

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4466 OF 2021

- 1) Ramesh s/o Pundlik Wankhade,
Aged 62 years, Occupation – Cultivator,
- 2) Vinod s/o Sahebrao Wankhade,
Aged 43 years, Occupation – Cultivator,

Both R/o Mardi, Tq. Teosa,
District – Amravati.

.... **PETITIONERS**

VERSUS

- 1) Onkar s/o Baliram Meshram,
Aged 64 years, Occupation – Cultivator,
- 2) Ramrao s/o Baliram Meshram,
Aged 61 years, Occupation – Cultivator,
- 3) Someshwar s/o Baliram Meshram,
Aged 56 years, Occupation – Cultivator,
- 4) Namdeo s/o Baliram Meshram,
Aged 54 years, Occupation – Cultivator,
- 5) Waman s/o Baliram Meshram,
Aged 52 years, Occupation – Cultivator,
- 6) Vinod s/o Baliram Meshram,
Aged 50 years, Occupation – Cultivator,
- 7) Nandkumar s/o Baliram Meshram,
Aged 46 years, Occupation – Cultivator,
- 8) Shewantabai s/o Narayan Meshram,
Aged 82 years, Occupation – Cultivator,

9) Suresh s/o Narayan Meshram,
Aged 49 years, Occupation – Cultivator,

Respondents 1 to 9 R/o Mardi,
Tq. Teosa, District Amravati.

10) Pralhad s/o Narayan Meshram,
Aged 64 years, Occupation – Service,
R/o Amravati, Tq. and District
Amravati.

11) Shri Guru Vibhuti Bharti Maharaj
Sansthan, through its trustee
Ramdas Ajabrao Tekade,
R/o Mardi, Tq. Tiosa, District Amravati.

.... **RESPONDENTS**

Mr. Ibrahim A. Fidvi, Counsel for the petitioners,
Mr. A.S. Deshpande, Counsel for respondents 1 to 10,
Mr. A.R. Deshpande, Counsel for respondent 11.

CORAM : **ROHIT B. DEO, J.**
DATED : **15th FEBRUARY, 2022**

ORAL JUDGMENT :

Petitioners are the defendants in Regular Civil Suit 133/2008 instituted by the respondents seeking a decree of perpetual injunction restraining the defendants from entering or committing encroachment qua the suit property, which is described as an ancient fortress ('Gadhi' in vernacular) situated at village Mardi, Tahsil-Tiosa, District-Amravati. The plaintiffs further claim a declaration that the measurement of the said fortress which the defendants carried out is illegal and does not bind the plaintiffs.

2. The plaintiffs claim to be the legal heirs of the original owners of the suit fortress namely Baliram and Narayan Meshram. According to the plaintiffs, the defendants carried out an illegal measurement of some portion of the suit fortress from the Southern side to which the plaintiffs objected. The cause of action for seeking injunction is referred to as the attempt of the defendants to encroach upon the suit property from the Southern side and to install a barbed wire fencing. The plaintiffs claim that the cause of action lastly arose on 07-10-2007 and the suit is instituted on 12-10-2007.

3. The defendants filed written statement generally denying each and every averment in the plaint and in the additional submissions denied that the plaintiffs were in possession of the entire area which is the subject matter of the sale-deed dated 19-2-1969 executed by the original owner one Shankar Atmaramji Wankhade in favour of Baliram and Narayan Meshram, whose legal heirs the plaintiffs claim to be. The defendants contended that a survey of the village sites was conducted in the year 1986 and Baliram and Narayan Meshram were found in possession of land admeasuring 691.1 square meters which was then assigned Plot 229. The defendants then contended that from Devidas Wankhade, defendant 1 purchased adjacent land admeasuring 130 square meters vide registered sale-deed dated 17-4-1986 which is

towards the South of Plot 229. The buruj bastion of the suit fortress was in the possession of defendant 1 since 1986, is the further averment in the written statement. It is averred that the total land in possession of defendant 1 in the year 1986 was 263.8 square meters and this portion was assigned Plot 226. It is then pleaded that land admeasuring 1527 square meters possessed by Bharti Maharaj Samadhi Mandir was allotted Plot 230 and Narayan Meshram was one of the trustees. The defendants then contended that the sale-deed executed by Shankar Atmaram Wankhade in favour of the ancestors of the plaintiffs is illegal and was never acted upon. According to the defendants, the ancestors of the plaintiffs took possession of only 691.1 square meters portion which is assigned Plot 229 and Plot 230 was allotted to Bharti Maharaj Samadhi Mandir, by the original owner Wankhade. The defendants then averred that defendant 2 is the owner and in possession of Plot 228, admeasuring 189.6 square meters and contended that the plaintiffs are illegally and falsely claiming ownership qua the entire area of Plots 226 to 230. The further averments in paragraphs 14 and 15 of the written statement read thus :

