

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7642 OF 2016**

Shri. Aashpak A. Gani Islampuri & Anr. .. Petitioners

Versus

Sou. Jyotsna Dhanji Ghadge .. Respondent

R.A. Naik I/b Umesh Mankapure for petitioners.

Mr. Kuldeep Nikam for respondent.

CORAM : K.K. TATED, J.

DATE : 04 FEBRUARY 2019.

P.C:-

. Heard learned Counsel for parties.

2. By this writ petition under Article 227 of the Constitution of India, petitioner/original defendant Nos.1 and 2 is challenging the order dated 03.08.2015 passed by Joint Civil Judge, Junior Division, Islampur below Exhibit-58 in Regular Civil Suit No.207 of 2013 allowing the respondent/original plaintiff's application under Order 26 Rule 9 of Civil Procedure Code, 1908 appointing the Court Commissioner to measure the area of Gut No.600/1 and 600/2 situated at Village Peth, Taluka Walva, District Sangli and order dated 28.01.2016 below Exhibit-64 rejecting their application for review.

3. In the present proceedings, the respondent/original plaintiff has filed Regular Civil Suit No. 207 of 2013 for an order of injunction restraining the defendant from disturbing his

possession in respect of the suit property as described in paragraph 1 of the plaint and for declaration that sale deed dated 25.03.2013 is void and illegal. In that proceedings, the plaintiff preferred an application below Exhibit-58 for appointment of Court Commissioner for measurement of land. That was allowed. Thereafter, the petitioner/original defendant preferred application below Exhibit-64 for review of order dated 03.08.2015. Same was rejected by the Court below.

4. Learned Counsel for the petitioner submits that the respondent/original plaintiff filed application below Exhibit-58 for appointment of Court Commissioner. He submits that at the time of passing the impugned order dated 03.08.2015, the trial Court ought to have held that the Court Commissioner cannot be appointed to collect the evidence against the other party. He submits that order dated 03.08.2015 clearly shows that Court has appointed Court Commissioner to find out whether the respondent/original plaintiff is in possession of the suit property or not. In support of this contention, he relies on the judgment of this Court in the matter of **Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and ors.**¹, paragraph 3 of the judgment reads thus :

“3. I am afraid, this submission cannot be accepted since the law cannot change on the basis of facts of the case, but has to be applied evenly to all situations. The learned counsel for the respondent No.1 further contends that since the order passed by the Court below is discretionary order, same ought not to be interfered with in revisional jurisdiction. I have already taken a view that the order passed

1 2001 (2) Mh.L.J. 959

contrary to the well settled position which has the inevitable effect of Court having acted in excess of jurisdiction and that is the good ground for interference in revisional jurisdiction.”

5. Learned Counsel for petitioner submits that as the trial Court appointed the Court Commissioner to find out the possession of the plaintiff in respect of the suit property and same cannot be allowed under Order 26 Rule 9 of Civil Procedure Code, as per the judgment of this Court in the matter of **Sanjay Namdeo Khandare (Supra)** the impugned order is required to be set aside.

6. I heard both the sides at length. It is to be noted that, in the present proceedings, respondent/original plaintiff has filed suit for injunction and declaration. In that suit, he has already made averment that the plaintiff is in possession of the suit property. Not only that, application filed by the plaintiff for Court Commissioner was allowed. Defendant's application for review stands rejected. Not only that, bare reading of order dated 03.08.2015 shows that the Court has directed Court Commissioner to measure the land bearing Gut No.600/1 and 600/2 which is in possession of the plaintiff. Same do not amount to collection of the evidence.

7. The authority relied by the petitioner in the matter of **Sanjay Namdeo Khandare (Supra)** is not applicable to the facts and circumstances of the present case.

8. In view of above facts, I do not find any substance in the present writ petition. Hence, following order :

- a) Writ petition stands dismissed.
- b) Hearing of Regular Civil Suit No.207 of 2013 is expedited.
- c) No order as to costs.

(K.K.TATED, J.)