

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

WRIT PETITION NO.4044 OF 2018

Pandharinath Ramchandra Kumbharkar .. Petitioner
Vs.
Manik Ramchandra Kumbharkar & Ors. .. Respondents

Mr.Sachin Khandagale a/w Mr.V.R. Kasle for the petitioner.
Mr.Rahul Kadam for the respondents.

CORAM : R.D. DHANUKA, J.
DATE : 14th September 2018

P.C.:

1. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 7th February 2018 passed by the learned District Judge-1, Baramati below Exhibit-16 filed by the petitioner (original defendant) under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 inter alia praying for appointment of Court Commissioner for site inspection.

2. A perusal of the order dated 7th February 2018 indicates that the learned District Judge while hearing the arguments had made an enquiry in view of the fact that both the parties were claiming their possession over the one and the same area, as to whether the Court Commissioner was appointed or not. Pursuant to the query raised by the learned District Judge, the original defendant filed an application below Exhibit-16 inter alia praying for appointment of Court Commissioner, on 7th February 2018. The learned District Judge has allowed the said application for appointment of Court Commissioner for site inspection.

3. The petitioner had filed a suit inter alia praying for declaration that the sale deed in question was not binding on the petitioner. The learned District Judge passed a decree in favour of the petitioner and rendered a finding of fact that the petitioner was in possession of the suit property. It is the case of the petitioner that the original defendant has also admitted in the cross-examination that the petitioner was in possession of the suit property. The application is opposed by the respondents on the ground that the application made by the original defendant was at the instance of the learned District Judge.

4. Mr.Kadam, learned counsel for the respondents submits that the learned District Judge has not directed to make any report as to the status of the possession of the suit property in the impugned order. He submits that the Court Commissioner has been directed only to inspect the site and to report the existing position of the suit property and any other fact noticed like well, pipeline, demarcation of the property etc. and to report the same to the learned District Judge by submitting a report.

5. It is not in dispute that the suit was filed by the petitioner inter alia praying that the sale agreement was not binding upon the petitioner. The learned trial Judge has already rendered a finding of fact to the effect that the petitioner was in possession of the suit property. The appeal arising out of the said order is pending. In paragraph 5 of the impugned order, the learned District Judge noticed that both the parties were claiming their possession over the one and the same area.

6. In my view, the order dated 7th February 2018 thereby appointing the Court Commissioner for a direction to inspect the site and report existing position of the suit property and any other fact noticed like well, pipeline, demarcation of the property etc. is ex facie perverse. The report called for by the learned District Judge is totally unwarranted and beyond the scope of the subject matter of the suit. The impugned order dated 7th February 2018 passed by the learned District Judge-1, Baramati is quashed and set aside. The application below Exhibit-16 filed by the original defendant is rejected. The learned District Judge shall decide the appeal preferred by the original defendant on its own merit without being influenced by the observations made in the impugned order as well as the observations made by this Court in this order. Writ petition is allowed in aforesaid terms. No order as to costs.

R.D. DHANUKA, J.