

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

930 WRIT PETITION NO. 6969 OF 2018

GINYANDEV S/O DNYANESHWAR SHINDE DIED THROUGH LRS.
NARSINH S/O GINYANDEV SHINDE AND OTHERS
VERSUS
MHOHANRAO MAHADU SHINDE AND OTHERS

.....

Advocate for Petitioners : Mr. A. R. Tapse h/f
Mr. Suryawanshi Prashant D.

Advocate for Respondent Nos. 1 to 4 : Mr. H. P. Jadhav
Advocate for Respondent No.5 : Mr. Nagarsoge Sahebrao A.

.....

CORAM : V. K. JADHAV, J.
DATED : 12th December, 2019

PER COURT:-

1. Heard finally with consent at admission stage.
2. This is a Writ Petition preferred by the original plaintiffs. The petitioners/plaintiffs have instituted the suit for perpetual injunction and in the pending suit, the petitioners/plaintiffs filed an application Exhibit 37 under Order XXVI Rule (9) of CPC for appointment of the T.I.L.R., Kaij as court commissioner and the original defendant no.5, who has filed consent written statement, has also filed application Exhibit 40 for the same purpose. The trial

court, by impugned common order dated 16.05.2018 below Exhibits 37 and 40 in Regular Civil Suit No. 177 of 2016, rejected both the applications. Hence this Writ Petition.

3. Learned counsel for the petitioners/original plaintiffs submits that though the suit is instituted for a decree of perpetual injunction, in fact there is a boundary dispute between the parties. It has been specifically pleaded that the respondents/defendants have destroyed the common *bandh* and they are trying to encroach upon the portion of the suit land. In the facts and circumstances of the present case, it is thus necessary to jointly measure the suit land so also the land of the defendants which is adjacent to the suit land so as to resolve the dispute finally.

4. Learned counsel for the respondents/original defendants submits that the suit is simplicitor for perpetual injunction and as such, the application seeking appointment of the court commissioner is in the form of collection of evidence and the trial court has rightly rejected the same. There is no substance in the Writ Petition. The Writ Petition is liable to be dismissed.

5. Though in the impugned order the trial court has observed that the plaintiffs initially filed the suit for simplicitor injunction and thereafter amended the same by way of adding relief of declaration of ownership regarding the suit property, both the counsel, on instructions, submit that there is no such amendment carried out by the original plaintiffs and the suit is for simplicitor perpetual injunction. It is well settled that in a suit for simplicitor perpetual injunction, the plaintiffs cannot be permitted to collect evidence by filing application for appointment of court commissioner. It is for the plaintiff to prove his lawful possession over the suit property and the decree of perpetual injunction can be passed on its basis. In view of the same, I do not find any fault in the order passed by the trial court. There is no substance in this Writ Petition. Hence the Writ Petition is hereby dismissed. No costs.

(V. K. JADHAV, J.)

vre/