

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11502 OF 2015

Dattatray Hari Avate ... Petitioner
Vs.
Shivaji Dattajirao Dhanawade and another ... Respondents

Mr. N. J. Patil i/b. MR. Amey Patil for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 26, 2015

P.C. :

Heard Mr. Patil, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 21.08.2015 passed by the learned 3rd Joint Civil Judge, Junior Division, Ichalkaranji below exhibit-18 in Regular Civil Suit No.206 of 2015. By that order, the learned trial Judge rejected the application made by the petitioner under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 for appointing Court Commissioner for bringing on record the factual position of the suit property as well as the measurements of the shed.

3. Mr. Patil submitted that it is the case of the plaintiff that original defendant No.1 has in fact sold 0.05 Are from consolidated Gat No.955/B/1/A which in all admeasures 1 H 90 Ares on 22.06.2007 to him. In pursuance of that sale deed, defendant No.1 has put plaintiff in possession thereof. However, defendant No.2, claiming to be owner of 12.5 Ares, has obstructed peaceful possession of the plaintiff. Plaintiff realized that while executing the sale deed that the defendant No.1 did not give correct description. In the sale deed, instead of showing

consolidated Gat No.955/1/B/A, consolidated Gat No.542/B/2, in all admeasuring 1 H 78 Ares is mentioned. On the basis of this mistake, defendants are obstructing peaceful possession of the plaintiff. In order to remove the confusion and to bring on record the factual position, plaintiff took out application for appointment of Court Commissioner. By the impugned order, the learned trial Judge rejected the application. He submitted that this is a case of dispute as regards identity of the land, and therefore, the learned trial Judge ought to have allowed the application and appointed the Court Commissioner. In support of this submission, he relied upon the decision of this Court in the case of ***Yeshwant Vs. Vithobaji*, 2010 (3) Mh.L.J. 956.**

4. I have considered the submissions advanced by Mr. Patil. I have also perused the material on record. Plaintiff claims to have purchased 0.05 Are from consolidated Gat No.955/B/1/A and that he is in peaceful possession of that property. The Suit is instituted for rectification of the sale deed and for declaration of ownership over the property described in paragraph 1 of the plaint. In other words, the Suit is not for the possession of the encroached portion or about identity of the land. Controversy between the parties can be resolved by considering the boundaries in the sale deeds as the Suit is for rectification of the sale deed. Plaintiff claims to be in possession of 0.5 Are of consolidated Gat No.955/B/1/A. Thus, plaintiff will have to establish his case about the mistakes in the sale deeds.

5. It is settled position in law that if there is dispute as regards area etc., the boundaries in the sale deed will prevail over. As the Suit is not for possession of the encroached portion or the boundary dispute, the learned trial Judge has rightly rejected the application. While rejecting the application, the learned trial Judge has considered various judgments

and has observed that this is not dispute regarding identity of the suit property as also this is not a Suit for possession of the encroached portion. In view thereof, reliance placed by Mr. Patil on the decision of this Court in the case of **Yeshwant** (*supra*) does not advance the case of the petitioner. 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) C.P.C.

(R. G. KETKAR, J.)

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