

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

914 WRIT PETITION NO. 9611 OF 2013

SAYYED KHWAJA SAYYED MOIHIUDDIN
VERSUS
DIGAMBAR GANGARAM HALDE (PATIL) AND ANOTHER

...

Advocate for Petitioner : Mr. A. A. Mukhedkar
Advocate for Respondent No.1 : Mr. R. S. Deshmukh
Advocate for Respondent No.2 : Absent.

.....

CORAM : V. K. JADHAV, J.
DATED : 7th MARCH, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. The petitioner / original plaintiff has filed an application Exh.27 for appointment of Court Commissioner and the learned 5th Jt. Civil Judge (Junior Division), Nanded by impugned order dated 07.10.2013 rejected the said application. Hence, this writ petition.
3. Learned counsel for the petitioner / original plaintiff submits that so far as the suit land Gut No. 37/A is concerned, admittedly the Nalleshwar road is passing through the said land

and deceased Gangaram who happened to be the father of respondent No.1 / original defendant no.1, after acquisition of certain land from the said gut number for construction of the road as above and due to some other facts as detailed in para Nos. 7 & 8 of the plaint, no land in suit land Gut No.37/A remained for deceased Gangaram. However, respondent No.1 / original defendant No.1 being the legal heir of deceased Gangaram is trying to take disadvantage of the revenue entries. Even respondent No.1 / defendant No.1 got mutated his name to the extent of 76 R land standing in the name of deceased Gangarm with the help of respondent No.2 / original defendant No.2. Learned counsel submits that defendant No.1 by taking undue advantage of the said revenue entries, trying to dispossess the plaintiff from the suit land. Learned counsel submits that the petitioner has filed an application Exh.27 to measure the suit land Gut No. 37/A alone and if the suit land is measured, no prejudice is likely to be caused to the respondents/defendants. However, the learned judge of the trial court erroneously rejected the application Exh-27.

4. Learned counsel for the respondents / defendants submits

that in a suit simplicitor for decree of perpetual injunction, the petitioner / plaintiff has filed an application Exh.27 for appointment of Court Commissioner. The learned Judge of the trial court has rightly observed that the creation of evidence to show the possession over the suit land through the Court Commissioner is impermissible. Learned counsel submits that there is no boundary dispute and even the petitioner / plaintiff has not instituted the suit for relief of removal of encroachment or recovery of any encroached portion. Learned counsel for the respondents / defendants submits that even the petitioner / plaintiff has carried out the measurement privately and also submitted the report along with map before the trial court.

5. I do not find any substance in this writ petition. The petitioner has already filed a certified copy of the measurement map vide list Exh.9 on record. Further the petitioner / plaintiff has instituted a suit simplicitor for decree of perpetual injunction. There is no boundary dispute. The petitioner has not instituted the suit for removal of encroachment or recovery of possession of any encroached portion. In fact, there are no allegations of any encroachment on the suit land. On the other

hand, it is the specific pleading of the petitioner / plaintiff that the respondents /defendants have no land at all in Gut No. 37/A.

6. In view of the same, in order to prove lawful possession over the suit property, the petitioner / plaintiff can lead oral and documentary evidence, if available to him to substantiate his contentions to the effect that no land remained in the suit land for deceased Gangram, as such the respondents / defendants' title to the suit land to the extent of 76 R land is defective. However, in absence of any boundary dispute, such application seeking appointment of Court Commissioner cannot be allowed. The learned Judge of the trial court has rightly rejected the application Exh.27. I find no fault in the impugned order. Hence, I pass the following order.

ORDER

I) Writ petition is dismissed. No costs.

(V. K. JADHAV, J.)

vsm/