

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2758 OF 2017

Anita R. Vibhute & Ors.

... Petitioners

Vs.

Subrav Katakdhond

... Respondent

Mr.A.S. Kulkarni for the Petitioners

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 5, 2017**

P.C. :

1. In this petition filed under Article 227 of the Constitution of India, the petitioner who is the original defendant in Regular Civil Suit No.645 of 2013 challenges the order of the trial Court dated 9.11.2061 passed below exhibit 27 thereby appointing the District Superintendent of Land Records as Court Commissioner to measure the land bearing Survey No.9/1 and 9/2 of Nannaj village, Taluka North Solapur, District Solapur and submit report. The learned Counsel for the petitioners has submitted that both the agricultural lands of the petitioner/defendant and the respondent/plaintiff are adjacent. The original predecessor in title was one Madhukar Patil. The petitioner has purchased 61 ares of

land from survey No.9, which is numbered as 9/1. Thereafter, from the other part of the land i.e., survey No.9/2, the petitioner purchased 30 ares of land from Madhukar Patil and the remaining 40 ares of land was purchased by one Balu Khandu Tonpe and the plaintiff/respondent has purchased that 40 ares of land from Balu Khandu Tonpe. There is a dispute in respect of a well in the house and the water of that well. The learned Counsel submits that the application below exhibit 5 seeking interim injunction against the petitioner/defendant was rejected by the trial Court on 21.11.2013. Hence, the appeal preferred against the said order by the respondent/plaintiff was also rejected and the order of the trial Court was confirmed by order dated 11.2.2015 passed by the District Judge. He submitted that the trial Court and the District Court had observed that the plaintiff could not prove his case prima facie in respect of the right in the well and therefore has rejected the application below exhibit 5. He relied on the sale deed of the land 9/1 where there is a mention of the well. He submitted that under such circumstances, the application moved by the plaintiff/respondent for appointment of Court Commissioner is an attempt to collect evidence which is not allowed under the law and therefore, the order dated 9.11.2016 passed by the Civil Judge,

Junior Division, Solapur allowing the said application is to be set aside. He further submitted that the learned Judge ought not to have mentioned the measurement of survey No.9/1 alongwith 9/2 when the plaintiff / respondent sought the measurements of only survey No.9/2 and not 9/1.

2. The learned Counsel for the respondent while opposing this petition has pointed out that the petitioner has in fact filed Suit No.1790 of 2012 against the present respondent/plaintiff. In the said suit, as the application below exhibit 5 was partly allowed by the order dated 19.12.2013 by the 4th C.J.J.D., Solapur. He pointed out that in the said order, the learned Judge has specifically mentioned that the said well is in 40 areas of gat No.9/2 and it is not in 30 ares in 9/2. the land which is purchased by the present petitioner/defendant and the plaintiff in the RCS No.1790 of 2012. He supports the impugned order.

3. Perused the sale deed, where the 1/4th share in respect of the use of the water is sold to the petitioner and accordingly, it is mentioned in the recitals. It appears that the order passed by the learned Civil Judges dated 19.12.2013 in the suit filed by the petitioner and the order dated 21.11.2013 passed in the Regular

Civil Suit No.645 of 2013 are contrary findings in respect of the location of the well.

4. Considering this, the order passed by the learned trial Court allowing the application for appointment of the Court Commissioner under Order 26 Rule 9 of the Civil Procedure Code cannot be faulted with. If the trial Court wants the Court Commissioner to bring certain facts on record after investigating the matter can pass the order even suo motu and thus, the order of measuring both the Survey numbers which are adjacent i.e., Survey No.9/1 and 9/2 is found illegal. The report of the Court Commissioner, though subject to cross-examination, yet, it may be helpful to adjudicate the issue before the Court. Hence, the impugned order is maintained. No interference is called for.

5. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)