

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1074 OF 2016**

Janabai Rajaram Kadam

Petitioner

Vs

Shri Arvind Ramrao Gharge and
Ors

.. Respondents

Mr. Kalpesh U. Patil, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 16/02/2016

PC:

1. Heard Mr. Kalpesh Patil, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 26.10.2015 passed by the third Jt. Civil Judge, Jr. Dn., Vaduj, below Exh.65 in Regular Civil Suit No.332 of 2014. By that order, the learned trial judge rejected the application made by the petitioner, hereinafter referred to as 'defendant n.1'.
3. Respondents no.1 and 2, hereinafter referred to as 'plaintiffs' have instituted suit against defendant no.1 and respondent no.3, hereinafter referred to as 'defendant no,2', for perpetual injunction restraining defendant no.1 from causing obstruction to the occupation of the plaintiffs; for mandatory injunction directing defendant no.1 to remove stones put up by her for carrying out construction as also remove the

encroachment.

4. Pending the suit, the plaintiffs took out application Exhibit-5 for injunction restraining defendant no.1 from restraining defendant no.1 from raising construction over the suit property till the decision of the suit. That application was allowed on 26.12.2014. The plaintiffs thereafter filed application dated 4.12.2014 at Exh.21 under Order 26, Rule 9 for appointing Taluka Inspector, City Survey Land Records, Khatav as Court Commissioner. The plaintiffs also filed application Exh.47 alleging that defendant no.1 carried out construction despite injunction order and to bring that position on record, Commissioner may be appointed. By order dated 31.1.2015, the learned trial judge allowed the application Exh.21 and rejected application Exh.47 and appointed Dy. Superintendent of Land Records, Vaduj (Khatav) for carrying out measurement of Gat No.646 in City Survey no.186.

5. In pursuance thereof, Dy. Superintendent of Land Records Vaduj submitted report at Exh.58. Defendant no.1 raised objections on 15.9.2015 for not accepting the said report. The objections raised by defendant no.1, I am told, are not yet decided.

6. Defendant no.1 thereafter filed application under Order 26, Rule 10 at Exh.65 for appointing Court Commissioner. By the impugned order, the learned trial Judge rejected the application.

7. Mr. Patil strenuously contended that Dy. Superintendent of Land Records has not carried out measurement and also has not submitted report by following order dated 31.1.2015, by which application Exh.21 was allowed. In short, he submitted that Dy. Superintendent of Land Records did not submit report by following the directions contained in the order dated 31.1.2015 and, therefore, it is necessary to appoint Court Commissioner for bringing the position on record.

8. By the impugned order, the learned trial Judge has rejected the application on the ground that for collecting the evidence the Court Commissioner cannot be appointed.

9. As noted earlier, by order dated 31.1.2015, the learned trial Judge appointed Dy. Superintendent of Land Records as Court Commissioner. In pursuance of that order, Dy. Superintendent of Land Records has submitted report Exh.58. Defendant no.1 has lodged objections on 15.9.2015. In the application Exh.65 defendant no.1 has made grievance against the report submitted by Dy. Superintendent of Land Records. In my opinion, the application Exh.65 itself was misconceived more so when defendant no.1 has already lodged objections to the report submitted by the Court Commissioner. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application by observing that the Court Commissioner cannot be appointed for collecting evidence.

Hence, no case is made out for interfering with the impugned order. 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.)