

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2255 OF 2017

Sadashiv Ramchandra Patil ... Petitioner
Vs.
Radhabai Barkya Patil and others ... Respondents

Mr. Bhushan Walimbe for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : MARCH 01, 2017

P.C. :

Heard Mr. Walimbe, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged the judgment and order dated 02.01.2017 passed by the learned Civil Judge, Junior Division, Panvel below exhibit-31 in Regular Civil Suit No.18 of 2015. By that order, the learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'plaintiffs', under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. In support of this Petition, Mr. Walimbe submitted that plaintiffs have instituted Suit for declaration that defendant has illegally encroached upon the suit premises to the extent of 22 Gunthas in Gat No.76 and for removal of illegal work done by the defendant. During the pendency of the Suit, plaintiffs took out application exhibit-5 for injunction restraining the defendant from further encroaching the suit premises. By order dated 04.02.2015, the learned trial Judge rejected the application. While rejecting the application, in paragraph 10, the learned trial Judge observed that plaintiffs have failed to bring on record

the extent of the property encroached and whether there has been any encroachment at all. The learned trial Judge prima facie found that there was no encroachment made by the defendant in the plaintiffs' property. He submitted that after rejection of the application on 04.02.2015, plaintiffs filed present application for appointment of the Court Commissioner. By the impugned order, the learned trial Judge has allowed the application and appointed D.I.L.R. to carry out the survey. He submitted that once the learned trial Judge has recorded a prima facie finding that there is no encroachment, the learned trial Judge was not justified in allowing the application for appointment of Court Commissioner. He invited my attention to the reply filed by the defendant at exhibit-41. He further submitted that while allowing the application, the learned trial Judge observed that defendant has obstructed the efforts made by the plaintiffs for carrying out the measurement. The same is without any basis. He further submitted that by application exhibit-31, plaintiffs are trying to collect evidence. He, therefore, submitted that the impugned order deserves to be set aside.

4. I have considered the submissions advanced by Mr. Walimbe. I have also perused the material on record. Perusal of the case made out by the plaintiffs shows that plaintiffs claimed to be owner of Gat Nos.76 and 77. The property of the defendant is Gat No.78, which is on the southern side of Gat No.76 and 77. Plaintiffs have alleged that defendant has made encroachment in Gat No.76 to the extent of 22 Gunthas. Accordingly, plaintiffs have prayed for declaration that defendant has made encroachment to the extent of 22 Gunthas in Gat No.76 and for removal of the encroachment. Perusal of prayer clause (c) also shows that plaintiff prayed for appointment of the Court Commissioner for removing unauthorized work from the suit property.

5. It is no doubt true that during the pendency of the Suit, plaintiffs filed application exhibit-5 for temporary injunction restraining defendant from committing further encroachment and the said application is rejected by the learned trial Judge by observing that prima facie, plaintiffs have failed to bring on record the extent of the property encroached and whether there has been any encroachment at all. It has also been observed that plaintiffs have failed to show their own demarcation or sign or marking, and therefore, there is no reason to say that some sort of encroachment has been made into the plaintiffs' property. It is precisely for that purpose, plaintiffs filed application under Order XXVI, Rule 9 of C.P.C. for demarcating actual boundary of the property by appointment of Court Commissioner.

6. Having regard to the fact that the Suit is for removal of encroachment, in my opinion, it is absolutely necessary to appoint the Court Commissioner. The submission of Mr. Walimbe that by this application, plaintiffs are trying to collect evidence cannot be accepted in view of the decision of this Court in the case of ***Ramchandra Bhikaji Jagtap vs Dudharam Langruji Padvekar, 2004 (1) MhLj 278***. In that case, it is observed in paragraph 10 thus,

“10. ... It is clear that under Order 26, Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local investigation or not. The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary dispute and disputes about the identity of lands are instances, when a Court should order a local investigation under Order 26, Rule 9 of the Code of Civil Procedure. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon. Oral evidence cannot conclusively prove such an issue.”

7. 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.

(R. G. KETKAR, J.)

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