IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11394 OF 2017

Nainsukh Joseph Bhagat … Petitioner

Versus

Rajendra Benjamin Chitre … Respondent

Mr. Sagar A. Joshi for Petitioner.
Mr. S. R. Ronghe for Respondent.

CORAM : NITIN W. SAMBRE, J.
DATE : 15th OCTOBER 2018.

P.C.

. Heard respective parties through their Counsel. With consent, the matter is taken up for final hearing. Affidavit in-reply tendered by the Respondent – Defendant is taken on record.

2. The Petitioner is challenging the order below the Application (Exhibit 16) in Regular Civil Suit No.102 of 2016 pending on the file of Joint Civil Judge Senior Division, Daund, District Pune. It is an application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Court Commissioner filed at the behest of the Petitioner – Plaintiff which came to be rejected by the impugned order dated 1st March 2017. As such, this Writ Petition.

Vijaya Gourishankar Yadav

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Date: 2018.10.22 10:50:36 +0530

3. The suit in question is for removal of encroachment and possession as described in plaint map based on title. The alleged cause of action is dated 4th October 2015, the date on which the Respondent - Defendant claimed to have encroached on the part of the property bearing City Survey No. 384 to the extent of 513 sq. ft. The details of which can be noticed in paragraph no. 5 and paragraph no. 7 of the plaint.

4. The learned Counsel for the Petitioner – Plaintiff in the aforesaid factual background would urge that the Application moved for appointment of Commissioner is based on the cause of action accrued on 4th October 2015 which issue is lost sight of by the learned trial court while passing the impugned order. He would then urge that the earlier measurement carried out on 14th February 2011. The remeasurement carried out at the behest of the Defendant – Respondent on 14th February 2011 cannot be relied upon when the suit is based on a cause of action, which has accrued subsequent to measurement.

5. *Per contra*, the learned Counsel for Respondent – original Defendant would invite attention of this Court to the pleadings in paragraph nos. 4 and 5 of the plaint so as to claim that the suit of the Petitioner - Plaintiff is based on a cause of action of 2011 which is by exaggeration alleged to have been taken place on 4th October 2015, for

which apart from pleading, no legal basis is claimed. According to him, the measurement carried out on 14th February 2011 once having been not objected under the provisions of Clause 247 of the Maharashtra Land Revenue Code, the same has attained finality for the parties to the suit and it is not open for either of the parties to seek appointment of the Commissioner for the said measurement by taking recourse to the civil proceedings. The learned Counsel then would urge that the act on the part of the Petitioner – Plaintiff is nothing more than an attempt to collect the evidence so as to strengthen a claim put-forth in the suit. As such, he sought rejection of the Petition.

6. Considered rival submissions.

7. It appears from the pleadings as are raised in the plaint predecessor of parties appears to be were in dispute in earlier point of time which claimed to have been settled way back.

8. The earlier encroachment as was alleged by the Plaintiff against the Defendant was to the extent of 425 sq. ft. which has prompted perhaps to carry out measurement on 14th February 2011.

9. The case of the Plaintiff from the pleadings in the plaint if appreciated, there appears to be a cause accrued on 4th of October 2015,

the date on which the Respondent had encroached to the extent of total 530 sq. ft. with detail dimensions, the Petitioner – Plaintiff has also produced in the plaint map. Once the Plaintiff has produced such details along with plaint map, the least was expected of the learned trial court while dealing with the prayer under the provisions of Order 26 Rule 9 of the CPC is to appreciate the disclosure made therein.

10. The fact remains that the cause of action accrued appears to be subsequent to that of earlier measurement. In that view of the matter, the order impugned passed by the learned trial court is contrary to the factual matrix and the provisions of law i.e. the object with which the provisions of Order 26 Rule 9 of the CPC are incorporated in the statute book.

11. So far as the submission of the learned Counsel for Respondent that it will be open for the Petitioner – Plaintiff to rely on the measurement of 2011 while recording the evidence in suit, in my opinion, the proceedings before the Revenue Authorities would be termed as trait, as it lacks originality. Such proceedings are always subject to final outcome of the proceedings which are adjudicated in relation to the same subject matter by the Civil Court. It can be viewed as an approach on the part of Petitioner to strengthen his case *qua* the cause alleged in para nos. 4, 5 and 7 of the plaint.

12. That being so, in my opinion, the order impugned is not sustainable and as such is liable to be quashed and set aside.

13. The order impugned dated 1st March 2017 passed below Exhibit 16 in Regular Civil Suit No. 102 of 2016 is hereby quashed and set aside. The Application (Exhibit – 16) stands allowed.

14. Let the measurement be carried out at the cost of the Petitioner – Plaintiff.

15. The Respondent herein had every opportunity to question the said measurement during the course of recording of evidence.

16. As such, the Writ Petition stands allowed.

(NITIN W. SAMBRE, J.)