IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.1354 OF 2022

Shamrao Dattu Patil and Another ...Petitioners
vs.
State of Maharashtra and Others ...Respondents

Mr. Paras Yadav, for the Petitioners.
Mr. Satyajeet Shirke, for Respondent No. 7.
Ms. V.S. Nimbalkar, AGP for the State.

CORAM : N. J. JAMADAR, J.
DATE : APRIL 27, 2023

P.C.:

1. Heard the learned counsel for the parties.

2. The challenge in this petition is to a judgment and order dated 20th October, 2021 passed by the Additional Chief Secretary, (Revenue) and Special Officer whereby the Revision Application preferred by the petitioners being RTS-3820/11/Case No.45/J-5A, Case No. 30(11)2020 came to be dismissed affirming the order passed by the Additional Commissioner, Pune in RTS No. 115 of 2016 dated 26th September, 2019 which, in turn, had affirmed the order passed by the Additional Collector, Kolhapur in Second Appeal No. 9 of 2012 against a judgment and order in BND/A/No. 3 of 2011.

3. By the judgment and order dated 30th May, 2012 the Sub Divisional Officer, Kolhapur Division, Kolhapur had allowed the application preferred by the respondent No. 7 under section 138 of the Maharashtra Land Revenue Code, 1966 and directed the Tahsildar, Karveer to take the possession of 0.02R land bearing Survey No. 138/12 and handover the same to respondent No. 7 on the basis of the encroachment which was noticed in the measurement carried out by the surveyor under MR. No. 3439 of 2003.

4. The learned counsel for the petitioners submitted that respondent No. 7, while prosecuting the remedies before the revenue authorities, had instituted a Civil Suit, bearing RCS No. 91 of 2011, before the Civil Judge Senior Division, Kolhapur for removal of encroachment and delivery of possession of the suit property. In the said suit respondent No. 7 had preferred an application for interim injunction which came to be rejected by the civil Court by order dated 1st March, 2021. It was urged that since the respondent No. 7 had already instituted a suit for substantive relief of removal of encroachment and delivery of possession of suit property, the proceedings could not have been prosecuted before the revenue authorities.

5. The learned counsel for the petitioners invited attention of the Court to the provisions contained in sub section (4) of section 138 of the Maharashtra Land Revenue Code, 1966. Sub section (4) and (5) read as under:-

> **138 Effect of settlement of boundary :-**
> (4) :- Where any person has been ejected or is about to be ejected from any land under the provisions of sub-section (2), he may, within a period of one year from the date of the ejectment or the settlement of the boundary, institute a civil suit to establish his title thereto.
> (5) Where a civil suit has been instituted under sub-section (4) against any order of ejectment, such order shall not be subject to appeal or revision.

6. Drawing an analogy, the learned counsel would urge that having instituted the suit, the respondent No. 7 could not have prosecuted the proceedings before the revenue authorities. I am afraid to accede to this submission.

7. The provisions contained in sub section (4) of section 138 operate in a converse situation. In view of the order passed by the authorities under the Code, in fact, the petitioners are under a threat of ejectment from the suit land. Therefore, it was for the petitioners to invoke the remedy before the civil Court. In any event, the determination or the settlement of boundaries under section 138 of the Code is *de hors* the title to the encroached portion. The authorities under the Code seem to have committed no

error in determining the issue which squarely falls within the ambit of section 138 of the Code.

8. It would, therefore, be appropriate to grant liberty to the petitioners to institute a suit in respect of allegedly encroached portion of the land and seek appropriate relief, as envisaged by sub section (4) of section 138 of the Code.

Hence, the following order.

ORDER

1] The petition stands disposed with liberty to the petitioners to institute a suit and seek appropriate relief in respect of the subject matter of the impugned order on or before 30th June, 2023.

2] The order passed by the Revenue Authorities shall not be given effect, till 30th June, 2023.

3] Petition disposed.

4] No costs.

(N. J. JAMADAR, J.)