

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9075 OF 2022

1. Vijaykumar S/o Trimbakrao Ingale
2. Kapildev S/o Trimbakrao Ingale

PETITIONERS

VERSUS

1. Nagnath Raosaheb Ingle
2. Vaijanath S/o Raosaheb Ingle

RESPONDENTS

Dr. R.R. Deshpande, Advocate h/f. Ms. Priyanka Deshpande,
Advocate for the petitioners.
Mr. Nitin Jagadale, Advocate h/f. Mr. V.D. Salunke, Advocate for
respondents.

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON: 15th JUNE, 2023
PRONOUNCED ON: 14th JULY, 2023

ORDER :

1. This petition filed under Article 227 of the Constitution of India, challenges the order passed by learned 2nd Joint Civil Judge, Junior Division, Ambejogai, below Exhibit-5 in Regular Civil Suit No. 102/2020 and the order passed by learned District Judge-3, Ambejogai, in Miscellaneous Civil Appeal No. 22/2020.

2. Respondents and one Sumanbai Ingale filed Regular Civil Suit No. 82/2006, in respect of agricultural land, Survey No. 303 (Gut No. 69) admeasuring 5 Acre 18 Gunthas, situated at

village Jodwadi, Taluka- Ambejogai, District- Beed, for perpetual injunction against the petitioners. The suit was dismissed on 31.10.2013. Thereafter, respondents filed Regular Civil Appeal No. 5/2014 against the judgment and decree of Trial Court. Said appeal was dismissed by order dated 07.02.2018. Both the judgments and decrees were challenged by filing second appeal, which is admittedly pending in this Court.

3. Respondents thereafter filed Regular Civil Suit No. 102/2020 for relief of declaration of ownership and perpetual injunction in respect of of 77 Are land from Gut No. 69 of Village Jodwadi. Petitioners being defendants opposed the claim by filing written statement as well as counter claim, claiming 43 Are land from Gut No. 69. Application Exhibit-5 filed by the respondents/plaintiffs for temporary injunction is allowed by the Trial Court and application Exhibit-29 filed by the petitioners for temporary injunction is rejected.

Petitioners challenged both these orders in Miscellaneous Civil Appeal No. 22/2020, which is dismissed on merits. Hence, the present petition.

4. Heard the learned advocate for the petitioners and learned advocate for the respondents. Perused the memo of writ

petition, annexures thereto and the impugned orders.

5. Learned advocate for the petitioners assailed the impugned order contending that both the Courts have ignored the fact that the suit filed by the respondents/plaintiffs is barred by provisions of res-judicata. He submits that cause of action in the earlier suit and present suit is the same, hence, second suit (present suit) is barred under section 12 of Code of Civil Procedure. He further submits that respondents/plaintiffs are in adverse possession of suit property, since preceeding 12 years. In the present case that is not proved by the respondents/plaintiffs, as since year 2006 the parties are litigating against each other. Therefore, he submits that these vital aspects are ignored by both the Courts while allowing Exhibit-5 application of respondents. He therefore submits that impugned orders be quashed and set aside and application Exhibit-5 filed by the respondents be rejected by allowing the petition.

6. On the other hand, learned advocate for the respondents supported the impugned orders. He states that the petitioners himself filed counter claim for 43 Are land and they have not claimed 77 Are land. According to him, both the Courts

have given cogent reasons and therefore, impugned orders are not liable to be interfered with.

7. It appears from the record that in Regular Civil Suit No. 82/2006, under the orders of the Trial Court, Taluka Inspector of Land Records prepared map of suit property and carried out measurement in the presence of defendants No. 1 and 2/petitioners. They did not object to the said measurement. Said map was proved on record. In the said map it was revealed that plaintiffs are in possession over 77 Are land from Gut No. 69. Defendants/petitioners did not file cross appeal challenging the judgment and decree passed in Regular Civil Suit No. 82/2006. In that suit defendants/petitioners did not plead anything about alleged additional land. Now almost after 12 years, in the counter claim, defendants/petitioners have come out with a case that defendants are having additional 43 Are land and they claimed ownership of same by adverse possession.

8. As per the judgment of the Trial Court in Regular Civil Suit No. 82/2006 and the District Court in Regular Civil Appeal No. 5/2014, it is clear that the plaintiffs/respondents have possession over 77 Are land. It appears that both the parties have filed affidavit of adjacent land owners to prima facie prove

their possession over the suit land. As per the affidavit of plaintiffs they are in possession of land on north side of the canal and the defendants are in possession over the land on south side of canal. Considering the affidavits of both the sides, Trial Court has rightly come to a conclusion that, at this stage, map Exhibit-67 has more probative value. After considering the record, Trial Court has rightly come to a conclusion that plaintiffs have prima facie shown that they have possession over the 77 Are land, balance of convenience is in their favour and if injunction is not granted then the plaintiffs will suffer irreparable loss. On the basis of record the Trial Court is right in holding the defendants have failed to show that they have possession over 77 Are land as well as 43 Are land, therefore, plaintiffs are entitled for relief of injunction.

9. The Appellate Court after perusing the record and the citations relied upon by both the sides has confirmed the findings of the Trial Court and is justified in holding that the findings recorded in Regular Civil Suit No. 82/2006 and in the judgment of 2003, followed by the finding in the first appeal, prima facie, reflects that plaintiffs are in actual possession of the suit property over sufficient long period of time and same is to the

knowledge of defendants.

10. Both the Courts have recorded concurrent finding of facts. The objection raised by the petitioners as to the maintainability of the suit has to be considered at the time of final adjudication of the suit. It is settled legal position that at the time of deciding the application Exhibit-5, under Order 39 Rule 1 and 2 of the CPC, the Court is to consider (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for temporary injunction is disallowed.

11. In the present case, both the Courts have concurrently held that the respondents have prima facie case and balance of convenience is in their favour and they will suffer irreparable loss if injunction is not granted to them. The concurrent finding of facts are not liable to be interfered with in the extra ordinary writ jurisdiction. There is no illegality or perversity in the orders impugned in the present petition. The writ petition being devoid of merit is dismissed. No costs.

[NITIN B. SURYAWANSHI, J.]