

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

WRIT PETITION NO. 11739 OF 2015

Shri Prabhakar Bhagwan Patil-
Salunkhe Shindhe,

..Petitioner

Vs

1. Shri Ashok Pandurang Patil-
Salunkhe Shindhe and Ors.

.. Respondents

Mr. Balwant V. Salunkhe, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.
DATE : 30/11/2015

PC:

1. Not on Board. At the request of Mr. Salunkhe, taken up for admission. Heard Mr. Balwant Salunkhe, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, original defendant no.3 has challenged the Judgment and order dated 18.2.2015 passed by the learned Jt. Civil Judge, Jr. Dn., Kavathe Mahankal, below Exhibit-64 in Regular Civil Suit No.85 of 2014. By that order, the learned trial Judge rejected the application made by the petitioner under Order XXVI, Rule 9 of the Civil Procedure Code, 1908 (for short, 'C.P.C.') for appointing Court Commissioner.
3. While rejecting the application, the learned trial Judge noted that evidence of the plaintiff was closed on 9.12.2014.

Defendant no.1 examined himself as a witness on his behalf as also on behalf of defendants no. 2 and 4 and closed evidence on 5.2.2015. The written Statement of defendant no.3, viz. petitioner herein, and defendants no. 1, 2 and 4 is almost identical. After the evidence of defendant no.1 was closed on 5.2.2015, on the same day the petitioner made application for appointing Court Commissioner. The learned trial Judge noted that defendant no.3 had opportunity to file application at the earliest. However, the application was filed after completion of evidence and on that ground the learned trial Judge rejected the application. Apart from that, the learned trial Judge also observed that since the suit is for declaration of easementary rights, the plaintiff has to establish existence of the suit road as also his right to use the same. As the plaintiff himself is not seeking appointment of Court Commissioner, it is not possible to accept application of defendant no.3.

4. Mr. Salunkhe was not in a position to demonstrate that the impugned order is perverse. Having regard to the fact that the application was made after evidence of the witnesses was closed, the learned trial Judge rightly rejected the application. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. The 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 Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)