

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 8183 OF 2016

Suresh Madanlal Agrawal,
Age 63 years, occup. Business,
R/o House No. 3071/72,
Lane no.3 (Agra Road),
Dhule 424 001

... Petitioner

versus

01. Ratnakar Govind Ranade,
Age 71 years, occup. Business,
R/o 76, Arpan, Vaibhav Nagar,
Dhule

02. Dr. Rajesh Ratnakar Ranade,
Age 43 years, occup. Medical
Practitioner, r/o 76, Arpan,
Vaibhav Nagar, Dhule

03. The Municipal Commissioner,
Dhule Municipal Corporation,
Dhule

04. The Town Panner,
Dhule Municipal Corporation,
Dhule

05. Ravindra Madanlal Agrawal,
age 62 years, occup. Business,
R/o House No. 3071/72,
Lane No. 3 (Agra Road),
Dhule 424 001

.. Respondents

Mr. P. S. Paranjape, Advocate for petitioner

Mr. Y. G. Gujarathi, Advocate for respondent no.2-caveator

CORAM : SUNIL P. DESHMUKH, J.
DATE : 21st August, 2017

ORAL JUDGMENT

1. Rule. Rule made returnable forthwith. Heard the learned counsel for parties finally by consent.

2. Petitioner-original plaintiff is before this court purportedly aggrieved by order dated 09-06-2016 on Exhibit - 59 in special civil suit no. 114 of 2011, whereunder request of the petitioner to have appointment of court commissioner to measure property bearing C.T.S. No. 1226 as referred to in Exhibit - 59 particularly in paragraph 4 thereof has been rejected by the Joint Civil Judge, (Senior Division), Dhule.

3. The court had considered that it is a cardinal principal, an appointment of court commissioner is not permissible for collection of evidence and further that there is no boundary dispute, going by the pleadings of the parties. The court has adverted to that the plaintiff's case is about construction by defendant no. 1 and 2 being an encroachment in the form of wall, and to bring-forth said situation, appointment of court commissioner had been sought. The court further adverted to that there is no dispute between the parties in respect of wall situated between plaintiff's and defendants' properties and also

that entire building is not the suit property. The court found commission sought is not conducive for the purpose of suit and as such rejected the application.

4. Mr. Paranjape, learned counsel for petitioner contends that whole the property had been purchased by petitioner in the year 2003-2004, including northern side wall which is claimed to have been encroached upon by respondents-defendants and as such, appointment of court commissioner would be necessary for bringing forth the encroachment. Generally, in the matters of encroachments, the decisions hitherto would show that such an application deserves to be granted.

5. On the other hand, Mr. Y. G. Gujarathi, learned counsel appearing on behalf of respondent no. 2 submits that the court had declined the request of the petitioner for all right reasons. Respondent no. 2 has disputed the claim of the plaintiff of him being exclusive owner of the northern side wall of his property. He further purports to refer that as a matter of fact, the petitioner - plaintiff had given no objection to the plans submitted by defendants to local authority for construction over defendants' property. He, therefore, submits that primary burden liable to be discharged about entire northern wall is of his ownership is entirely on the petitioner and unless and until

he is in a position to prove the same, the appointment of court commissioner is unlikely to achieve purpose. He further submits that the construction as referred to has already been complete and whether it tantamounts to encroachment would not be able to be proved unless the primary burden referred to above is discharged by the petitioner-plaintiff. He thus submits that writ petition does not carry any substance and deserves to be dismissed.

6. Having heard learned counsel as aforesaid, plaintiff's case appears to be to remove the wall constructed on northern side of property bearing C.T.S. No. 1226 belonging to petitioner – plaintiff and to reconstruct the same as had been subsisting and also to issue mandatory injunction in case of failure of defendants to remove the said wall, authorizing plaintiff for removal of the same and by granting injunction against defendants and to pay damages of Rs.5,00,000/- to the plaintiff – petitioner.

7. Petitioner appears to claim exclusive ownership of the wall stated to be of 2 ft. in width situated on northern side of C.T.S. No. 1227. It also emerges that construction by defendant has already been completed. In the circumstances, until the petitioner – plaintiff discharges his primary burden about 2 ft.

wide wall on northern side of said property exclusively has been of his ownership, the measurement as sought might not carry any meaningful purpose. This is one more aspect in addition to the ones dealt with by the trial court while considering application Exhibit – 59 may be relevant.

8. It is being apprised of that plaintiff's evidence has been closed and respondents – defendants are to commence their evidence.

9. Having regard to aforesaid, at this stage, it does not appear to be a case wherein any order is liable to be passed reversing the order of the trial court.

10. Writ petition, as such, is not being entertained and is dismissed. However, it would be open for the petitioner-plaintiff to make an appropriate application before the trial court as and when it is deemed that the situation with reference to the evidence warrants the same and in case of such an application, the same be considered and decided on its own merits.

11. Rule stands discharged.

SUNIL P. DESHMUKH,
JUDGE

pnd