

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 5114 OF 2016

Shri. Laxman Eknath Dodke ...Petitioner
Versus
Shri. Kushal Subayya Hegde ...Respondent

....
Mr. S.C. Wakankar, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 27th APRIL, 2016

P.C.

1. Not on board. At the request of Mr. Wakankar, taken up for admission.
2. Heard Mr. S.C. Wakankar, Advocate for the petitioner, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 20.2.2016 passed by learned Jt. Civil Judge, Senior Division, Pune below Exhibit-18 in Special Civil Suit No.704/2015. By that order, learned trial Judge allowed the application made by the respondent, hereinafter referred to as 'plaintiff', under Order 26 Rule 9 of Code of Civil Procedure, 1908 (for short, 'CPC') and appointed Taluka Inspector of Land

Records [for short,TILR'], Haveli as a Court Commissioner.

4. The plaintiff has instituted the suit against the defendant seeking direction to remove the encroachment from and over the suit property as shown in the hatched portion in red ink in the plan annexed to the plaint at Annexure I and hand over vacant and peaceful possession of the same to the plaintiff; for perpetual injunction restraining the defendant from further encroaching upon the suit property and/or committing any further acts of construction or otherwise on the encroached portion of the suit property; for injunction restraining from using the suit property or any part thereof as thoroughfare. In the plaint, the plaintiff has contended that he had purchased the property more particularly described in paragraph-1 of the plaint by a registered sale deed dated 20.1.1984 from the erstwhile owner Hiranman alias Dharmababu Bodke. In paragraph-10, the plaintiff contended that the defendant cannot take undue advantage of the incorrect boundaries mentioned in the plaintiff's sale deed. Though the boundaries mentioned in the sale deed are incorrect, there is no dispute about the identification of the suit property and the same has been demarcated as per the Government Rules way back in the year

2004.

5. The plaintiff took out application at Exhibit-18 on 16.9.2015 for appointment of TILR as a Court Commissioner with a direction to inspect the suit property and give a demarcation of the same and submit report. Defendant resisted the application by filing reply dated 1.10.2015 at Exhibit-21. By the impugned order, learned trial Judge allowed the application and kept the dispute regarding boundaries open.

6. In support of this petition, Mr. Wakankar submitted that by sale deed dated 20.1.1984 the plaintiff has purchased the property having following description :

“All that piece and parcel of land measuring 4 (four acres) and bearing Survey No.86 situate at Mouje Varaje in Sub-Registration District, Taluka-Haveli, District-Pune and more commonly known as 'Talai' and which is bounded as follows :-

On to the East :- Road of Varje Gaon

On to the South :- S. No.85 of Dangat.

On to the West :- Out of this S.No. Of Shri Datar and Sheikh.

On the North :- S.No.84”

7. As against this in the plaint the description of the suit

property is given as under :

“1. Description of the Suit Property:

All that piece and parcel of land admeasuring 4 acres from and within Survey No.86, bearing Hissa No.1, situated at Mouje Warje and Sub-Registrar Haveli, District Pune and more commonly known as Talai and which is bounded as below :

On or towards East	: Survey No.86/2 of Shri Kottian, thereafter Mr. Shaikh and thereafter Mr. Datar
On or towards South	: Survey No.87 of Dangat
On or towards West	: Survey No.88, 89 & 91.
On or towards North	: Survey No.98.”

8. Mr. Wakankar submitted that the plaintiff has not applied for rectification of the sale deed. In other words, the plaintiff is claiming ownership on the strength of the sale deed dated 20.1.1984 giving description of the property purchased by him. The plaintiff also admitted in paragraph-10 of the plaint that the boundaries mentioned in the sale deed are incorrect. The plaintiff, therefore, cannot seek any relief much less appointment of the Court Commissioner in respect of the

property described in paragraph-1 of the plaint as the plaintiff is not owner of that property. He submitted that the plaintiff is owner of the property described in the sale deed and has no interest in the property described in paragraph-1 of the plaint. Learned trial Judge was therefore was not justified in allowing the application. Mr. Wakankar submitted that the defendant has no objection for the TILR carrying out the Commission work as per the description of the property given in the sale deed.

9. I have considered the submissions advanced by Mr.Wakankar. I have also perused the material on record.

10. The plaintiff has prayed for relief in terms of prayer clause (b), which is to the following effect :

“(b) Defendant be directed to remove the encroachment from and over the suit property as shown in the hatched portion in red ink in the plan annexed to the plaint at Annexure I and hand over vacant and peaceful possession of the same to the Plaintiff.”

11. The plaintiff has specifically admitted in paragraph-10 that the boundaries mentioned in the sale deed are incorrect. However, there is no dispute about the identification of the suit

property and the same has been demarcated as per the Government Rules way back in the year 2004. Perusal of prayer clause (b), extracted hereinabove, shows that the plaintiff has sought direction against the defendant to remove the encroachment from and over the suit property as shown in the hatched portion in red ink in the plan annexed to the plaint at Annexure I and hand over vacant and peaceful possession of the same to the plaintiff. In other words, the plaintiff has not sought direction against the defendant to hand over possession of the encroached portion as per the description given in the sale deed. It is also relevant to note that the plaintiff has not suppressed the fact that the boundaries in the sale deed are incorrect. In view thereof and having regard to the prayer clause (b) in the plaint made by the plaintiff and learned trial Judge keeping the dispute of boundaries dispute open, I do not find that any case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)