

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7745 OF 2023

Jamal Rasul Tamboli
deceased through LRs.

....Petitioners

V/S

Balu Babu Shikalgar
deceased through LRs.

....Respondents

...

Mr. Ashutosh Kulkarni i/b Mr. Siddhart Shitole for the Petitioners.

...

CORAM: SANDEEP V. MARNE, JJ.

DATE : 30 JUNE 2023.

P.C.:

. By this Petition Petitioners challenge the judgment and order dated 30 September 2022 passed by the District Judge-3, Sangli dismissing the Miscellaneous Civil Appeal No.163 of 2021 filed against the order of refusal of interim injunction passed by the 2nd Joint Civil Judge Junior Division, Vita on 23 September 2021.

2 In their Application for temporary injunction Plaintiffs had sought reliefs (i) not to disturb possession, and (ii) not to create third party interest in the suit property.

3 The trial Court has arrived at conclusion that the Plaintiffs could not *prima facie* prove possession of the suit property. The Appellate Court has not disturbed the said finding recorded by the trial Court. The trial Court has held the Plaintiffs did not mutate their names to the revenue records if they indeed were in possession of the suit property. It is further held that the possession cannot be presumed merely on the basis of Affidavit of a witness. Therefore, no error can be said to have been committed by the trial Court in refusing temporary injunction in respect of possession. The Appellate Court has rightly dismissed the Appeal filed by the Petitioners in that regard.

4 Mr. Kulkarni, the learned Counsel appearing for the Petitioners would further submit that both the trial Court as well as the lower Appellate Court have failed to take into consideration the second prayer for interim injunction to restrain the Defendants from creating any third party rights in respect of the suit property.

5 From perusal of the order of the trial Court, it appears that there is no specific finding with regard to the second part of the prayer made in the application for interim injunction. Therefore the submission made by Mr. Kulkarni may appear to be attractive in first blush. However perusal of the memo of Miscellaneous Civil Appeal No.163 of 2021 would show that the Petitioners did not raise any ground about non-consideration of

prayer for restraining the Defendants from creating third party rights in the suit property. It also appears that this ground was also not argued before the Appellate Court. Therefore, no fault can be found with the Appellate Court in not dealing with the second part of the prayer for interim injunction. It would be unfair to criticize lower Appellate Court for not deciding something which was never argued before it. Even in the memo of present Petition, there is no specific ground raised with regard to non-consideration of second part of the prayer in the application for interim injunction.

6 In that view of the matter, no case is made out for interference by this Court in impugned orders. The Writ Petition is devoid of merits. The Writ Petition is dismissed. There is no orders as to costs.

7 Needless to say that the observations made in the present order are *prima facie* and the Trial Court shall decide the suit without getting influenced by the observations made in this order.

SANDEEP V. MARNE, J.

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