

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.2993 OF 2016**

|                                                                                                           |                            |
|-----------------------------------------------------------------------------------------------------------|----------------------------|
| Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders | Court's or Judge's orders. |
|-----------------------------------------------------------------------------------------------------------|----------------------------|

Ms.Savita A. Prabhune, Advocate for Petitioners.

CORAM : R. G. KETKAR, J.

DATE : 05/12/2016

**P.C.:**

1. Not on board. At the request of Ms.Prabhune taken up in the production board.
2. Heard Ms.Savita Prabhune, learned counsel for the petitioners, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs' have challenged the judgment and order dated 4.11.2015 passed by the learned Jt. Civil Judge, Senior Division at Baramati below Exhibit-50 in Special Civil Suit No.9/2014. By that order, the learend trial Judge rejected the application made by the plaintiffs under Order XXVI Rule 9 of C.P.C.
4. Mr. Prabhune invited my attention to the prayers made in the suit. She submitted that the

defendant has sold the property bearing Gat No.70(B) to the plaintiffs by executing a registered sale deed on 17.4.2012. She submitted that defendants No.1 & 2 have made unauthorized construction admeasuring 69.66 square meters in Gat No.70-B sold to the plaintiffs. She submitted that by prayer clause (b), the plaintiffs have sought mandatory direction against defendants No.1 & 2 for demolishing the construction carried out by defendants No.1 & 2 to the extent of 69.66 square meters in Gat No.70-B. It is, therefore, necessary to appoint Court Commissioner for carrying out the measurement and fixing the boundaries of the suit property.

5. By the impugned order, the learned trial Judge has rejected the application on the ground that the plaintiffs and the defendants have jointly purchased the suit properties. The plaintiffs claimed that as they have paid the excess amount, they are entitled to proportionate share in the property purchased. In paragraph-6, the learned trial Judge has observed that in the plaint the plaintiffs did not come with the case of encroachment made by the defendants. The suit is not in respect of boundary dispute but essentially is in respect of allocation of area between the plaintiffs and the defendants. On one hand, the plaintiffs claimed more share in the property on the ground that they have paid more consideration than the defendants and on the other the defendants

claimed that they have jointly purchased the suit property.

6. The learned trial Judge has observed that as the suit is not in respect of boundary dispute, the application made under Order XXVI Rule 9 of C.P.C. is with a view to collecting evidence through Court machinery.

7. For the reasons recorded in paragraph-6 and 9 of the impugned order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed.

8. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)