

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12905 OF 2016

Ankush Tukaram Nanavare	 Petitioner
V/s.	
Madhukar Baburao Waghmare & Ors.	 Respondents

Mr. Rahul S. Kadam for the Petitioner.

Mr. Yogesh Sankpal, i/by Mr. Y.K. Deshpande, for Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 21ST MARCH, 2018.

P.C. :

1. Heard Mr. Kadam, learned counsel for the Petitioner, and Mr. Sankpal, learned counsel for Respondent No.1.

2. By this Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 15th June 2016 passed by the 2nd Joint Civil Judge, Junior Division, Indapur, below the application at "Exhibit-97" in Regular Civil Suit No.99 of 2004.

3. The application at "Exhibit-97" was filed by Respondent No.1, under Order 26 Rule 9 of the Code of Civil Procedure, 1908, for appointment of T.I.L.R. as 'Court Commissioner' and the Trial Court has,

after hearing learned counsel for both the parties, allowed the said application, directing the T.I.L.R. to measure the suit property and to fix the boundaries and also to file his 'Report' as to who is found in possession of the suit property.

4. The submission of learned counsel for the Petitioner is that, the Suit being simplicitor for injunction and not for removal of encroachment or for possession of the suit premises, the appointment of T.I.L.R. as 'Court Commissioner' is not at all warranted, as such appointment would amount to collection of evidence. The burden is on Respondent No.1-Plaintiff to prove his possession; however, all along, when he has thrice made application for appointment of T.I.L.R. as a 'Court Commissioner' for measurement of his land, it was informed to him that, as he was not found in possession of the suit land, measurement could not be carried out. Thus, it is submitted by learned counsel for the Petitioner that, now, for appointment of T.I.L.R. again as a 'Court Commissioner', Respondent No.1 wanted to establish his possession over the suit land and, therefore, the Trial Court has committed an error in allowing his application.

5. However, learned counsel for Respondent No.1 has brought to the notice of this Court that, the Petitioner himself has also filed a Suit, bearing Regular Civil Suit No.21 of 2005, against the Respondents for a

declaration and perpetual injunction in respect of the property bearing Gat No.1966. When the matter reached before this Court, both the parties have made a statement that, they will not disturb each other's possession; but then the fact remains that, as on today also, there is a dispute between the parties as to who is in possession of the property and which portion is in possession of which of the Plaintiff or Defendant. In such situation, in order to put an end to the controversy between the parties, if the Trial Court has appointed the T.I.L.R. as a 'Court Commissioner' to measure the suit premises, no fault can be found in the impugned order passed by the Trial Court.

6. Hence, the Writ Petition stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]