

Mr. Subhash Jha i/b. Law Global for Petitioners.
Mr. A. R. Metkari, AGP for Respondent No.1-State.

P.C. :

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and order dated 10.02.2016 passed by the learned 6th Joint Civil Judge, Junior Division, Pune below exhibit-27 in Regular Civil Suit No.45 of 2014. By that order, the learned trial Judge rejected the application made by the defendants under Order XXVI, Rule 10 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for appointing Superintendent or Taluka Inspector of Land Records, Haveli, Pune for demarcating 30 Are of plaintiffs' property and remaining 19 Are of defendants' property in Gat No.1104 as also 34 Are from Gat No.1107 of the plaintiffs.

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Are situate in Mauje Wadki, Taluka Haveli, District Pune (for short 'suit land'). Plaintiffs claimed to have purchased 30 Are land from Gat No.1104 from Jayashree Vinayak Chaudhary, Prabhakar Krushnaji Tope and Kamal Hiralal Surana on 09.01.2007. Plaintiffs have contended that Gat No.1104 in all admeasuring 1 Hectare 11 Are was the ancestral property of the defendants. Out of this area, on 30.10.1988, they sold 60 Are to Divakar Kashinath Hivarkar and 11 others. The said property changed hands. Ultimately, plaintiffs have purchased 30 Are from Abhay Chandanmal Darda. He submitted that though the plaintiffs have instituted Suit for perpetual injunction in respect of land bearing Gat No.1107, they are trying to encroach upon the remaining 19 Are owned by the defendants.

4. Mr. Jha has taken me through the application exhibit-27 made by the defendants for appointment of the Court Commissioner. In that application, defendants have specifically contended that plaintiffs have purchased 30 Are out of Gat No.1104 and remaining 19 Are of Gat No.1104 is owned by the defendants. Plaintiffs are trying to encroach upon the land owned by the defendants and it is therefore, necessary to appoint the Court Commissioner. He submitted that once the Court Commissioner is appointed and the lands are demarcated, it will resolve the controversy once for all. The learned trial Judge however rejected the application on the ground that defendants are trying to collect evidence. He submitted that the learned trial Judge committed error in rejecting the application.

5. I have considered the submissions advanced by Mr. Jha. I have also perused the material on record. A perusal of the plaint shows that plaintiffs have sought perpetual injunction against the defendants in respect of Gat No.1107. Plaintiffs claimed to have purchased 34 Are of

Gat No.1107. Though the reference is made by the plaintiffs as regards purchasing 30 Are from Gat No.1104, the subject matter of the Suit is Gat No.1107 and not Gat No.1104. A perusal of the application exhibit-27 filed by the defendants shows that defendants have contended that plaintiffs are trying to encroach upon 19 Are of Gat No.1104 owned by the defendants. By the application made by the defendants, they are trying to enlarge the controversy raised in the Suit. As noted earlier, Gat No.1104 is not the subject matter of the Suit. In view thereof, no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed. It will be open to the defendants, if so advised, to set up a counter-claim in the Suit. If the learned trial Judge permits defendants to set up a counter-claim, defendants are also at liberty to consider filing fresh application for appointment of Court Commissioner. All contentions of the plaintiffs in that regard, including the maintainability of counter-claim and fresh application for appointment of Court Commissioner, are expressly kept open.

6. It is, however, expressly made clear that where a decree is appealed from by the petitioners, 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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