

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

1050 WRIT PETITION NO. 12643 OF 2017

MAHADEV MALIKARJUN ARDHAPUE
VERSUS
VIJAYLAXMI VISHNUDAS VATAMAR

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Advocate for Petitioner : Mr. Ghatol Patil Shahaji B.

Advocate for Respondents : Mr. Swapnil S. Rathi

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CORAM : V. K. JADHAV, J.
DATED : 23rd MARCH, 2018

PER COURT:-

1. By consent of the parties, heard finally at admission stage.
2. The respondent-defendant has filed an application Exh.22 for appointment of Court Commissioner in the pending suit bearing R.C.S. No. 150 of 2017 instituted by the present petitioner-plaintiff for relief of decree of perpetual injunction simplicitor. The trial court by order dated 19.6.2017 has allowed the said application. Hence, this writ petition.
3. Learned counsel for the petitioner-original plaintiff submits that in the suit simplicitor for decree of perpetual injunction, in absence of any counter claim by the respondent-defendant, his application seeking appointment of Court Commissioner for measurement of the suit plot could not have been entertained by the

trial court.

Learned counsel for the petitioner in order to substantiate his contentions placed reliance on the following cases:-

- i) Sanjay Namdeo Khandare vs. Sahebrao Kacharu Khandare and others, reported in 2001 (2) Mh.L.J. 959,
- ii) Dnyandeo Vitthal Salke and others vs. Dagdu Kadar Inamdar, reported in 2017 (5) ALL MR 104
- iii) The order passed by this Court in writ petition No. 8178 of 2017 on 6.12.2017.

4. Learned counsel for the respondent-defendant submits that as per the pleading of the petitioner-plaintiff, open space of the defendant is adjacent to the western side of the plaintiff's old wall. It has been asserted that the petitioner-plaintiff is owner and possessor of old brick cement plaster wall. Learned counsel submits that the respondent-defendant disputed the same and after taking permission, demolished the wall and also old construction of bathroom. Learned counsel submits that the petitioner-plaintiff has made allegations about encroachment and essentially there is dispute with regard to the boundaries. The respondent-defendant

has thus filed an application Exh.22 and the trial court has rightly allowed the said application. No interference is required.

Learned counsel for the respondent-defendant, in order to substantiate his contentions, placed reliance on the judgment of this Court in the case of ***Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, reported in 2011 (3) Bom. C.R. 807.***

5. The trial court has not considered that the petitioner-plaintiff has instituted the suit simplicitor for perpetual injunction. The respondent-defendant has also not filed any counter claim alongwith his written statement. The trial court has passed the exparte status quo order and on appearance, the respondent-defendant has filed an application seeking appointment of Court Commissioner for measurement of suit plot and his plot. It has been alleged in the plaint that the respondent-defendant is trying to encroach upon the portion of the suit plot. Though there are certain allegations made in the written statement about the encroachment on the part of the petitioner-plaintiff himself, however, the respondent-defendant has not made any counter claim. In view of the same, in the suit simplicitor for decree of perpetual injunction, the evidence cannot be collected through the Court Commissioner. It is for the petitioner-plaintiff to show his lawful possession over the suit land failing

therein, the suit will be dismissed. On the other hand, the respondent-defendant has to prove nothing. Thus, the application filed by the respondent-defendant seeking appointment of Court Commissioner is unwarranted and uncalled for and the trial court should not have entertained the same. Hence, I proceed to pass the following order:-

O R D E R

- I. The writ petition is hereby allowed. No costs.
- II. The impugned order dated 19.6.2017 passed below Exh. 22 in Regular Civil Suit No. 150 of 2017 by the learned Civil Judge, Junior Division, Nanded is hereby quashed and set aside.
- III. The application No.22 is hereby rejected.
- IV. Writ petition is accordingly disposed of.
- V. The parties are at liberty to file an application before the trial court for expeditious disposal of the suit.

(V. K. JADHAV, J.)

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