



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

918 WRIT PETITION NO. 1453 OF 2024

Arjun Sadashiv Waykar & others

....Petitioners

VERSUS

Sambhaji Shivaji Waykar & others

.....Respondents

.....

Mr. Y. V. Kakde, Advocate for the Petitioners.

Mr. A. C. Sisodiya, Advocate for Respondent Nos. 1 to 4.

CORAM : R. M. JOSHI, J.

DATE : 28th JUNE, 2024.

PER COURT :

1. By consent of both sides, heard finally at admission stage.

2. Defendants in Regular Civil Suit No. 188/2020 raised challenge to the recasting of issue by order dated 30.11.2023.

3. Learned counsel for Petitioners submits that the Respondents/Plaintiffs have filed the suit for injunction simplicitor. According to him, such suit is not tenable. By drawing attention of the Court to the Written Statement filed by Defendants, it is sought

to be canvassed that the Defendants have specifically claimed ownership and possession of the suit property and therefore it is absolutely necessary for the Trial Court to decide the issue as to whether the Plaintiffs prove to be the owners and in possession of the suit property. It is submitted that the Trial Court has committed error in recasting the issue and calling upon the Plaintiffs only to prove their possession but not ownership.

4. Learned counsel for Respondents submits that the Plaintiffs have specifically come out with a case that the suit property was earlier ancestral property and there was partition of ancestral properties and in the said partition, suit property came to the share of the father of the Plaintiffs. To substantiate said contention, mutation entry bearing No. 1217 is relied upon which according to him, indicates that the factum of property coming to the share of Plaintiffs. He further argued that in the written statement, Defendants have admitted the factum of partition. It is not their specific claim about ownership of the suit property. It is also argued that once the Defendants claim title of the suit property on the basis of adverse possession being in possession thereof for more than 12 years, they admit title of Plaintiffs over the suit property.

5. Perusal of the plaint indicates that there is specific pleading with regard to the partition and the said fact of partition has not been disputed by the Defendants in their written statement. Contention of Plaintiffs about ownership of the suit property is supported by mutation entry indicating occurrence of partition of the properties long back. Though Defendants claim possession of the suit property, however, there is no specific pleading raised with regard to the ownership of the suit property. Apart from this, once the Defendants take the defence that they have become owners of the suit property by adverse possession, title of the Plaintiffs is deemed to have been admitted. In such circumstances, there occurred no issue/question before the Trial Court to decide ownership of Plaintiffs over the suit property.

6. From the rival pleadings before the Trial Court, Plaintiff is called upon to prove his possession of the suit property. If both the sides fail to lead any evidence, Plaintiffs would fail in the suit. Thus, the issue is rightly framed as to whether the Plaintiffs prove that they are in exclusive possession of Gat No. 107 admeasuring 40 R situate at village Sonewadi, Tq. Ahmednagar. There is no

perversity in the impugned order. Petition therefore stands dismissed.

(R. M. JOSHI)
Judge

dyb