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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2755 OF 2014

Vijay A. Mhatre & Ors.	...Petitioners
V/s.	
Yashwant B. Mhatre & Ors.	...Respondents

Mr.Ketan Joshi with Mr.V.V. Mohite for the Petitioners.

Mr.Sachin Chavan for the Respondent Nos.1 to 6.

CORAM : R.D. DHANUKA, J.
DATE : 28TH AUGUST, 2018.

P.C. :-

1. By this petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order dated 11th December, 2013 passed by the learned 2nd Joint Civil Judge, Junior Division, Alibaug, District Raigad below Exhibit-60 in RCS No.59 of 2013 filed by the petitioners (original plaintiffs) under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 *inter-alia* praying for appointment of the court commissioner. The said application was resisted by the defendant. The defendant had also filed written statement in the said suit filed by the petitioners for declaration of road, perpetual injunction and in the alternative for mandatory injunction in respect of the suit property.

2. By an order dated 11th December, 2013, the learned 2nd

Joint Civil Judge, Junior Division, Alibaug dismissed the said application (Exhibit-60) on the ground that the Court Commissioner cannot be appointed to observe the existence of the disputed road and for collecting evidence.

3. Mr.Joshi, learned counsel appearing for the petitioners invited my attention to the averments made in the plaint filed by the petitioners, averments made in the written statement filed by various defendants, the averments made in the application (Exhibit-60) and the averments made in the reply filed by the contesting defendants to the said application (Exhibit-60) and also the findings recorded by the learned trial Judge while rejecting the application (Exhibit-60) for appointment of the Court Commissioner.

4. It is submitted by the learned counsel that the petitioners had filed a suit for declaration of perpetual injunction and in the alternative for mandatory injunction in respect of the suit property. It is the case of the petitioners that the suit property was purchased by the petitioners from the original owner by a registered sale dated 6th June, 2002 for valuable consideration. The suit road was in existence since the date of the purchase of the said property by the petitioners. The respondents claim to be owners of adjacent land. He submits that the only suit road which was in existence and was used as an access was approaching through the land of the respondents. There is no

other way to approach the land of the petitioner. The respondents however are obstructing the suit land by creating obstacles. The petitioners had accordingly filed an application for appointment of the court commissioner.

5. It is submitted by the learned counsel that all the respondents are seriously disputing existence of the road itself in the written statement filed by them. The petitioners also placed reliance on a map showing location of the property of the petitioners and also the respondents. He submits that in view of the serious dispute raised by the respondents (defendants) about the existence of the road, it was necessary to appoint a Court Commissioner to visit the suit road and to submit a report before this Court with a view to resolve the controversy about the existence of the road. It is submitted that the application for appointment of the Court Commissioner was not made for collecting any evidence. Even if the learned trial Judge would have appointed the Court Commissioner, such report of the Court Commissioner would not be a conclusive evidence unless such Court Commissioner would be examined as a witness of the petitioners and shall be subjected to the cross-examination.

6. Learned counsel for the respondents on the other hand submits that the map relied upon by the petitioners have not been accepted by the learned trial Judge. The Court Commissioner could

not have been appointed for the purpose of collecting evidence. He submits that the oral evidence has already commenced. The petitioners have already filed affidavit in lieu of examination in chief of one of the witness. He submits that the findings rendered by the learned trial Judge while rejecting the application for appointment of the Court Commissioner, being not perverse, cannot be interfered with by this Court in this writ petition filed under Article 227 of the Constitution of India.

7. Mr.Joshi, learned counsel for the petitioners in rejoinder would submit that the suit filed by the petitioners was basically for enforcement of the easementary rights and in view of serious disputes about the existence of the road raised by the defendants, the appointment of the Court Commissioner would be necessary and would be in the interest of both the parties. He submits that no prejudice would be caused to the respondents if the Court Commissioner is appointed as prayed. It is submitted that the evidence of the petitioners has not been closed so far. This petition has been pending in this Court for last about four years.

8. A perusal of the plaint indicates that the reliefs claimed by the petitioners (original plaintiffs) are in the nature of enforcement of the easementary rights. On the contrary in the written statement filed by the respondents, the existence of the road itself is disputed

vehemently. On the other hand, it is the case of the petitioners that since the date of purchase of the property by the petitioners, approach to the plot was passing through the plot of the respondents which road has been obstructed prior to the date of filing of the suit.

9. In my view, in view of the serious dispute about the existence of the road itself raised by the respondents in the suit for enforcement for the easementary road, the petitioners had rightly filed an application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 for seeking appointment of the Court Commissioner. In my view, the learned trial Judge was not right in holding that the said application was made by the petitioners for collecting any evidence or that the Court Commissioner cannot be appointed by the trial Court to observe the existence of the disputed road. In my view, the impugned order thus passed by the learned trial Judge on 11th December, 2013 rejecting the application filed by the petitioners (Exhibit 60) under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 deserves to be set aside.

10. Even if the Court Commissioner is appointed by a Court, the visit of the Court Commissioner would be obviously in the presence of both the parties. Such report cannot be considered as conclusive unless the said Court Commissioner is examined as a witness by the petitioners if they seek to rely upon the said report and

in that event would be subjected to the cross-examination by the respondents. No prejudice of any nature whatsoever would be caused to the respondents if the application filed by the petitioners would have been allowed. I therefore, pass the following order :-

a). The impugned order dated 11th December, 2013 passed by the learned 2nd Joint Civil Judge, Junior Division, Alibag rejecting the application bearing Exhibit-60 is quashed and set aside. The application (Exhibit – 60) filed by the petitioners in RCS No.59 of 2013 is allowed.

b). The fees and expenses, if any, of the learned Court Commissioner shall be borne by the petitioners exclusively. The fees and expenses of the learned Court Commissioner shall be decided by the learned trial Judge and shall be paid by the petitioners as may be directed by the learned trial Judge.

c). Learned Court Commissioner shall give an advance notice to the plaintiffs and the defendants before his visit to the suit road. If any of the parties remain absent inspite of such advance notice by the learned Court Commissioner, the learned Court Commissioner shall execute the order of commission and shall submit a report expeditiously before the learned trial Judge.

d). It if the petitioners seek to examine the said learned Court Commissioner as a witness and to seek reliance on the said report,

the said Court Commissioner shall be subjected to the cross-examination by the respondents.

e). The Writ Petition No.2755 of 2014 is allowed in aforesaid terms. There shall be no order as to costs.

11. All the parties, the learned Court Commissioner and the learned trial Judge to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)