

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1416 OF 2016

Gorakh Sampatrao Patil

.... Petitioner

V/s.

Arjun Baburao Gaikwad

.... Respondent

Mr. Bhushan Walimbe for the Petitioner.

Mr. Pratap Patil for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 4TH APRIL, 2018.

P.C. :

1. Heard Mr. Walimbe, learned counsel for the Petitioner, and Mr. Patil, learned counsel for the Respondent.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 19th January 2016 passed by the Civil Judge, Junior Division, Shirala, below the application at "Exhibit-86" filed in Regular Civil Suit No.122 of 2014.

3. The application at "Exhibit-86" was filed by the Respondent, who is Original Defendant before the Trial Court, for appointment of T.I.L.R. as the 'Court Commissioner' for inspection and measurement of the suit land. The Trial Court has, despite the objection raised by the present

Petitioner, who is the Original Plaintiff, allowed the said application. Hence, being aggrieved thereby, this Writ Petition is preferred.

4. The submission of learned counsel for the Petitioner is that, the Suit is simplicitor for injunction. It is filed by the present Petitioner. If Petitioner fails to prove the location or identification of the suit property, he will fail. However, there is no justification at all for appointment of the 'Court Commissioner' in a Suit for injunction, that too for collection of evidence. It is urged that, in paragraph No.5 of his application, the Respondent has sought direction to be given to the Court Commissioner even to the extent of bringing the existing situation on the site to be brought on record. It is also requested that the T.I.L.R. should point out the residential houses of the parties and adjoining occupants. In view thereof, it is submitted that, it is as good as appointing the 'Court Commissioner' for collection of evidence. It is submitted that, in this case, there is no boundary dispute also, for settlement of which the appointment of 'Court Commissioner' can be essential. This is also not a Suit for removal of encroachment on the suit property and, secondly, the Respondent, who is the Original Plaintiff before the Trial Court, has not filed any counter-claim, seeking identification and location of the property in his possession.

5. In such situation, according to learned counsel for the Petitioner, the Trial Court has committed an error in allowing this application for

appointment of T.I.L.R. as 'Court Commissioner'.

6. Reliance is placed by learned counsel for the Petitioner on the Judgment of this Court [*Coram : S.B. Shukre, J.*] in the case of *Dnyandeo Vithal Salke Vs. Dagdu Kadar Inamdar, 2017 Mh.L.J. 314*, and on another Judgment of this Court [*Coram : Dr. Shalini Phansalkar-Joshi, J.*] in *Writ Petition (Stamp) No.35269 of 2017 dated 23rd January 2018*, wherein it was held that, normally, in a Suit for injunction, there is no propriety in the appointment of T.I.L.R. as 'Court Commissioner'.

7. Here in the case, however, in my considered opinion, the facts are different in the sense that the Petitioner is contending that he is the 'owner' of the suit property bearing Survey No.14/1A/2; whereas, according to the Respondent-Plaintiff, the 'original owner' of Survey No.14/1 is trying to sell out the area, which is already sold out by creating New Survey No.14/1A/2. He has sold out the area out of Survey No.14/1A/1, by showing separate Survey No.14/1A/2. Thus, the Respondent has denied its existence and hence, the location of the suit area is necessary to be ascertained.

8. In such situation, the Trial Court was justified in appointing the 'Court Commissioner' to find out as to whether there is any suit property bearing Survey No.14/1A/2 in existence with its four boundaries and for that purpose, the Trial Court has appointed the T.I.L.R. as 'Court Commissioner', so that the issue raised between the parties can be

decided completely, finally and effectually. On paper, the Petitioner may have purchased the suit property, but, in reality, on the ground whether such land exists or not being the real question in controversy between the parties, such question can be decided only by appointment of T.I.L.R. as 'Court Commissioner'.

9. The impugned order passed by the Trial Court in allowing the Respondent's application for the said purpose, therefore, does not call for any interference. The Writ Petition, hence, stands dismissed.

10. Learned counsel for the Petitioner, at this stage, requests to extend the stay, which was granted by this Court on 4th February 2016, when this Writ Petition was filed. Learned counsel for the Respondent opposes the said request.

11. In my considered opinion, already the Suit before the Trial Court being stayed for more than two years, the said order of stay is extended for a period of six weeks only from today, with a clear understanding that no further extension to the order of the stay will be granted.

[DR. SHALINI PHANSALKAR-JOSHI, J.]