

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

WRIT PETITION (ST.) NO.25726 OF 2018

Babaso Aliso Pathan

.. Petitioner

V/s.

Amin Babaso Pathan

.. Respondent

Mr.Padmanabh D. Pise for the petitioner

CORAM: K.K. TATED, J.

DATED : NOVEMBER 26, 2018

P.C. :

1 Heard.

2 By this petition under Article 227 of the Constitution of India, the Petitioner original defendant challenges the order dated 23.07.2018 passed by Civil Judge, Junior Division, Kagal below Exhibit-38 in Regular Civil Suit No.162 of 2012 under Order 26 Rule 9 of the Code of Civil Procedure, 1908 allowing respondent / plaintiff's application for appointment of Court Commissioner.

3 The learned counsel for the Petitioner original defendant submits that in the present proceeding Respondent original plaintiff filed Regular Civil Suit No. 162 of 2012 for declaration and possession of the encroached property i.e. agricultural land bearing Gut no.540/3 admeasuring OH 28R situated at Kagal,

Dist. Kolhapur.

4 The main contention of the petitioner is that in the present proceeding, Respondent original plaintiff's evidence as well as cross-examination was over on 01.01.2018 and thereafter plaintiff filed application under Order 26 Rule 9 of the Code of Civil Procedure, 1908 for appointment of Court Commissioner on 10.01.2018. He submits that plaintiff had to prove his case on his own. Therefore, there is no question of any assistance from the court to bring evidence on record, against the other party. He submits that in the present proceedings, Respondent original plaintiff filed Application below Exhibit-38 to bring the evidence on record which is not permissible in law. He further submits that all these facts were not considered by the Trial Court at the time of passing impugned order. Hence, impugned order is required to be set aside by allowing present petition.

5 It is to be noted that the dispute in the present litigation is about encroachment of agricultural land. Therefore, plaintiff filed Application under Order 26 Rule 9 of the Code of Civil Procedure, 1908 for appointment of Court Commissioner. That Application was allowed by the Trial Court in view of the judgment of this court in the matters of ***Kashinath s/o. Ramkrishna Chopade v. Purushottam Tulshiram Tekade and others 2005(4) Mh.L.J. 471 and Payani Achuthan v. Chamballikundu Harijan Fisheries Development Co-op. Society and Others AIR 1996 Kerala 276.***

6 It is to be noted that encroachment can be decided, after

appointment of TILR and or any other person to measure the suit property and report thereof. Same is allowed by Trial Court. Considering these facts, I do not find any substance in the present Writ Petition.

7 Hence, Writ Petition stands rejected.

8 No order as to costs.

(K.K. TATED, J.)