

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

WRIT PETITION NO. 3863 OF 2015

Tukaram Abaji Mane

Petitioner

Vs

Shri Govind Shankar Jadhav and
Ors

.. Respondents

Mr. Prabhanjan Gujar, Advocate for the petitioner.

Mr. Hrishikesh Giri i/b Mr. Prashant M. Patil, Advocate for
respondents no.1,3 and 4.

CORAM : R.G.KETKAR,J.

DATE : 06/08/2015

PC:

1. Heard Mr. Prabhanjan Gujar, learned counsel for the petitioner and Mr. Hrishikesh Giri, learned counsel for respondents no.1,3 and 4 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant no.1 has challenged the Judgment and order dated 16.9.2014 passed by the learned Jt. Civil Judge, Jr. Dn, Koregaon below Exhibit 24 in Regular Civil Suit No. 131 of 2006. By that order, the learned trial Judge rejected the application filed by defendant no.1 under Order 26, Rule 9 of C.P.C. for appointment of Commissioner.

3. In support of this Petition, Mr. Gujar submitted that respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit for removal of encroachment and possession of Pad land (barren land) on the southern side of Gat No. 515 (Old

Gat No.498). Suit is based on measurement carried on 20.10.2005 by Taluka Inspector of Land Records, Koregaon. He further submitted that even the learned trial Judge has framed issues on 30.4.2010 at Exhibit 13 and in particular Issues no. 1 to 3 are to the following effect:

1. Whether the defendants no.1 and 2 have encroached upon the land of plaintiff?
2. Whether the defendants no.1 and 2 perfected their title to the alleged encroached portion of the land by adverse possession?
3. Is the plaintiff entitled to recover possession of encroached portion of land?

He, therefore, submitted that suit instituted by the plaintiff is essentially for recovery of possession of the encroached portion of the land and, therefore, it is necessary to appoint Court Commissioner to carry out measurement. In support of this proposition, he relied upon the decision of this Court in the case of Manohar Mahadeorao Pagrut Vs. Sunanda Ramdas Tharkar, 2008 (4) All MR 718. On the other hand, Mr. Giri supported the impugned order.

4. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The plaintiff came with the case that he is the owner of agricultural land, bearing Gat No.515 ad-measuring 00.68R. On 20.10.2005, Taluka Inspector of Land Records, Koregaon carried out measurement and southern

portion admeasuring 00.32R of this land was shown as Pad (barren) land. In paragraph 4, the plaintiff asserted that defendants no.1 and 2 have unauthorizedly and illegally taken possession of this land. It is in that context, the plaintiff has set out cause of action in paragraph 6 as to date on which defendants 1 and 2 took possession unauthorisedly and accordingly in paragraph 7 he has made valuation. Considering the assertions made in the Plaint in its entirety, I do not find that the suit is for removal of encroachment and for recovery of possession of the encroached portion. Suit is essentially on the premise that defendants no.1 and 2 have unauthorizedly taken possession of 00.32R on the southern side of Gat No.515. Understood thus, I do not find that the learned trial Judge committed any error in passing the impugned order. In paragraph 11, the learned trial Judge has noted that suit is instituted in the year 2006. Issues were framed on 30.4.2010. The plaintiff has filed affidavit in lieu of examination in chief and matter was adjourned for defendant to conduct cross examination. It is thereafter the present application at Exh.24 is filed on 16.1.2014.

5. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the

decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)