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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9825 OF 2015

Grampanchayat, Shirte Through
Sarpanch Sou.Suvarna Danaji Nalavade .. Petitioner

Vs.

The State of Maharashtra and others .. Respondents

Mr. Sandeep S.Salunkhe, Advocate for the Petitioner.
Mr.A.R.Metkari, AGP for State – Respondent No.1.

CORAM : R.G.KETKAR, J.
DATED : 19th NOVEMBER, 2015

P.C. :

. Heard Mr. Sandeep S.Salunkhe, learned Counsel for the petitioner and Mr.A.R.Metkari, learned AGP for respondent No.1-State.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the order dated 23/01/2014 passed by the learned Civil Judge, Senior Division, Islampur below Exhibit 41 in Regular Civil Suit No. 421 of 2012. By that order, the learned trial Judge rejected the application made by the plaintiff under Order 26 Rules 9 & 10 of Code of Civil Procedure, 1908 for appointment of the Court Commissioner for carrying out the measurements.

3. Mr.Salunkhe strenuously contended that plaintiff instituted Suit for declaration and for perpetual injunction. The plaintiff claims that decision dated 29/02/2012 taken by the District Superintendent of Land Records, Sangli is illegal and for perpetual injunction restraining the defendants No. 2 to 6 from taking possession unauthorisedly as also changing the nature of the suit property. He submitted that in fact defendant No. 6 in paragraph 9 of the written statement clearly admitted that he has committed encroachment in the suit property. Since there is boundary dispute as also defendant No.6 has committed encroachment, the learned trial Judge ought to have appointed the Court Commissioner for bringing factual position on record.

4. It is not possible to accept this submission as perusal of paragraph 9 of the written statement, prima facie, does not appear that defendant No. 6 admitted that he encroached upon the suit property. That apart, the Suit is instituted for declaration that the order dated 29/02/2012 passed by the District Superintendent of Land Records is illegal and for perpetual injunction. Perusal of the plaint, prima facie does not indicate that Suit is raising boundary dispute or is about encroachment. The learned trial Judge rightly held that the Commissioner cannot be appointed for the purpose of collecting the evidence. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence,

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.)