

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 8815 OF 2015

Shri. Badshah Rahimanshah
Makandar (Fakir)

...Petitioner

Versus

Shri. Kishor Ganpatrao Shitole
And Ors.

...Respondents

....

Mr.Anilkumar Patil, Advocate for the Petitioner.

Mr.Manoj Patil i/b. Ms. Suman Lengare, Advocate for
Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 14th FEBRUARY, 2017

P.C.

1. Heard Mr.Anilkumar Patil, learned Counsel for the petitioner and Mr.Manoj Patil, learned Counsel for respondents, at length.

2. Rule. Mr.Manoj Patil waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

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 15.6.2015 passed by the learned Jt.Civil Judge, Jr Dn., Sangli below Exhibit 37 in Regular Civil Suit No.372 of 2011. By that order, the learned trial Judge appointed City Survey Officer, Sangli as a Court Commissioner and directed him to measure the properties of the plaintiff and the defendants as mentioned in Application Exhibit-37 as per their sale deeds and submit his report along with detailed map on or before the next date.

4. Mr.Anilkumar Patil submitted that the plaintiff has instituted suit simplicitor for perpetual injunction restraining the defendants from causing obstruction to the plaintiff's possession and from carrying out construction in the open space. In other words, he submitted that the dispute is not relating to the boundaries as also the suit is not for recovery of possession of the encroached portion. The learned trial Judge was not justified in appointing Court Commissioner. The application was made by the defendants for appointment of Court Commissioner for collecting evidence.

5. On the other hand, Mr. Manoj Patil supported the

impugned order. He submitted that there are several litigations pending between the parties. In particular, he invited my attention to R.C.S. No.457/2000 instituted by Kishor Shitole and Dattatraya Yadav and against Badshah Fakir (Makandar) and the prayers made in that suit. He submitted that there is dispute as regards identity of the property. The learned trial Judge was, therefore, justified in passing the impugned order.

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for perpetual injunction. The question is whether the plaintiff has established his possession or not in respect of open space which is the subject matter of the Suit. The plaintiff will have to establish his case by leading evidence and for that purpose the defendant cannot apply for appointment of the Court Commissioner. The learned trial Judge was not justified in allowing the application which is made by the defendant with a view to collecting evidence through Court machinery. The question is whether the plaintiff is in possession of the open space or not can be established by leading evidence and for that purpose appointment of Court Commissioner is not necessary.

Hence, the impugned order cannot be sustained and as such is set aside. Application Exhibit-27 made by the defendants is dismissed. Rule is made absolute with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)