

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 3526 OF 2017**

Shri Vilas Mahadu Kalamkar & Ors.       ]       Petitioners

Vs.

Shri Dhondiba Bhimaji Mate               ]       Respondent

.....  
Mr. Uday B. Nighot, Advocate for the petitioners.

**CORAM : R.G. KETKAR, J.**

**DATE : 23<sup>rd</sup> MARCH, 2017.**

**P.C.**

Not on board. At the request of Mr. Nighot taken up in the production board.

2.           Heard Mr. Uday B. Nighot at length, learned Counsel for petitioners.

3.           By this petition under Article 227 of the Constitution of India, the petitioners hereinafter referred to as 'defendants No. 1 to 7' have challenged the judgment and order dated 14<sup>th</sup> February,

2017 below Exhibit-44 as also the judgment and order dated 14<sup>th</sup> February, 2017 below Exhibit-48 passed by the learned Civil Judge Junior Division, Junnar, Pune in Regular Civil Suit No. 16 of 2015. By order dated 14<sup>th</sup> February, 2017 below Exhibit-44, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as 'plaintiff' for appointment of Taluka Inspector of Land Records, Junnar (for short 'T.I.L.R') as a Court commissioner. By order dated 14<sup>th</sup> February, 2017 below Exhibit-48, learned trial Judge rejected the application made by the defendant Nos. 1 to 7 for appointment of Court commissioner.

4. In support of this petition Mr. Nighot has taken me through the assertions made in the plaint as also rough sketch map forming part of the suit, as also prayers made in the suit. He has also taken me through the application made by the plaintiff for appointment of T.I.L.R as also application made by defendant Nos. 1 to 7. He submitted that basically the plaintiff is not in possession of the suit property at all. In view thereof, the learned trial Judge was not justified in allowing the application Exhibit-44. As far as the application Exhibit-48 made by defendant Nos. 1 to 7 is concerned, he submitted that defendants have set up counter

claim. Defendants No. 1 to 7 have prayed for cancellation of the sale deed dated 15<sup>th</sup> June, 2010 in respect of the suit property described in paragraph 2 (a) of the plaint. In fact, suit property described in paragraph 2(b) and 2(c) of the counter claim is the suit property described in paragraph 2 (a). He submitted that as the plaintiff is not in possession of the suit property as also he has produced imaginary rough sketch map in the suit, it is necessary to appoint commissioner for bringing factual position on record. The learned trial Judge was not justified in rejecting application Exhibit-48 made by defendant Nos. 1 to 7.

5. With the assistance of Mr. Nighot, I have perused the material on record. A perusal of the plaint and application Exhibit-44 shows that the plaintiff has alleged that the defendants have committed encroachment to the extent of 3.67 Are in the suit property described in paragraph 2(a) of the plaint. By prayer clause (c), the plaintiff has also sought possession of the encroached area by the defendants. In view thereof, as also for the reasons recorded in paragraph 4 of the impugned order, I do not find any fault in the order passed by the learned trial Judge below Exhibit-44.

6. As far as order below Exhibit 48 is concerned, a perusal of the counter claim made by defendant Nos. 1 to 7 indicates that they have not raised any dispute as regards encroachment as also they have not raised any boundary dispute. In paragraph 6 of the impugned order, the learned trial Judge has observed that the defendants have not made any allegations about encroachment. In paragraph 7, the learned trial Judge observed that Court Commissioner is not required to be appointed for finding out who is in possession of the suit property. For the reasons recorded in paragraphs 6 and 7 in order passed below Exhibit-48, I do not find that the learned trial Judge has committed any error. Hence, the petition fails and the same is dismissed.

7. It is made clear that where a decree is challenged by the petitioner, 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.]**