

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5865 OF 2018

Netaji Shamrao Yadav
Versus
Satyawar Maruti Chavan

.. Petitioner

.. Respondent

Mr. P.B. Gujar for the Petitioner.

CORAM : K.K. TATED, J.

DATE : 28 NOVEMBER 2018.

P.C:-

. Heard learned Counsel for the petitioner.

2. By this petition, under Article 227 of the Constitution of India, petitioner is challenging order dated 05.02.2018 passed by learned Joint Civil Judge Junior Division, Wai below Exhibit-47 in Regular Civil Suit No. 86 of 2015 dismissing petitioner's application under Order 26 Rule 9 of the Civil Procedure Code on the ground that the petitioner to prove his case about removal of encroachment and possession.

3. Learned Counsel for the petitioner submits that the trial Court failed to appreciate the facts that to demark the exact area encroached by the defendant, appointment of Court Commissioner is necessary. He submits that in his application for appointment of Court Commissioner dated 21.09.2016, he specifically made a statement in paragraph 3 of that application and in the copy of plaint that the respondent encroached the certain area belonging to the petitioner. He

submits that all these facts were not considered by the trial Court at the time of passing impugned order dated 05.02.2018. Hence, petitioner preferred present writ petition.

4. The learned Counsel for the petitioner submits that in the interest of justice, this Hon'ble Court be pleased to set aside the order dated 05.02.2018 and allowed the application filed by the Petitioner below Exhibit-47 under Order 26 Rule 9 of Civil Procedure Code.

5. I heard learned Counsel for the petitioner. It is to be noted that in the present proceedings, petitioner filed Regular Civil Suit No. 86 of 2015 for direction to the respondent/defendant to remove the unauthorized construction carried out by them in petitioner's property. Prayer clause (a) and (b) of plaint clearly shows that petitioner has claimed mandatory direction against defendant to remove unauthorized construction from his property. These facts were considered by the trial Court at the time of deciding the application below Exhibit-47. Hence, I do not find substance in the present Writ Petition.

- a) Writ Petition stands rejected.
- b) No order as to costs.

(K.K. TATED, J.)