“14. That there is a Gobar Gas Plant & cattle shed of the defendant No.1 on the plot No.226 owned by him. The plaintiffs’ plot No.229 is situated towards northern side of the said plot No.226. As the plaintiffs started dispute regarding the boundaries between the respective plots of the plaintiffs and defendants, the defendant No.1 applied to the Taluka Inspector Land Records, Tiosa for getting his plot No.226

measured through Government agency. Accordingly, notices were issued by the office of T.I.L.R., Tiosa to all the adjacent occupants, including the plaintiffs and the plot No.226 owned by the defendant No.1 was measured by the Government Measurers on 28-9-2007. The plaintiffs have unnecessarily and illegally tried to prevent the Government Measurers from taking measurements of the plot of defendant No.1. The defendants have only readjusted their boundaries as per the Government measurement dated 28-9-2007 and no encroachment of any kind is made by them over the plaintiff's plot. A complaint was lodged by the son of defendant No.1 on 7-10-2007 against the plaintiff Nos.3, 5 and 6 for offences punishable under Sections 294, 506 read with Section 34 of I.P.C. as the said plaintiffs tried to disrupt the boundary marks and hurled abuses against the defendant No.1 and his family members.

15. That the suit is liable to be dismissed for non-joinder of necessary party. No declaration can be claimed regarding the legality of the measurement made by the office of Taluka Inspector Land Records, Tiosa without joining him as a party to the suit. Moreover the plaintiffs have not elaborated anywhere in their plaint as to how the measurement was illegal.”

4. The learned trial Court framed issues vide Exhibit 64 on 01-8-2012 which are reproduced below :

- “1) Does the plaintiffs prove that defendant got carried out the measurement through TILR on 28-9-2007 ?*
- 2) Does the plaintiffs prove that that, measurement is illegal, invalid and not binding on the plaintiffs ?*
- 3) Does the plaintiffs are entitled for decree of declaration ?*
- 4) Does the plaintiffs prove alleged encroachment over the suit plot ?*
- 5) Does the plaintiffs entitled for decree of perpetual injunction ?*

6) *What order and decree ?”*

5. The defendants preferred an application dated 07-3-2017 seeking striking out issue 1 and modification of issue 2 and for framing additional issues.

6. In the afore-referred application Exhibit 117, the defendants submitted that since the measurement dated 28-9-2007 is admitted, issue 1 is wholly unnecessary. The defendants sought modification of issue 2 in the following terms:

“2) Do the plaintiffs prove that the measurement carried out through T.I.L.R. on 28.9.2007 is illegal, invalid and not binding on the plaintiffs?”

The defendants further sought modification of issue 4 to clarify that the plaintiffs prove that on 07-10-2007 the defendants attempted encroachment and further prayed that an additional issue be framed regarding ownership and possession of the suit fortress. The defendants further submitted that the suit is liable to be dismissed for non-joinder of necessary party since the authority which carried out the measurement is not impleaded although a declaration is sought regarding the legality of the measurement. The defendants further

prayed that issue of limitation may be framed since according to the defendants, the suit is barred by limitation.

6. The defendants further preferred a separate application Exhibit 124 for framing additional issues under Order XIV Rule 5 of the Civil Procedure Code (Code) and sought the framing of the following additional issues :

“a) Do the defendants prove that the sale transaction on dated 29-8-1951 is not genuine?

b) Do the defendants prove that the sale-deed dated 29-8-1951 is a false and fabricated document ?”

7. The learned trial Judge was pleased to reject both the applications Exhibits 117 and 124 and the consideration as is discernible from paragraphs 7 and 8 is thus :

“7. Therefore, I have gone through the averments in plaint and written statement (Exh. 15 and 55). The fact in issue is whether the measurement conducted by TILR on 28-9-2007 is illegal, invalid and not binding on the party. The plaintiffs certainly claimed declaration to that effect. The plaintiffs did not pray for quashing and setting aside said measurement, therefore, the plaintiffs appear to be rightly approach before the civil court.

