

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2465 OF 2019

Anuradha Prakash Saxena and Anr. .. Petitioners

V/s.

Gangeshwar Builders and Ors. .. Respondents

Mr.Girish J. Paryani for the petitioners

**CORAM: K.K. TATED, J
DATED : MARCH 6, 2019**

P.C. :

1 Heard.

2 By this petition under Article 227 of the Constitution of India, the Petitioner challenges the order dated 27.10.2017 passed by 3rd Joint Civil Judge, Senior Division, Kalyan below Exhibit-28 in Special Civil Suit No. 100 of 2018 rejecting their Application for appointment of court commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908.

3 In the present proceedings, Petitioner original plaintiff filed Regular Civil Suit No. 100 of 2015 in the court of Civil Judge, Senior Division, Kalyan for declaration and injunction under section 34 of Specific Relief Act, 1963 and Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 with following prayers:

*“a. that this Hon’ble Court be pleased to declare
that the plaintiff No.2 are absolute owners in respect of*

land admeasuring 672 sq.yards equivalent to 561.85 sq.meters bearing Plot No.4 & 5, Survey No.5, Hissa No.3/1 Part of Village Belavli Taluka Ambernath Dist. Thane;

b. that this Hon'ble Court be pleased to declare that Agreement for Assignment of Development Right dated 30th December, 2010 executed by defendant no.1 in favour of defendant no.2, in respect of suit premises is illegal, bad in law, unforceable and not binding upon the plaintiffs and same is liable to be set aside and cancelled.

c. that this Hon'ble Court be pleased to declare that the permission dated 24th February, 2005 and revised permission dated 24th April 2011 granted by defendant no.3 to defendant no.2 is absolutely illegal, bad in law, inoperative and not binding upon the plaintiffs;

d. that the defendant nos.1 and 2 their servants and agents be restrained by permanent order and injunction of this Hon'ble Court from entering into and/or encroaching upon and/or disturbing the plaintiff possession and/or dispossessing the plaintiffs and/or constructing any building/buildings on the said land admeasuring 672 sq. yards equivalent to 561.85 sq. meters bearing Plot No.4 & 5, Survey No.5 Hissa No.3/1

Part of Village Belavli Taluka Ambernath Dist. Thane;

e. The defendant Nos.1 and 2 be restrained by permanent order and injunction of this Hon'ble Court from dealing with, disposing of, alienating encumbering and/or in any manner parting with possession of land admeasuring 672 sq. yards equivalent to 561.85 sq. meters bearing Plot No.4 & 5, Survey No.5 Hissa No. 3/1 Part of Village Belavli Taluka Ambernath Dist. Thane and/or to create third party interest thereon.

f. that the defendant No.3 their servants and agents be restrained by an order injunction of this Hon'ble Court from granting any further permission to defendant nos.1 and 2 for constructing any structure or building on the land admeasuring 672 sq.yards equivalent to 561.85 sq.meters bearing Plot No.4 & 5, Survey No.5 Hissa No.3/1 Part of Village Belavli Taluka Ambernath Dist. Thane;

g. Interim and ad-interim injunction in terms of Prayer (d) to (f) above;

h. For such and other reliefs as the nature and circumstances of the case may require.”

4 In that Suit, they filed Application for appointment of court commissioner on 20.10.2016 with following prayers:

“7. In such circumstances and to avoid further multiplicity of proceedings the appointment of office TILR is necessary for demarcation of the suit property.

It is, therefore, prayed that this Hon’ble Court may be pleased to appoint the Court Commissioner for fixing the boundaries bearing Plot Nos. 4, 5, 6, 8, 9 and 10 situated at Survey No.5, Hissa No.3/1(p) at Village Belavli and Plot No.3 situated at Survey No.3, Hissa No.1/1(p) at Village Belavli, Taluka Ambernath, Dist. Thane, within the limits of Kulgaon Badlapur Municipal Council , Badlapur, for which the Plaintiffs are ready to pay the necessary charges, if any, and be directed to the office of TILR to submit the report within 7 days from the date of order which will be in the interest of justice.”

5 The learned counsel for the Petitioner submits that the court below erred in coming to the conclusion that the Petitioner has failed to make out any case for appointment of the court commissioner. He submits that admittedly, the dispute between the Petitioner and the Respondent is in respect of the boundaries of their land. Hence, the Petitioner had made an Application for appointment of court receiver to demarcate the property in possession of the Petitioner. He submits that even the Trial Court has failed to consider the notice dated 13.10.2015 and 23.10.2015 issued by the Sub Registrar, Thane in respect of the suit property. He submits that unless and until the court commissioner is

appointed with direction to demarcate the boundaries of the Petitioners' property, it is not possible to decide the suit on its own merits. Therefore, in the interest of justice, this Hon'ble Court be pleased to set aside the impugned order passed by the court below allowing their Application for appointment of court commissioner under Order 26 rule 9 of the Code of Civil Procedure, 1908.

6 Heard both the sides at length.

7 It is to be noted that in the present proceedings, Petitioner original plaintiff filed suit for declaration and for setting aside the development agreement dated 30.12.2010 executed by defendant no.1 in favour of defendant no.2. Bare reading of the development agreement as well as Application below Exhibit-28 shows that plaintiff wants to appoint court commissioner to demark his property. These facts were considered by the Trial Court at the time of rejecting Petitioner's Application in paragraph 7 of the impugned order dated 27.10.2017. Trial Court also recorded the finding that plaintiff has not made any grievance to the defendant about the encroachment of their land.

8 Considering these facts and the impugned order dated 27.10.2017, I am of the opinion that Petitioner has not made out any case for entertaining the present Writ Petition. Hence, Writ Petition stands rejected. No order as to costs.

(K.K. TATED, J.)