

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.37/2015

Ashok Mahadeo Masane ... Petitioner

V/s.

State of Maharashtra & Ors. ... Respondents

Mr. C. S. Joshi for the Petitioner
Mr. R. P. Kadam for Respondent No.1.
Mr. Dilp Bodke for Respondent Nos.2 to 4.

CORAM: K.K. TATED, J.

DATED : JANUARY 23, 2019

P.C. :

1 Heard. By this petition under Article 227 of the Constitution of India the Petitioner – Defendant No.6 challenges the order dated 02.05.2014 passed by the Civil Judge, Senior Division, Vaduj below Exhibit- 51 in Regular Civil Suit No. 258/2013 allowing the Respondent – Plaintiff's Application under Order 26 Rule 9 of the Code of Civil Procedure, 1908 appointing the Court Commissioner to carry out survey of land bearing Gut No.1458 admeasuring 54R situate at mauje Pusegaon Dist. Satara.

2 The learned counsel for the Petitioner submits that in the present proceedings, the Respondent – Plaintiff filed the said suit in the court of Civil Judge, Junior Division, Vaduj for declaration that they are owner of the suit property as described in paragraph 1 of the plaint on the basis of adverse possession. He

further submits that the issue of ownership has already been decided by the Revenue authority. In support of this contention, he relies on Exhibit-B on page 9 being order dated 29.03.1990. He further submits that it is not necessary in the present matter to appoint a court commissioner for carrying out the measurement.

3 On the other hand the learned counsel for the Respondent – Plaintiff submits that just to demark the encroachment on the property, it is necessary to appoint a court commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908.

4 Heard both sides at length. In the present proceedings, the Respondent – Plaintiff has filed the said suit for declaration as owner on the basis of the adverse possession. Said suit itself is not maintainable in law as held by the apex court in the matter of ***Gurdwara Sahib Vs. Gram Panchayat Village Sirthala & Anr. (2014) 1 SCC 669***, that “even if the Plaintiff is found to be in adverse possession, it cannot seek a declaration to th effect that such adverse possession has matured into ownership. Only if proceedings are filed against the Appellant and the Appellant is arrayed as Defendant that it can use this adverse possession as a shield/defence.”

5 As the suit itself is not maintainable, as it is filed by the Respondent Plaintiff, there is no question of allowing the Application made by the Plaintiff under Order 26 Rule 9 of the Code of Civil Procedure, 1908.

6 Hence, the Writ Petition is allowed.

a. Order dated 02.05.2014 passed by the Civil Judge, Senior Division, Vaduj below Exhibit-51 in Regular Civil Suit No. 258/2013 is set aside.

b. Hearing of Regular Civil Suit No. 258/2013 is expedited.

c. Civil Judge, Senior Division, Vaduj is directed to decide Regular Civil Suit No. 258/2013 as early as possible, in any case, on or before 31.12.2019.

d. Writ Petition is allowed accordingly.

(K. K. TATED, J.)