

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8363 OF 2014

- | | | |
|----|---------------------------------|---------------------|
| 1] | Shri Gundappa Tukaram Gote |] |
| | Age 64 years, Occ : Agriculture |] |
| | |] |
| 2] | Shri Anil Gundappa Gote |] |
| | Age 37 years, Occ : Agriculture |] |
| | |] |
| | Both residing at Walve Khurd |] |
| | Taluka Kagal, District Kolhapur |]..... Petitioners. |

Versus

- | | | |
|----|---------------------------------|---------------------|
| 1] | Shri Dhondiram Tukaram Gote |] |
| | Age 73 years, Occ : Agriculture |] |
| | |] |
| 2] | Shri Maruti Vithal Patil |] |
| | Age 71 years, Occ : Agriculture |] |
| | |] |
| | Both residing at Walve Khurd |] |
| | Taluka Kagal, District Kolhapur |]..... Respondents. |

Mr. Chetan G Patil for the Petitioners.

Mr. Rajesh B Parab for the Respondent Nos.1 and 2.

CORAM : R. M. SAVANT, J.
DATE : 10th February 2015

ORAL JUDGMENT

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this court is invoked against the order dated 11/7/2014 passed by the learned Joint Civil Judge, Junior Division, Kagal by which order the Application (Exhibit 35) for appointment of the Court Commissioner came to be allowed and the Court Commissioner came to be appointed and the direction/mandate was issued to the Court Commissioner in terms of the operative part of the impugned order dated 11/7/2014. The mandate was to the effect that the Court Commissioner is appointed to make local investigation of the properties bearing Grampanchayat (for short "GP") Nos. 45/1/A and 45/1/C.

3 The suit in question has been filed for permanent injunction by the Plaintiffs i.e. the Petitioners herein. The suit properties are GP Nos.45/1/C and 502. According to the Plaintiffs in so far as the property bearing GP No.45/1/C is concerned, the same admeasures 600 sq.ft., and in so far as the property bearing GP No.502 is concerned, the same admeasures 700 sq.ft. It is the case of the Plaintiffs that on account of the sale deed executed by the Defendant No.1 in favour of the Defendant No.2 i.e. the Respondents herein that the Plaintiffs apprehend that their possession in respect of the said two properties would be interfered with.

4 The Defendants have set up the defence on the basis that the property bearing GP No.502 is an adjunct to the property bearing GP

No.45/1/A and more specifically an open space to the property bearing GP No.45/1/A.

5 The parties litigated in so far as the application for temporary injunction is concerned right up to this Court. This Court vide the order passed today in Writ Petition No.6258 of 2014 has dismissed the said Writ Petition filed by the Defendants challenging the order passed by the Lower Appellate Court which confirmed the order passed by the Trial Court granting temporary injunction to the Plaintiffs.

6 Whilst recording the findings in favour of the Plaintiffs, the Trial Court has adverted to the fact that in the assessment extracts for the year 2011-2012 and 2012-2013 there is a variance in the area of the property bearing GP No.45/1/A which belongs to the Defendant No.1, and in so far as the assessment extract for the year 2012-2013 is concerned, the same shows an area of about 1276 sq.ft. which is much more than the area of 600 sq.ft. which was shown in the assessment extract for the year 2011-2012. The Trial Court has therefore posed a question as to how the Defendant No.1 could sell an area which is much more than what belongs to him.

7 It is after the Lower Appellate Court had dismissed the Appeal filed by the Defendants that the instant application came to be filed by the

Defendants for appointment of the Court Commissioner. The Trial Court has allowed the said Application principally on the ground that the parties have denied the specifications of the properties given by each other, and therefore, it is necessary to make the local investigation, in so far as the property bearing GP No.45/1/A/ is concerned, as the said property belongs to the Defendant No.1 and the Defendant No.1 claims that the property bearing GP No.502 is an adjunct to the said property.

8 As indicated herein above in so far as the application for temporary injunction is concerned, both the Courts below after taking into consideration the material produced by the parties which included the assessment extracts produced by the Defendants have recorded a finding in favour of the Plaintiffs. It is also required to be noted that in so far as the case of the Plaintiffs is concerned, they have mentioned the areas of the suit properties. In my view, therefore, once the Plaintiffs mentioned the area of the suit property and once the Defendants are seeking to set up the defence on the basis of the assessment extracts the parties would have to prove their respective assertions by leading cogent evidence in support of their respective assertions but cannot seek appointment of the Court Commissioner to fix the boundaries. If the said course of action is permitted then the same would run counter to the judgments of this Court as well as the Apex Court that a Court Commissioner cannot be appointed for collection of evidence through the

medium of the Court. The end result of the appointment of the Court Commissioners in the instant case would in fact result in the Defendants collecting evidence through the medium of the Court which is impermissible.

9 In that view of the matter, the impugned order dated 11/7/2014 cannot be sustained, the same is therefore required to be quashed and set aside and is accordingly quashed and set aside. The Application (Exhibit 35) would stand dismissed. The above Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]