8. Secondly, the defendants said that they have admitted the measurement dated 28-9-2007, therefore, issue No.1 needs to be strike out. But, on perusal of written statement, the defendants specifically pleaded the measurement about the plot No.226 and the plaintiffs in the plaint alleged about carrying out the measurement of the some of the portion of the fortress from its Southern side. It shows that the defendants did not admit the averment pleaded by the plaintiffs. On the contrary, it appears that the defendants

came with different stand. Therefore, the fact which is pleaded by the defendants is not the admission of the fact pleaded by the plaintiffs. Therefore, the issue which is framed at Sr.No.1 below Exhibit 64 appears to be rightly framed of which burden of proof is cast upon the plaintiffs. Moreover, it appears that the remaining issues are properly framed by taking into consideration, the pleadings of the parties. The set of facts in the above cited judgments are different from the facts in issue involved in the case in hand. Therefore, with due respect it is submitted that the ratio laid down in the above authorities is not helpful to the defendants. Therefore, I do not find need of amendment in already framed issues. So also, I do not find need of framing additional issues as proposed in this application. The attempt of defendants shows only to prolong the trial of the case by filing miscellaneous applications. Therefore, the application appears to be devoid of substance. Hence, the application is liable to be rejected.”

8. The learned trial Judge has rightly held that issue 1 does arise since there is no categorical admission of the plaint averment that the measurement pertains to some portion from the suit fortress from its Southern side. For similar reasons, I find that issue 2 which is framed requires no modification. Issue 4 places the burden of proving the alleged encroachment on the plaintiffs and it would be wholly unnecessary to modify the said issue and to make a reference to “an attempt to commit encroachment”.

9. In so far as the additional issues, which according to the defendants, are required to be framed, the suit seeks a declaration that

the measurement conducted by the defendants is not binding on the plaintiffs, and an injunction that the possession of the plaintiffs qua the suit property shall not be disturbed. An issue arises when a material proposition of fact or law is asserted by one party and denied by the other. Material proposition is a proposition of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. In the factual matrix, the material proposition is the assertion of the plaintiffs to be in possession of the suit property. Ordinarily, the plaintiffs would be entitled to claim an injunctive relief against interference in possession, if settled possession is shown. While the defendants had indeed denied the title of the plaintiffs to certain portions of land, it is not even clear from the plaint whether the portions to which the defendants are referring, are claimed to be part of the suit fortress. While it would not be fair to make any observation on the likely fate of the suit, it is obvious, that if the particulars of the property qua which the injunction is sought, is not clearly established, it would be difficult for any Court to adjudicate on the aspect of encroachment. Be that as it may, in the facts of the case, the issue of ownership as such would not arise. Every assertion in the written statement which is adverse to the plaintiffs need not give rise to an issue. The assertion must be material in the sense that the assertion must be alleged in order to constitute defence. In so far as the relief of

injunction, all that is required by the parties to establish is who is, as a fact, in possession. I find no error in the order of the learned trial Judge to the extent the additional issues touching the title to the various portions referred to by the defendants, are not found arising.

10. The suit is filed in close proximity to the alleged cause of action of attempted interference in possession and the issue of limitation as such does not arise. According to the defendants, it is in the context of the averments of paragraph 16 of the written statement that the issue of limitation arises. Perusal of the said paragraph reveals that according to the defendants, they have occupied plots 226, 227 and 228 since to 1.9.1986 continuously, and therefore, the suit is beyond limitation. The suit is not for possession. The suit proceeds on the premise that it is the plaintiffs who are in possession. If the plaintiffs fail to establish possession, the suit shall be dismissed. An issue of limitation would not arise only because the defendants are alleging that qua certain survey numbers, which according to them constitute part of the ancient fortress, the defendants are in possession since 1986.

11. Implicit in the issue whether the plaintiffs are entitled to the relief claimed, is the duty to ascertain whether the suit is

competently instituted. In this view of the matter, assuming that the plaintiffs were required to join the State Government or any officer, the said aspect can always be looked into at the stage of final hearing and no separate issue may be required.

12. The petition is without substance and is dismissed.

JUDGE

adgokar/belkhede