

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4537 OF 2015

Shri Kashinath Shankar Khute

..Petitioner.

Vs

Mrs Muktabai Babanrao Ghode

.. Respondents

and Ors

Mr. Bhushan U. Deshmukh, Advocate for Petitioner.

Mr.Chaitanya Nikte i/b Mr. Rajan S. Pawar, Advocate for
Respondent no.1.

**CORAM : R.G.KETKAR,J.
DATE : 15/12/2016**

PC:

1. Heard Mr.Bhushan Deshmukh, learned counsel for the petitioner and Mr.Chaitanya Nikte, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 3.1.2015 passed by the learned 2nd Jt. Civil Judge, Jr. Dn., Niphad below Exhibit -61 in R.C.S.No. 218 of 2012. By that order, the learned trial Judge rejected the application made by the plaintiff under Order 26, Rule 9 of C.P.C. for appointment of Court Commissioner.

3. In support of this petition, Mr. Deshmukh submitted that defendants no. 2 to 4 have illegally executed sale deed dated 17.8.2010 in favour of defendant no.1. In pursuance of that sale

deed, defendant no.1 is raising construction towards eastern side of the suit property. It is, therefore, necessary to appoint the Court Commissioner for bringing on record the factual position as also for determining the mesne profits. On the other hand, Mr. Nikte supported the impugned order.

4. Perusal of the plaint shows that the plaintiff has prayed for cancellation of the sale deed dated 17.8.2010 executed by defendant no.1 in favour of defendants no. 2 to 4 as also for perpetual injunction restraining defendant no.1 from disturbing possession of the plaintiff. In other words, the suit does not involve boundary dispute and also it does not involve recovery of possession of encroached portion. In fact, in paragraph 2 the plaintiff has averred that the suit property described in paragraph 1 is ancestral property of plaintiff and defendants no.2 to 6.

5. While dismissing the application, the learned trial Judge observed that the plaintiff can adduce evidence to substantiate his contention that defendant no.1 is raising construction. The appointment of Court Commissioner is with a view to collecting evidence.

6. For the reasons recorded in paragraph 6 of the impugned order, I do not find that the learned trial Judge has committed any mistake in dismissing the application. 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) of C.P.C.

7. Liberty is reserved to the plaintiff to file application for expeditious disposal of the suit. If such an application is filed, the learned trial Judge will pass appropriate order keeping in mind that one of the parties is a senior citizen.

(R.G.KETKAR, J.)