

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11028 OF 2015

Shri. Vitthal Shivaji Bhosale
And Ors.

...Petitioners

Versus

Shri. Prabhakar Shivaji Bhosale
And Anr.

...Respondents

....

Mr.S.A. Rajeshirke, Advocate for the Petitioners.
Mr.Anand Vadgaonkar, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 05th JANUARY, 2017

P.C.

1. Heard Mr.S.A. Rajeshirke, learned Counsel for the petitioners and Mr.Anand Vadgaonkar, learned Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 13.7.2015 passed by the learned Jt. Civil Judge, Junior Division, Pandharpur below Exhibit-27 in R.C.S. No.271/2015. By that order, the learned trial Judge rejected the application made by defendants No.1 to 4 under Order XXVI Rule 9 of C.P.C. for appointing Court Commissioner.

3. In support of this Petition, Mr.Rajeshirke submitted that the learned trial Judge rejected the application mainly on the ground that the defendant No.1 claimed to be in possession of 60 Ares on the basis of agreement of sale executed by the plaintiff and his wife in the year 2006, however, the defendants did not file agreement of sale or any other document showing their possession. He further submitted that the defendants are possessing the documents to establish their possession. It is, therefore, necessary to appoint the Court Commissioner for bringing on record the factual position. He relied upon the decision of this Court in *Bharat Dadu Bansode v. Bashir Aminuddin Kureshi, Writ Petition No.2515/2011, decided on 7.6.2011*. In that case, the trial Court rejected the application on the ground that the petitioner claimed to be owner of part of Gat No.2655 to the extent of 2 Hectares and 0.2 Are out of total area of 10 Hectares and 51 Ares having purchased from the brother of the respondent. The petitioner instituted suit for perpetual injunction restraining the defendant from disturbing his possession of the portion purchased by him. Mr. Rajeshirke submitted that even in the present case the plaintiff has instituted the suit for perpetual injunction claiming to be in

possession of entire 1 Hectare 21 Ares of Gat No.48/2A/4/2 (for short, 'suit property'). As against this, it is the case of the defendants that they have purchased 60 Ares out of 1 Hectare 21 Ares of Gat No.48/2A/4/2. He, therefore, submitted that the decision in the case of *Bharat Bansode* (supra) is applicable and, therefore, the learned trial Judge should have appointed Court Commissioner.

4. On the other hand, Mr.Vadgaonkar supported the impugned order.

5. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. The plaintiff has instituted suit for perpetual injunction restraining the defendants No.1 to 4 from causing obstruction to his possession over the suit property. It is, therefore, for the plaintiff to establish his possession over the suit property. If defendants No.1 to 4 are claiming to be in possession of 60 Ares, it is for them to establish said fact by leading evidence. In other words, it is a matter of evidence and for that purpose appointment of Court Commissioner is absolutely not necessary. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the

application for appointment of Court Commissioner.

6. Mr. Rajeshirke relied upon the decision of this Court in the case of *Bharat Bansode* (supra). Perusal of paragraph-3 of that decision shows that the learned Single Judge recorded that there appeared to be a dispute as to the possession as also the description and location of the property purchased. In the present case, the plaintiff has specifically asserted that he is in possession of entire property. As against this in the case of *Bharat Bansode* (supra), the plaintiff claimed to be owner of 2 Hectare and 0.2 Are out of total area of 10 Hectare 51 Ares. In view thereof, the decision in the case of *Bharat Bansode* (supra) does not advance the case of the defendants. Hence, the Petition fails and the same is dismissed.

7. 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.)