respondents is sought. Thus, it appears that that lands in respect of which reliefs are claimed in both the suits are different. The extent of the encroachment is different in both the suits so also the dates of cause of action. In this view of the matter, it cannot be said that the matter in issue in the suit of 2009 is directly and

substantially the matter in issue in the previously instituted suit of 1985 between the same parties. Merely because parties are same, that sole ground cannot be said to be sufficient to stay the subsequent suit of 2009.

14. In this view of the matter, this court is of the considered view that section 10 of the CPC has no application in the facts of the present case and the decision in the second appeal does not have direct bearing on the present suit of 2009.

15. The petitioners are, however, entitled to contest present suit of 2009 on merits, by bringing all the relevant facts to the notice of the Trial Court. However, they are not entitled to seek stay to the present suit of 2009.

16. The Trial Court has passed a reasoned order and no illegality or perversity is found in the impugned order. The writ petition, being meritless, is dismissed with no order as to costs. Rule stands discharged.

17. In view of dismissal of the writ petition, civil application No. 6167 of 2021 is also disposed of.

[NITIN B. SURYAWANSHI]
JUDGE