



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9274 OF 2024

Kailas Pandurang Raut And Another
VERSUS
Sunil Raghunath Nawale And Others

- Ms. S. M. Zaware, Advocate for the Petitioners
- Mr. M. N. Kalyane h/f Mr. G. B. Rajale, Advocate for the Respondent No. 1
- Ms. K. R. Jamdhade, AGP for Respondents/State

CORAM : R.M. JOSHI, J
DATE : NOVEMBER 28, 2024

PER COURT :

1. This Petition takes exception to order passed below Exh. 5 in RCS No. 426/2021 dated 26.06.2021 as well as the order of confirmation of the same in Misc. Civil Appeal No. 15/2021.

2. Petitioners are Defendant Nos. 2 and 3 in the original proceedings. The suit came to be filed by Respondents seeking possession of the encroached portion as well as injunction. Application Exh. 5 was allowed and Defendants were restrained from taking possession of the balance area of the suit property described in paragraph 1A with injunction not to obstruct the Plaintiff's possession over the same.

Further order of injunction was also issued restraining them from destructing bandh. This order was unsuccessfully challenged before the District Court in MCA No. 15/2021.

3. Learned Counsel for the Petitioners/Defendant Nos. 2 and 3 makes statement that after passing of order below Exh. 5 and during pendency of MCA by consent of both sides, survey of land in question was done and the survey map was filed before the Trial Court. Inadvertently, the said map was not brought to the notice to the Appellate Court and, therefore, in MCA said fact was not taken into consideration. She, therefore, seeks direction to the Trial Court to decide the Exh. 5 in the light of the said map. She also made statement that not only that the map was prepared pursuant to the consent given by both sides but also this map has not been challenged by any party till date.

4. Learned Counsel for Respondent/Original Plaintiff opposed the Petition by contending that the order passed below Exh. 5 is after considering the material placed on record available at the relevant

time. It is his submission that since the said map was not part of record, no fault can be found with the said order. In any case, it is his submission that if this Court is inclined to call upon the Trial Court to decide Exh. 5 afresh, till decision thereof, the order passed by the Trial Court dated 26.06.2021 be continued.

5. No doubt, at the time of the decision of Exh. 5 on 26.06.2021 the measurement map was not available on record. Undeniably, the measurement of the subject property is carried out by consent of both sides. As per the statement made across the bar by the learned Counsel for the Petitioner, this map has not been taken exception to by the parties to the suit. In such circumstances, the said map becomes relevant document for the purpose of decision of Exh. 5. In the peculiar facts of this case, since this evidence was not available at the time of passing of the order below Exh. 5, this Court finds it appropriate to direct learned Trial Court to decide Exh. 5 afresh taking into consideration the measurement map now placed on record.

6. At the same time, this Court finds substance

in the contention of the learned Counsel for Respondent/Plaintiff that the order passed below Exh. 5 is in force for not less than 3 ½ years period. Thus, it would be in the interest of parties that this order shall remain in force till decision of learned Trial Court afresh on Exh. 5.

7. Hence, Petition is disposed of in following terms:

- a) Order passed below Exh. 5 shall be treated as set aside on passing of the fresh order on the application Exh. 5 in RCS No. 426/2021 on relegation of the matter back to the Trial Court.
- b) Trial Court is directed to decide application Exh. 5 within a period of three months from today.

8. In view of above, Petition is disposed of.

(R.M. JOSHI, J.)