

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

WRIT PETITION NO.7295 OF 2018

Prasad Dattaram Mane and Ors. .. Petitioners

V/s.

Vijay Suresh Jagtap .. Respondent

Mr.Ajay A. Joshi for the petitioners

CORAM: K.K. TATED, J
DATED : JANUARY 21, 2019

P.C. :

1 Heard.

2 By this petition under Article 227 of the Constitution of India, the Petitioner original defendant challenges the order dated 01.03.2018 passed by Civil Judge, Junior Division Sawantwadi below Exhibit-65 in Regular Civil Suit No. 70 of 2017 allowing Respondent original plaintiff's Application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 for appointment of Court Commissioner.

3 In the present proceedings, plaintiff filed Regular Civil Suit No. 70 of 2017 for easementary right for ingress and outgress in respect of the suit property. In that Suit, plaintiff filed Application for appointment of Court Commissioner to carry out

survey of the land on the basis of sale deed dated 18.05.1944 and 01.06.1945 to point out the four corners of the suit property and encroachment, if any, made by the defendant along with the road.

4 The learned counsel for the Petitioner original defendant submits that by making of Application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 Respondent original plaintiff wants to bring evidence on record through Court. He submits that burden is cast upon the plaintiff to prove his case by leading the evidence and placing on record relevant documents. In spite of doing so, plaintiff wants to bring entire evidence on record by appointing court commissioner.

5 The learned counsel for the Petitioner submits that by way of court commissioner, Respondent original plaintiff is collecting the evidence in support of his contention, which is not permissible in law. He further submits that Petitioner carried out construction after taking permission from the concerned authorities. He submits that once construction is carried out on the basis of sanction plan, there is no question of court commissioner to go into the said question again and submit that report. Hence, impugned order dated 01.03.2018 passed by Trial Court below Exhibit-65 is required to be set aside.

6 Heard.

7 It is to be noted that in the present proceedings, Respondent original plaintiff filed Suit for easementary right of way from the suit land as described in paragraph 1 of the plaint.

Not only that Petitioner original defendant carried out some unauthorised construction on his land. To find out the exact area of the plot of land and whether the right is in existence or not, Respondent original plaintiff filed Application for appointment of court commissioner. In that Application, he specifically stated that court commissioner be directed to verify the suit land on the basis of sale deed dated 18.05.1944 and 01.06.1945. It is well settled that to find out the exact encroachment of the lands, it is necessary to appoint an expert in that field. In the present proceedings, Trial Court directed to carry out commission work on the basis of sale deed dated 18.05.1944 and 01.06.1945.

8 Considering these facts, there is no question of collection of evidence and or giving the opinion in respect of construction of suit property if it is carried out as per the sanction plan. Therefore, I do not find any substance in the present Writ Petition. Hence, Writ Petition stands rejected.

(K.K. TATED, J.)