

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 253 OF 2017

Lahu Maruti Kadam (since Deceased)

Through LRs.

...Petitioners

Versus

Jaykumar Kalu Bagul And Ors.

...Respondents

....

Mr.Abhijeet Kadam i/b. Vaibhav R. Gaikwad, Advocate for the
Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 17th JANUARY, 2017

P.C.

1. Not on board. At the request of Mr.Kadam taken up for admission.
2. Heard Mr. Abhijeet Kadam, learned Counsel for the petitioners, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff' has challenged the judgment and order dated 9.8.2016 passed by the learned Civil Judge, Junior Division, Mangaon below Exhibit-49 in R.C.S. No.91/2010. By that order, the learned trial Judge rejected the application made by the plaintiff under Orded XXVI Rule 9 of C.P.C. for appointment of T.I.L.R. as a Court

Commissioner.

4. The plaintiff has instituted suit *inter alia* for mandatory injunction against the defendants for removing unauthorized gate erected on the road situate in the suit property, amongst other prayers. During pendency of the suit, the plaintiff took out application Exhibit-18 for appointment of the Court Commissioner for bringing on record the factual position. By order dated 3.1.2012, the learned trial Judge rejected the application.

5. Aggrieved by that decision, the plaintiff preferred Civil Revision Application No.254/2012. By order dated 22.11.2016, this Court dismissed Civil Revision Application by passing following order :

“By the impugned order, the applicant/original plaintiff's application to appoint Commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908, is rejected. It is settled law that the Commissioner cannot be appointed to collect evidence. That apart, the revision is also not maintainable against the order rejecting the application for appointment of Commissioner. In that view of the matter, the civil revision application is dismissed.”

6. It appears that the plaintiff filed application Exhibit-49 for appointment of Court Commissioner. That application was

allowed by the learned trial Judge on 5.7.2014. The learned trial Judge appointed T.I.L.R. as Court Commissioner to submit report after inspecting the site. Aggrieved by that decision, the respondent instituted Writ Petition No.9147/2014. This Court set aside that order and directed the trial Court to re-consider the application for appointment of Court Commissioner afresh. In pursuance of that order, the application was heard afresh. By the impugned order, the learned trial Judge has rejected the application. It is against this order, the plaintiff has instituted this Petition.

7. In support of this Petition, Mr.Kadam strenuously contended that in fact while rejecting the application, the learned trial Judge has observed that it is necessary to appoint T.I.L.R. He submitted that in paragraph-10 of the impugned order, the learned trial Judge observed that joint measurement on both properties by T.I.L.R. is necessary to determine the dispute between the parties at once and on merit. In other words, the learned trial Judge held that it is necessary to appoint T.I.L.R. as Court Commissioner for elucidating the matter in dispute. However, the learned trial Judge rejected application on the ground that the present application is barred by *resjudicata*. The

learned trial Judge was of the view that earlier application at Exhibit-18 filed by the plaintiff was dismissed by the trial Court and said decision was upheld by this Court in C.R.A. No.254/2012 and, therefore, the present application is hit by principles of *resjudicata*. He submitted that said finding is contrary as the matters were not directly and substantially in issue while deciding the application at Exhibit-18. He, therefore, submitted that the impugned order deserves to be set aside thereby allowing the application Exhibit-49.

8. I have considered the submissions advanced by Mr.Kadam. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit alleging that the defendants have unauthorizedly erected gate on the road situate in the suit property. Having regard to prayer clause (a) of the suit, it is absolutely unnecessary to appoint the Court Commissioner. Whether the defendants have erected gate on the road situate in the suit property is a matter of evidence to be adduced by the plaintiff. For that purpose appointment of Court Commissioner is absolutely unnecessary. That apart earlier the plaintiff had filed application Exhibit-18 for the self-same relief. By order dated 3.1.2012, the learned trial Judge has rejected the

application. While rejecting the application, the learned trial Judge was of the view that it is not necessary to appoint Court Commissioner. I have already extracted the order passed by this Court on 22.11.2012 in C.R.A. No.254/2012. After recording that the application was made by the plaintiff for appointment of the Court Commissioner under Order XXVI Rule 9 of C.P.C., this Court observed that it is settled law that the Commissioner cannot be appointed to collect evidence. In my opinion, the attempt on the part of the plaintiff is to collect evidence through the machinery of the Court, which is not permissible.

9. Mr. Kadam relied upon the decision of ***Sajjadanashin Sayed MD.B.E. EDR. (D) by L.Rs. v. Musa Dadabhai Ummer and others, (2000) 3 SCC 350*** to contend that the learned trial Judge committed error in holding that the present application is hit by principles of res judicata. I have already considered the earlier application Exhibit-18 made by the plaintiff for appointment of the Court Commissioner. That application was rejected by the trial Court and said order was upheld by this Court. The plaintiff has filed present application praying for appointment of T.I.L.R.

10. In paragraph-12 of the impugned order, the learned

trial Judge reproduced the averments made in application Exhibit-18 and compared with the averments made in the present application Exhibit-49. In paragraph-13, the learned trial Judge noted that the comparison of both the applications shows that the only word added in the present application is “iron gate”. The learned trial Judge held that the contents of prayer in both the applications are same. In view thereof, I do not find that the learned trial Judge committed any error in rejecting the application on the ground that it is hit by resjudicata.

11. In my opinion, the decision in **Sajjadanashin Sayed** (supra) does not advance the case of the plaintiffs.

12. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, the Petition fails and the same is dismissed.

13. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)