

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.11544 OF 2022**

BABU ALIAS BABURAO GENAJI KAPASE THROUGH
GENERAL POWER OF ATTORNEY KRUSHNA BABURAO
KAPASE
VERSUS
DHARMARAJ BABASAHEB JAYBHAYE

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Mr. S. D. Kulkarni h/f Mr. Rahul P. Dhase, Advocate for the
Petitioner.

Mr. S. S. Thombre, Advocate for Respondent.

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**CORAM : SANDEEP V. MARNE, J.
DATED : 06th DECEMBER, 2022.**

PER COURT:-

1. Petitioner challenges the judgment and order dated 30.07.2022 passed by the Ad-hoc District Judge-1, Beed in Miscellaneous Civil Appeal No.46/2021 thereby confirming the order dated 16.03.2021 passed by the Civil Judge, Junior Division, Shirur (Kasar) rejecting the petitioner's/plaintiff's application for temporary injunction.

2. Plaintiff claims to be the owner and occupier of the land bearing Survey No.188/S. It is his case that out of that land, the land admeasuring 4R has been acquired for construction of road. He further claims that in respect of such acquired land which now no longer exists, defendant no.2 entered into the sale deed with defendant no.1 in the year 2019 and got the name of defendant no.1 mutated to the record of rights of such non-existent land admeasuring 4R. On the strength of these pleadings, the suit is filed seeking a declaration that plaintiff is owner of the suit property and for injunction against defendant from interfering in his possession in suit property.

3. It is the case of petitioner/plaintiff that since the acquired land admeasuring 4R which is subject matter of the sale deed executed by defendant no.2 in favour of defendant no.1 is not in existence, defendant no.1 has encroached upon the other land forming part of Survey No.188/S of the plaintiff. However, perusal of the description of the suit property would indicate that petitioner/plaintiff had chosen to include only the land admeasuring 4R out of Survey No.188/S. It is unclear as to whether the suit property described in the plaint is the one in respect of which sale deed is executed (alleged non-existent land) or the portion of the land in possession of plaintiff over which defendant no.1 is allegedly encroaching upon. If the land covered by the sale deed is not in existence, there is no question of petitioner/plaintiff being in possession of that land. Therefore, *prima facie* petitioner/plaintiff cannot seek a declaration of ownership in respect of that land nor can seek injunction. In such circumstances, the prayer of petitioner/plaintiff for interim injunction was completely unwarranted. The Trial Court and the Lower Appellate Court have rightly rejected the prayer of petitioner.

4. The petition is devoid of merits and the same is dismissed without any orders as to cost.

5. Needless to say that, the Trial Court shall not be influenced by the observations made in this order while deciding the suit finally.

(SANDEEP V. MARNE)
JUDGE