

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.280 OF 2016

Manik Ramchandra Kumbhar	...	Petitioner
Vs.		
Jainunissa Hussain Bagwan	...	Respondent

Mr. Umesh H. Pawar for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : MARCH 17, 2017

P.C. :

Heard Mr. Pawar, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the judgment and order dated 31.10.2015 passed by the learned IVth Joint Civil Judge, Junior Division, Karad below exhibit-21 in Regular Civil Suit No.492 of 2014. By that order, the learned trial Judge rejected the application made by the plaintiff under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for appointment of Taluka Inspector of Land Records as a Court Commissioner.

3. In support of this Petition, Mr. Pawar submitted that plaintiff has instituted Suit inter alia for perpetual injunction restraining the defendant from obstructing the plaintiff from using the property described in paragraph 1B of the plaint as also from encroaching upon the property described in paragraph 1B of the plaint; for declaration that plaintiff is owner of property described in paragraphs 1A and 1B of the plaint on the basis of the sale deed. He has invited my attention to the recitals in the sale deed dated 15.12.1960 executed by and between Ganesh Bhau Kumbhar and Ramchandra Maruti Kumbhar to contend

that on the northern side of City Survey No.406A, there is a way for ingress and egress. He submitted that this is described in paragraph 1B of the plaint. Plaintiff has become owner of the property described in paragraphs 1A as also 1B. He also invited my attention to the map to indicate that on the western side of Survey No.424/2B-1, there is a lane admeasuring 3.5 meters. He submitted that even defendant admits that there is a right of way to the plaintiff. However, defendant contends that it is 3 feet and not 3.5 meters, as claimed by the plaintiff. He submitted that as the defendant has objected width of way, it is a fit case for appointment of Court Commissioner.

4. While rejecting the application, in paragraph 6 of the impugned order, the learned trial Judge has observed that prima facie, sale deed dated 15.12.1960 does not indicate that plaintiff's predecessor had purchased the said property. The learned Judge observed that plaintiff has not challenged the sale deed, which is silent as far as access way is concerned. Defendant admitted that plaintiff has access way right of 3 feet in width. The learned trial Judge thereafter observed that plaintiff has failed to prima facie prove possession of the property 1B. Court Commissioner cannot be appointed for collecting the evidence. Court Commissioner can be appointed for ascertaining encroachment.

5. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged by the petitioner, 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 the proceedings as contemplated by Section 105(1) of C.P.C.

6. Mr. Pawar submitted that during the pendency of this Petition, plaintiff has filed application for amendment of the plaint. Instead of claiming ownership rights over property 1B, he is claiming easementary rights.

7. In view thereof, in the event of the trial Court allowing the application for amendment, plaintiff will be at liberty to file application for appointment of Court Commissioner and in that event, the learned trial Judge will decide the said application on its own merits, uninfluenced by the observations made in the impugned order and this order. Order accordingly.

(R. G. KETKAR, J.)

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