

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 3485 OF 2016

BABAN ALIAS BABASO BHAGWAN
CHAVAN AND ORS

...Petitioners

Versus

SHRI. LALASO DHONDIRAM JADHAV
AND ORS

...Respondents

....

Mr. Rajaram V. Bansode, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 12th APRIL, 2016

P.C.

1. Heard Mr. R.V. Bansode, learned Counsel for the petitioner, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 13.1.2016 passed by learned Civil Judge, Junior Division, Dahivadi below Exhibit-6 in R.C.S. No.126/2014. By that order, learned trial Judge allowed the application made by the respondents under Order 26 Rules 9 and 10 of CPC and appointed Taluka Inspector of Land Records, Dahivadi (for short, 'TILR').

3. Mr. Bansode submitted that the plaintiffs have

instituted suit for perpetual injunction restraining the defendants from causing obstruction to their possession or committing encroachment, for possession of the encroached portion and for fixation of the permanent boundaries. In other words, the plaintiffs have not instituted the suit partition. He has also taken me through the sale deed dated 21.3.2009 as also the application made by the plaintiffs under Order 26 Rules 9 and 10 of CPC and in particular paragraph-4 thereof and submitted that the plaintiffs claimed that they have 2 anna 2 paisa share in gat No.109/A and the reply filed by the defendants. Mr. Bansode submitted that the Commissioner cannot be appointed in such a situation.

4. As noted earlier, the plaintiffs have instituted suit for possession of the encroached portion, if the Court finds that the defendants have committed encroachment as also for fixation of permanent boundaries. It is in that context they took out application under Order 26 Rules 9 and 10 of CPC for appointment of Court Commissioner. Learned trial Judge relied upon the decision of ***Kashinath Shastri vs. Haribhau Bawantade, 2004(2) Mh.L.J. 722*** and in paragraph-9 dealt

with the sale deeds of 1989, 2009 and 2011 which are produced on record. After considering the sale deeds, learned trial Judge noted that in all the three sale deeds map is not enclosed and it is not possible to find out which property is sold and where it is located. For deciding the suit it is necessary to carry out measurement of the property sold under the sale deeds. Accordingly, learned trial Judge appointed TILR for submitting report after going through the sale deeds in question and carrying out measurements. In my opinion, the impugned order is purely discretionary and also is for the purpose of assisting the Court in finally deciding the suit. Hence no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

5. It is made clear that where a decree is challenged by the petitioners, 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 CPC.

(R. G. KETKAR, J.)