

Anand

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

WRIT PETITION NO.1939 OF 2017

Vinod Nivrutti Patil .Petitioner

Vs.

Balaso Anna Mane & ors. .Respondents

Mr.U.R.Mankapure, Advocate, for the Petitioner

CORAM : R.G.KETKAR, J.

DATE : 10.03.2017

P.C.

. Heard Mr. Mankapure, learned counsel for the Petitioner.

2. By this Petition under Article 227 of the constitution of India, the Petitioner, hereinafter referred to as 'Plaintiff' has challenged the Judgment and Order dated 25.02.2016 passed by the learned C.J.J.D., Palus below Exh.80 in R.C.S.No.77 of 2010 as also the Judgment and Order dated 10.11.2016 passed by the learned C.J.J.D., Palus below Exh.85 in R.C.S.No.77 of 2010. By Order dated 25.02.2016, the learned trial Judge rejected the Application made by the Plaintiff for framing the following additional issue.

“Do defendants No.1 to 4 prove that, plaintiff has made encroachment of 0H.06R in Gat No.9”

3. By Order dated 10.11.2016 passed below Exh.85, the learned trial Judge rejected the Application made by the Plaintiff for issuing witness summons to Shri M. D. Aiwale, Cadastral Surveyor as Court witness.

4. In support of this Petition, Mr. Mankapure submitted that the Plaintiff has instituted suit inter alia for declaration of his ownership over Gat No.12 admeasuring 0.64 R + 0.06 PK situate at village Ghogaon, Taluka-Palus, District-Sangli; for perpetual injunction restraining the Defendants from obstructing Plaintiff's possession over the suit property. He has taken me through Paragraphs 4 & 5 of the plaint. In paragraph 4, the Plaintiff asserted that the Defendants have claimed that the Plaintiff has made encroachment to the extent of 0H.06R in Gat No.9 owned by them. The Defendants have carried out measurement on 16.02.2010 and 02.03.2010 which incidently falls on Tuesday. The Plaintiff is carrying on dairy business in addition to agriculture and every Tuesday, he is required to go out of village through out the day. Taking advantage of this position , the Defendants got the land measured on 16.02.2010 and 02.03.2010 which indicates that the Plaintiff has made encroachment to the extent of .06R in their property.

5. He also invited my attention to the Written Statement filed by the Defendants as also the Application Exh.80 made by the Plaintiff for framing additional issue and Application Exh.85 for issuing witness summons to Shri M. D. Aiwale, Cadastral Surveyor as Court witness. He submitted that as the Defendants have asserted that the Plaintiff has encroached to the extent of .06R in Gat No.9, it is necessary to frame additional issue as also issue witness summons to Shri M. D. Aiwale, Cadastral Surveyor as a Court witness. He submitted that the learned trial Judge was not justified in rejecting the Applications Exh.80 & Exh.85.

6. I have considered rival submissions advanced by the learned counsel for the parties. I have also perused the material on record. As noted earlier, the Plaintiff has claimed declaration of his ownership rights admeasuring 0.64 R + 0.06 PK over Gat No.12 as also perpetual injunction. As per Section 101 of the Indian Evidence Act, 1872, burden is on the Plaintiff to prove his ownership. The Plaintiff also claims that he is in possession of 0.64 R + 0.06 PK over Gat No.12. It is, therefore, necessary for the Plaintiff to establish his ownership as also possession. The burden is essentially on the Plaintiff to prove these facts. The learned trial Judge, therefore, observed that it is not necessary to frame additional issue proposed by the Plaintiff. The

issues were already framed below Exh.54 and issues No.1 to 3 will decide the fate of the suit. For the reasons recorded in paragraphs 5 to 7 of the Order dated 25.02.2016, I do not find that the learned trial Judge committed any error in rejecting the Application Exh.80 and in not framing additional issue suggested by the Plaintiff.

7. As far as Application Exh.85 for issuing witness summons is concerned, in paragraph 6, the learned trial Judge has observed that the Plaintiff has contended that survey carried out by the Cadastral Surveyor is incorrect. The Plaintiff will have to stand or fall on his legs. He cannot take help of the Court. The burden of establishing ownership is on the Plaintiff. For the reasons recorded in paragraph 6 of the impugned Order, I do not find that the learned trial Judge committed any error in rejecting the Application Exh.85. Hence, Petition fails and same is dismissed.

8. 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.

(R.G.KETKAR, J.)