

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

920 WRIT PETITION NO.7902 OF 2020

**SHIVAJI VITHALRAO SAWARE AND ANOTHER
VERSUS
JAGANATH EKNATH KADAM AND ANOTHER**

...

Advocate for Petitioners : Mr. Deshpande Ajay S.

CORAM : MANGESH S. PATIL, J.

DATE : 02.12.2020.

PER COURT :

Heard learned advocate Mr. Deshpande for the petitioners who are the original plaintiffs.

2. In a suit for perpetual injunction the petitioners are claiming that the road in dispute is meant for exclusive use as an internal road by the owners of the properties in the Lay out. They are seeking to injunct the respondents/defendants from using it.

3. By the application (Exhibit 60) under Order XXVI Rule 9 of the Code of Civil Procedure the petitioners sought appointment of a Court Commissioner to bring on record the fact about existence of an alternate road for the use of the respondents/defendants.

4. The learned advocate Mr. Deshpande submits that since the respondents/defendants are claiming a right to use the road in dispute, an attempt is being made by the petitioners/plaintiffs to demonstrate that in fact an alternate road is available for being used by the respondents/defendants.

5. It is apparent that the respondents/defendants have not come with any counter claim regarding existence of any right of easement in them

much less that of easement of necessity. As has been rightly observed by the learned Civil Judge, the petitioners are now trying to take upon themselves the responsibility to disprove the contention of the respondents/defendants regarding non availability of alternate way. In fact that being not a matter in controversy, appointment of a Court Commissioner to bring on record existence of the alternate road is not going to help the learned Civil Judge in deciding the suit. Precisely for this reason the learned Civil Judge has rejected the application of the petitioners for appointment of the Court Commissioner. There is no apparent illegality in the impugned order.

6. Besides, it is also clear that the learned Civil Judge has refused to concede to the request of the petitioners also on the ground that the application was moved even before the parties led evidence. I do not find any apparent illegality even in this observation.

7. The plaintiffs/petitioners are supposed to stand or fall on their own legs and are not expected to dislodge the case of the defendants/respondents. If they succeed in proving that the road in dispute is exclusively an internal road not meant for public use, that would be sufficient for the Trial Court to decree the suit.

7. In view of above, there being no apparent illegality in the impugned order passed by the learned Civil Judge, the Writ Petition is dismissed.

8. Needless to state that as is observed by the learned Civil Judge in paragraph No. 23 if at an appropriate stage appointment of a Court Commissioner is found necessary for elucidating any matter in controversy, he may resort to the provisions of the Order XXVI Rule 9 of the Code of Civil Procedure.

(MANGESH S. PATIL, J.)

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