

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.13196 OF 2016

M/s. Swayam Builders through Mr. Kishor K. Shah ... Petitioner
Vs.
Asgarbhai Valibhai Vohra and others ... Respondents

Mr. Ashutosh Gole for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 06, 2016

P.C. :

Heard Mr. Gole, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged the order dated 01.10.2016 passed by the learned 10th Joint Civil Judge, Senior Division, Thane, below exhibit-110 in Special Civil Suit No.946 of 2011. By that order, the learned trial Judge had re-cast issue No.2 and also framed additional issues and gave liberty to the parties to adduce evidence on the said issues.

3. Mr. Gole has invited my attention to the prayers made in the Suit as also written statement filed by the defendant No.8, and in particular paragraphs 6 to 8 thereof. He submitted that issues were framed on 28.09.2015. He submitted that the Suit is part heard and at that stage, without hearing the parties, the learned trial Judge has passed the impugned order and also framed additional issues.

4. Perusal of the prayers in the plaint, and in particular paragraph (d) shows that plaintiffs have sought perpetual injunction restraining

defendants No.1 to 8 from making any further encroachment or trespassing in the suit property and / or from carrying out any work of any nature whatsoever upon the suit property or any part thereof. By prayer (b), plaintiffs have also sought possession of the suit premises by way of mandatory injunction. He submitted that issue No.2A is therefore redundant. It is also not necessary to frame issue No.2B, which casts burden on defendant No.2 to prove that he is in lawful possession of the suit property since February 2011. Perusal of the written statement and particularly paragraph 9 thereof prima facie shows that defendant No.1 has claimed ownership of the suit property on the basis of the Conveyance Deed dated 08.02.2011. Defendant No.8 claims to be in possession of the suit property. It is in that context, the learned trial Judge has re-cast the issues wherein burden is on the plaintiffs to prove that they are in possession of the suit property (Issue No.2A). As the defendant No.8 claims to be in legal possession, by issue No.2B, the learned trial Judge has cast burden on the defendant No.8 to prove that he is in lawful possession of the suit property since February 2011. In view thereof, I do not find that the learned trial Judge has committed any error in re-casting the issues afresh when he has given liberty to the parties to adduce the evidence on the said issues. Hence, Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged 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 proposed proceedings as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)