

DDR

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

WRIT PETITION NO. 4328 OF 2016

Kallappa Rupal @ Rupsingh Rathod

& rs.

..Petitioners

vs.

Laxmibai Siddhappa Hegadi & ors.

..Respondents

....

Shri S.S. Shah for the petitioners.

Shri Ashok B. Tajane for respondent No.1.

....

CORAM : M.S.KARNIK, J.

DATE : 17th SEPTEMBER, 2019

P.C. :

Heard learned counsel for the petitioner.

2. The petitioner is the original defendant. The petitioner challenges an order dated 11th February, 2016 passed by the trial Court allowing the application below Exhibit 114 filed by the plaintiff under Order 26 Rule 9 of the Code of Civil Procedure. The plaintiff had filed the suit for removal of encroachment. Earlier the plaintiff had moved an application for appointment of the Court Commissioner and accordingly by the

order passed below Exhibit 16 the TILR was appointed as a Court Commissioner. Thereafter, again the Court Commissioner was appointed. It is the case of the plaintiff that in both these reports the encroached portion is not shown. Thereafter, again by Exhibit 114 the petitioner requested for appointment of the Superintendent of Land Records to be appointed as a Court Commissioner. The trial Court allowed the application by impugned order and appointed the Superintendent of Land Records as the Court Commissioner.

3. Learned counsel for the petitioner – original defendant submitted that on two earlier occasions the TILR has already submitted the reports. Not satisfied with the said reports again an application Exhibit 114 is made for appointment of the Superintendent of the Land Records. He would submit that when these two reports are already on record, the plaintiff cannot be permitted to keep on making applications till he gets a favourable report in his favour.

4. Learned counsel for the respondent on the other hand supported the impugned order. He submits that the suit is for encroachment. According to him, it is necessary to place on record the details of encroached portion for proper adjudication of the dispute. As earlier reports do not show the encroached portion, the trial Court therefore allowed the application to bring on record the correct factual position.

5. I have gone through the order passed by the trial Court. On earlier two occasions the TILR had submitted the report. The evidence of the parties is yet to be recorded. No doubt, the suit is filed for encroachment and the trial Court has now allowed the appointment of the Superintendent of the Land Records as a Court Commissioner. Having regard to the fact that there are already two earlier reports of the Court Commissioner on record, in my opinion, the trial Court should have proceeded with the recording of the evidence. The impugned order therefore calls for interference.

6. The order passed below Exhibit 114 dated 11/2/2016 is set aside. However, it is made clear that in case the plaintiff makes a fresh application for appointment of the Court Commissioner after the evidence is recorded, the trial Court may consider the same on its own merits and in accordance with law.

7. The trial Judge is requested to expedite the suit.

8. With these observations, the Petition is disposed of.

(M.S.KARNIK, J.)