

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 8098 OF 2018

Shri. Haridas Deu Dongare
and others

...Petitioners

Versus

Shri. Netaji Mahadeo Bawale
and others

...Respondents

....

Mr.M.A. Choudhari, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 15th FEBRUARY, 2019

P.C.

1. Not on board. At the request of Mr. Choudhari taken up for admission.
2. Heard Mr. M.A. Choudhari, learned counsel for the petitioners, at length.
3. As per the administrative order of the Hon'ble the Chief Justice the petitioners have moved this Court as regular Court presided over by Hon'ble Mr. Justice K.K. Tated is not available for judicial work.
4. Mr. Choudhari submitted that as the learned trial Judge has fixed the matter tomorrow for final arguments he has moved this Court for urgent interim protection.
5. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the order dated 6.10.2017 passed by the learned 2nd Jt. Civil Judge, Junior Division, Mohol below Exhibit-66 in R.C.S. No.17/2010. By that order, the learned trial Judge

rejected the application of the plaintiffs for appointment of Court Commissioner.

6. In support of this Petition, Mr. Choudhari has invited my attention to :

- (i) the prayers made in the suit filed by the plaintiffs;
- (ii) communication of January, 2002 addressed by the Taluka Inspector of Land Records (for short, 'T.I.L.R.') to Navnath Deu Dongre and five others setting out therein that on 11.1.2002 inspection of lands and measurement was carried out and as per the actual occupation, the areas of Survey Nos.129/1 and 129/2 are mentioned as per the sanctioned consolidation scheme and actual possession;
- (iii) communication dated 17.12.2016 to the effect that the original record in the office of T.I.L.R. is destroyed; and
- (iv) paragraph-5 of the plaint.

7. Mr. Choudhari submitted that the original record maintained by the office of T.I.L.R. is destroyed with the result the measurement carried on 11.1.2002 is also not available for production before the trial Court. It is, therefore, necessary to appoint Court Commissioner for carrying out measurement.

8. I have considered the submissions advanced by Mr. Choudhari. I have also perused the material on record. A perusal of the prayers made in the plaint shows that the plaintiffs claimed declaration of ownership over the land admeasuring 13 Acres 30 Gunthas equivalent to 5 Hectare 50 Ares and necessary entries may be made in 7/12 extract. The plaintiffs also claimed perpetual

injunction restraining the defendant from causing obstruction to their peaceful possession.

9. By the impugned order, the learned trial Judge rejected the application mainly on the ground that the prayers made in the suit are for declaration and injunction and not for recovery of possession of any encroached area. In paragraph-6, the learned trial Judge noted the submission of the plaintiffs as regards carrying out urgent measurement and destruction of the documents. In paragraph-7, the learned trial Judge observed that having regard to the nature of the suit and the reliefs claimed, this is not dispute which requires to elucidate it by appointing Court Commissioner. Appointment of Court Commissioner will amount to collecting evidence which is not permissible in law.

10. For the reasons stated in paragraphs-6 to 8 of the impugned order, I do not find that any case is made out for interfering with the impugned order. Hence, petition fails and the same is dismissed.

11. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of Code of Civil Procedure, 1908.

(R. G. KETKAR, J.)