

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3888 OF 2018

Amrutrao Narayan Dhumal
(Since deceased through LRs.)

...Petitioners

vs.

Vijaysinh Jagannath Bhoite and Ors.

...Respondents

Mr. K.J. Phakde, for the Petitioners

Mr. V.R. Gaikwad, for Respondent Nos. 1 and 3.

CORAM : M. S. SONAK, J.

DATE : APRIL 25, 2019

ORAL JUDGMENT

. Heard Mr. K.J. Phakde, learned counsel for the Petitioners and Mr. V.R. Gaikwad, learned counsel for the Respondents.

2. The challenge in this Petition is to the order dated 19th December, 2017 by which the learned trial Judge dismissed the Petitioner's application (Exhibit 79) seeking recall and order dated 20th August, 2016 further seeking permission to comply with the order made below Exhibit 76 on 29th April, 2016.

3. In this case, the record indicates that the Petitioners filed suit on 24th January, 2014 and obtained an injunction to restrain the Respondents from proceeding with the construction on 6th

September, 2014. Therefore, the Petitioners applied for appointment of Court Commissioner which was granted on 8th January, 2015 and the officials from TILR office were appointed as Court Commissioner. Even before this commission could be executed, the Petitioners took out yet another application seeking appointment of another Court Commissioner on the basis of TILR officials will not be able to execute this commission. This application came to be dismissed on 9th February, 2016 on the ground that it was a prematured application. Ultimately, the TILR submitted a report stating that they are unable to make any comments on the issue of encroachment on the same date. The Petitioners filed application for appointment of yet another Commissioner which was granted on 29th April, 2016 and the Petitioners were to take steps for executing commission, so that the report is available within two months. The Petitioners in fact had to submit necessary acceptance for execution within seven days.

4. Admittedly there is no compliance on the part of Petitioners. Therefore, learned trial Judge by order dated 20th August, 2016 ordered for framing of issues. The Petitioners then took out application (Exhibit 79) seeking for recall of the order dated 20th

August, 2016 and for permission to execute the commission beyond the period prescribed in the order dated 29th April, 2016.

5. Mr. K.J. Phakde, learned counsel for the Petitioners submit the Petitioners were not aware about the order dated 29th April, 2016. He submits that soon after this order was made, the Court proceeded for vacation. He submits that only after three months the Petitioners became aware about the order and soon thereafter the application was made seeking compliance.

6. According to me, it is not believable that the Petitioners were not aware of the order made by the learned trial Judge in his own favour. In any case, the Petitioners should have been diligent in the matter rather than simply pleaded negligence in such matter. This diligence is impermissible in the present case because the Petitioners restrained the Respondents from proceeding for the construction of the house on the ground that there is encroachment. The Petitioners could not have opposed the framing of the issues because the execution of the commission are matters which are not strictly speaking interlinked.

7. Mr. Gaikwad, learned counsel for Respondent Nos. 1 to 3 is

justified in his submission that the Petitioners having secured interim relief were not interested in proceeding with the matter or interested in proceeding with the execution of the commission.

8. In any case, the matter can be examined from the different perspective. Mr. Phakde submits that since this is a case of encroachment, report of Court Commissioner is vital. Already the officials of TILR had been appointed as Court Commissioner but they submitted that the report was not conclusive. The Petitioners now seek appointment of yet another Court Commissioner. From this, it appears that the Petitioners are only interested in collecting the evidence in respect of the plea of encroachment. The purpose of appointment of the Commissioner is not for the purpose to collect the evidence. The Petitioners have shown no interest in execution of the commission. The Petitioners cannot be said to be seriously prejudiced because it is always open to the Petitioners to engage their own surveyor or expert and thereafter examined on the issue of alleged encroachment, if any. The Respondents also get opportunity to cross examine them. The Respondents are also at liberty to engage their own surveyor to demonstrate that there is no encroachment made by them.

9. Considering the facts in the present case, it is not necessary to exercise the supervisory jurisdiction of this Court to interfere in the impugned order.

10. At the time of issuance of notice, this Court had directed the Petitioners to deposit the amount of Rs. 10,000/- by way of costs. This on the basis of such deposit, that the proceeding before the trial Court were also stayed. Now the Petition is dismissed. The costs of Rs. 5,000/- is imposed upon the Petitioners. This is because at the behest of the Petitioners the proceeding before the trial Court remained stayed for almost one year and all throughout this period the injunction against the Respondents continued. This Petition is therefore dismissed with cost of Rs. 5,000/-.

11. All concerned to act on the basis of authenticated copy of this order.

12. The learned trial Judge is directed to expedite the proceeding in the Civil Suit.

(M. S. SONAK, J.)