

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

17 WRIT PETITION NO. 3458 OF 2015

KALU GANGARAM PANDIT
VERSUS
GAJANAN YAWANTRAO POLE

With

37 WRIT PETITION NO. 1639 OF 2016

KALU GANGARAM PANDIT AND OTHERS
VERSUS
GAJANAN YASHWANTRAO POLE U G FATHER
YASHWANT SHESHRAOPOLE

Shri. R.J. Nirmal, Advocate, for petitioners.

Shri. B.S. Kudale, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 22 AUGUST 2016

ORDER:

1) Writ Petition No.3458/2015 is filed to challenge the order of appointment of Court Commissioner made by the learned Judge of the Civil Court, Junior Division, Aundha in Regular Civil Suit No.30/2014. The second petition, Writ Petition No.1639/ 2016, is filed to challenge

the order made in the same suit on amendment application filed by the plaintiff.

2) The suit is filed by the respondent, plaintiff for relief of declaration of ownership and for possession. It is his case that one canal has divided his land into two parts. The portion situated on northern side of the canal belongs to him but the defendant No.1 has illegally taken possession of that portion. The plaintiff had requested to appoint Cadestral Surveyor as Court Commissioner to make it clear that the aforesaid portion is part of his survey number. After hearing both the sides the trial Court has allowed the application. The Court Commissioner has made measurement and the report shows that there is encroachment over 14 R portion belonging to the plaintiff and the encroachment is made by the adjoining owner, the defendant No.1.

3) In view of the aforesaid report of the Court Commissioner the plaintiff then filed application for making amendment in the pleadings and he has changed the area to make it to the extent of 14 R instead of 16 R.

As during pendency of the suit, defendant Nos.2 and 3 transferred the property in favour of their mother Vimalbai, the plaintiff had prayed for adding Vimalbai also as party defendant in the suit and in view of the circumstance that during pendency of the suit, property is transferred to Vimalbai, this relief is also granted by the trial Court.

4) The learned counsel for the petitioner submitted that the appointment of Court Commissioner was made only with a view to collect evidence and so such order ought not to have been made. This submission is not at all acceptable. There was specific case of the plaintiff that the portion situated to northern side of the canal is also belonging to him but the defendant has forcibly occupied it. Thus the specific portion of which possession is sought, was mentioned in the plaint. The Cadestral Surveyor could have only ascertained the exact area of that portion. On the other point, the defendant has no case as during pendency of the suit the property was transferred to Vimalbai and so Vimalbai was required to be made party defendant.

5) The learned counsel for the petitioner submitted that in the counter claim filed for relief of perpetual injunction by the defendants application was moved for granting interim relief and in view of these circumstances, the trial Court ought to have decided the interim application as such material can be used by the plaintiff in the matter of interim relief. This submission is not acceptable as the plaintiff has come with specific case that the disputed portion is in possession of the defendants. In view of this, this Court holds that there are no merits in both the petition. So, both the petitions are dismissed.

Sd/-
(T.V. NALAWADE, J.)

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