



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10653 OF 2022

Shiwaji Renurao Taral

VERSUS

Laxman Bhavarao Palhal And Others

- Mr. S. N. Lute, Advocate for the Petitioner
- Mr. V. M. Humbe, Advocate for the Respondent Nos. 1 to 4

CORAM : R. M. JOSHI, J
DATE : FEBRUARY 11, 2025

PER COURT :

1. This Petition takes exception to the orders dated 01.08.2022 passed below Exh. 5 in RCS No. 87/2021 rejecting temporary relief sought by the Petitioner/Plaintiff and confirmation thereof in Misc. Civil Appeal No. 127/2022 dated 08.09.2022.

2. The facts which led to the filing of the Petition can be narrated in brief as under:

Petitioner is Plaintiff who claimed to be owner of the suit property admeasuring 61R land situated at Nevapur, Tq. Kannad, Dist. Aurangabad. There is specific pleading that the suit property is his ancestral property and by mutation entry bearing

no. 3358 pursuant to the partition effected between the coparcener in which suit property came to the share and in possession of Plaintiff. There is specific averment in the plaint that the Defendants are adjoining owners of the suit property and they are trying to enter upon the suit property and attempting to encroach. On the basis of these pleadings, suit for perpetual injunction came to be filed. Application Exh. 5 came to be filed for temporary injunction. To support the said case, Plaintiff has relied upon mutation entry no. 3358 indicating the partition of the property bearing Gut No. 431-A and the area admeasuring 61R land coming to the share of Plaintiff. He has also placed on record 7/12 extract as well as the revenue entry indicating his possession over the suit property.

3. Defendants filed written statement and denied the contention of the Plaintiff. It is the case of the Defendants that the Plaintiff is holding only 50R land from the said gut. It is also claimed by Defendants that the Plaintiff is trying to take disadvantage of the revenue record to claim 61R land being in his possession. No counter claim is filed by Defendants.

4. Learned Counsel for the Petitioner/Original Plaintiff submits that the Trial Court has held that the Plaintiff has been able to prove his title and possession of the over suit property, however, rejected application Exh. 5 solely on the ground that no measurement is given of the encroached portion. He drew attention of the Court to the pleadings in the plaint wherein there is a specific statement made by Plaintiff that the Defendants are trying to encroach upon the suit property and that it is never case of Plaintiff that actual encroachment is done. It is his submission that both Courts below have committed error in appreciating the pleadings in the plaint and facts involved in this case and which has led to passing of perverse orders.

5. Learned Counsel for Respondents/Defendants opposed the Petition. It is his contention that Petitioner/Plaintiff ought to have filed suit for removal of encroachment and suit for simplicitor injunction is not maintainable. He has placed reliance on the judgment of Division Bench of this Court in case of Shailaja Kamalakar Limaye and Others vs. Nilakanth

Ganesh Pethe and Others, 2010(4) Mh.L.J. 160 and Hon'ble Supreme Court in case of Birwati Chaudhary and Others vs. State of Haryana and Others, (2018) 9 SCC 458.

6. There is no dispute about the fact that the Plaintiff has filed suit with specific plea that the Defendants are trying to encroach upon his property from southern and eastern sides. Plaintiff in support of his claim of title and possession over suit property has placed on record documentary evidence in the form of revenue record. Plaintiff, therefore, has *prima facie* established his title as well as possession over the suit property. In this backdrop, if it is contended by the Defendants that the Plaintiff is only holding the land admeasuring 50R, this by itself indicates that the Defendants are not accepting the possession of Plaintiff over 61R land and consequently at least at *prima facie* stage, case of Plaintiff about attempt made by Defendants to cause encroachment deserves acceptance. It is pertinent to note that Defendants have not filed any counter claim to assert any right in respect of the suit property.

7. Both Courts below have considered the case of the Plaintiff to be of encroachment being already carried out by the Defendants in the suit property. This is not the case sought to be made out by Plaintiff before the Trial Court. Once Plaintiff proves that the Defendants are attempting to encroach upon the suit property and *prima facie* satisfies this Court about title and possession over the property, the inevitable order would be of granting temporary injunction against the Defendants.

8. At this stage, it would be relevant to take into consideration the observations made by the Trial Court with regard to the case sought to be proved by both parties. Paragraph nos. 12 and 13 are reproduced herein below:

12. If the pleadings of the plaintiff are perused minutely, then he asserts that he is owner and possessor of the land bearing Gat No.431/A to the extent of 0.61 Hector situated at Nevapur. In order to substantiate this contention, plaintiff has placed on record the certified copy of the village form No. 7 and 12 of Gat No.431/A below Exh.No. 3/1 and 4. If the village form No. 7 and 12 is perused minutely, then it appears that, an area of 61R belongs to

the plaintiff. However, plaintiff has mentioned about 61Hector in his interim application. But, the village form No. 7 and 12 reflects about 61R.

13. Defendant No. 1 to 4 have taken the contention that plaintiff is entitled only to the area of 50R in Gat No.431/A. However, in order to substantiate this contention, defendants have not placed on record any materials. There is no document in support of this contention. Hence, the contention of plaintiff appears to be more probable, considering the village form of 7 and 12 of Gat No. 431/A.

This 61 Hector is wrongly mentioned by the Trial Court. The case of Plaintiff is only in respect of 61 R land.

It is thus held by Trial Court that the case of Plaintiff is more probable than Defendants.

9. With these observations, the Trial Court ought to have allowed the application for temporary injunction. However, went on refuse the same with observations made in paragraph 14 that the Plaintiff has not given any explanation to extent of encroachment from southern and eastern side. This finding of the Trial Court confirmed by the First Appellate Court with recording finding not in consonance with case of

Plaintiff as the Plaintiff has never approached to the Trial Court with any specific case that there is already encroachment of his land. It was a case of attempt on the part of the Defendants to cause encroachment thereupon. Hence, this Court finds substance in the contention of the Petitioner that this is a fit case wherein there could have been injunction against Defendants.

10. Since both Courts below have committed serious error in not appreciating the evidence on record and case sought to be made out by Plaintiff, same is resulted in recording of perverse findings.

11. In view of above discussion, Petition stands allowed. Impugned orders are set aside. Exh. 5 stands allowed.

(R. M. JOSHI, J.)