

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5302 OF 2018

Rameshwar D. Khillari and ors. .. Petitioners
vs.
Vitthal B. Khillari and ors. .. Respondents

Mr. Anant Vadgaonkar for the Petitioners.
Mr. P.B. Kulkarni for Respondent Nos. 5 to 10.

CORAM : M. S. SONAK, J.
DATE : 03 MAY 2019.

P.C. :-

1] Heard Mr. Vadgaonkar, learned counsel for the petitioners and Mr. Kulkarni, learned counsel for respondent Nos. 5 to 10.

2] The challenge in this petition is to the order dated 11th December 2017 by which learned Trial Judge has appointed the Court Commissioner to carry out measurements of both Gat nos., at the cost of plaintiffs and to submit a report specifying the alleged encroachment, if any.

3] Mr. Vadgaonkar, learned counsel for the petitioners, submits that the application for appointment of Court Commissioner at the behest of the defendants who had filed counter claim in the suit was not at all maintainable. He

submits that in any case, the Court Commissioner could not have been asked to undertake measurements of only Gat nos. indicated by the respondents in the counter claim. He submits that even otherwise there was absolutely no necessity for appointment of Court Commissioner, since the petitioners are in possession of the suit property from time immemorial. For all the aforesaid reasons, Mr. Vadgaonkar submits that the impugned order warrants interference.

4] Mr. Kulkarni, learned counsel for respondent Nos.5 to 10, defends the impugned order on the basis of reasoning reflected therein. He supports the contentions on behalf of the petitioners.

5] The application seeking appointment of Court Commissioner was made by respondent Nos.1 to 4, who are today not present, since, no notice has been issued to them. Therefore, the support by the learned counsel for the other respondents cannot take the case of the petitioners any further.

6] From the perusal of the impugned order, it is seen that discretion has been exercised by the learned Trial Judge in a fair and reasonable manner. Learned Trial Judge has recorded that there are allegations of encroachment and therefore, it is necessary to appoint the Court Commissioner and further that the appointment of such Court Commissioner will assist the Court in determining the real controversy between the parties.

7] The contentions made by Mr. Vadgaonkar are not quite clear. If the petitioners are of the opinion that the Court Commissioner is required to undertake measurements in respect of some other properties as well, then, it is always open to the petitioners to make such application before the learned Trial Judge, who shall consider the same in accordance with law. However, that cannot be a ground to interfere with the impugned order.

8] Similarly, the alleged circumstance of the petitioners being in possession of the suit properties from time immemorial are quite irrelevant, at this stage, because

such possession have to be proved in the course of trial. At this stage, we are only concerned with the appointment of Court Commissioner to take measurements and to report if there is any alleged encroachment.

9] For the aforesaid reasons, there is no case made out to interfere with the impugned order. This petition is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)