

Shankar Kalidas Kawade & Ors. .. Petitioners

Vs.

Mahadeo Maruti Kawade .. Respondent

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Ms. Manisha A. Devkar for the Petitioners.

Mr. Ajay A. Joshi for the Respondent.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 29TH SEPTEMBER, 2021.

P.C:-

1. The present Petitioners are the Original Defendants in the Regular Civil Suit instituted by one Mahadeo Kawade, the Respondent-Plaintiff in the Court of Civil Judge, Senior Division, seeking perpetual injunction in respect of the property mentioned in the plaint and the cause of action for the said suit is described to be an attempt made by the Defendants to create an obstruction in the peaceful enjoyment of the property in his possession. An injunction is, therefore, sought against the Defendants and their heirs/legal representatives not to create any

obstruction. Along with the said suit, an application for temporary injunction (Ex-5) has also been instituted.

2. On the suit being filed, the Defendants filed their Written Statement and asserted a Counter-claim on the basis of an easementary right flowing from a cart way, which is claimed to be in existence since last 50 years. It is pleaded that the said cart way running about 12 feet in width is used by the Defendants and his family members and, there is no other ingress or egress to the Defendants from the property and, therefore, an easementary right is claimed qua the 12 feet road passing between the two properties, which are shown by way of a rough sketch appended to the Written Statement/Counter-claim.

3. This is responded by the Plaintiff by a specific denial and a reference is made to an earlier suit, which was instituted in the year 2014 being R.C.S. Suit No.39 of 2014, which was instituted for effecting partition by metes and bounds. The easementary right is specifically denied. On the claims being put up before the court, an application is made by the Defendants by invoking Order 26 Rule 9 of the C.P.C. seeking appointment of the Court Commissioner in support of the claim of the Defendants that there existed a 12 feet road, which is being used as an access road and the said road is being put to use since last 50 years. The appointment of Court Commissioner is sought to factually ascertain the said position. Ex-21 makes the aforesaid request

whereas, Ex-48 requests for expeditious hearing of the application before Ex-50 is decided. There is another application (Ex-61) filed by the Defendants under Order 39 Rule 7 of the C.P.C. vide Ex-61 seeking spot inspection. Both the applications, being Ex-21 and Ex-48 are decided by a common order passed on 06/05/2021, which is assailed in the present Writ Petition whereas, application (Ex-61) filed under Order 39 Rule 7 of the C.P.C. is decided on 16/08/2021. The result of both the orders is that all the three applications filed by the Defendants are rejected.

4. As far as the impugned order dated 06/05/2021 is concerned, learned Judge has construed the provisions pertaining to the appointment of the Court Commissioner and, particularly, after referring to applications preferred under Order 26, Rule 9 of the C.P.C., have returned a finding that whether the road in question from the mid of the Plaintiff's said field is in existence or not is a matter of evidence, which needs to be proved by the Defendants by producing a cogent and reliable oral as well as documentary evidence on record and for that purpose, the Defendants cannot seek help of the court and the relief sought in the instant applications at Ex-21 and Ex-48 cannot be granted as it is a matter of evidence.

5. As far as the application filed vide Ex-61 is concerned, learned Judge has relied upon the same analogy that if the parties

before the court plead/assert a particular fact, the burden of proving that fact would lie upon the party so claiming and it is the duty of the respective parties to bring evidence before the court to establish the said facts, which is asserted by them. The court cannot come to the rescue of the parties to establish a particular fact and, since the appointment of the Court Commissioner is rejected by the court, the court observed that, the parties can bring the evidence before it only in the circumstances provided by the C.P.C. and the application came to be rejected.

6. Perusal of Order 26 of the C.P.C., which provided for appointment of Court Commissioner to examine witnesses, in particular Rule 9, reads thus:

“9. Commissions to make local investigations.- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

7. The report of the Commissioner as collated shall be

considered as evidence in the suit and shall form part of the record is what is prescribed by sub-rule (2) of Rule 10 and such a Court Commissioner can be examined in person in the contingency stipulated by sub-rule (3) of Rule 10.

8. In the present case, it can be seen that the Plaintiff has instituted a suit for grant of permanent injunction against the Defendants and the claim is sought to the effect that the Defendants are posing a hurdle by gaining access through the mid of their field being Gat No.31/2. Expressing apprehension that the Defendants would create a hindrance in the enjoyment of the property of the Plaintiff, a permanent injunction is sought restraining them from creating a way from the mid of their field. The Defendants in their Written Statement raise a Counter-claim and specifically plead that there exists a 12 feet wide cart road, which passes through Gat No.32, 31/2 to Gat No.30/2 and thereafter, reach to Gat No.36. The claim is made on the basis of the easementary right and the protection is sought by way of Counter-claim. The Counter-claim has been responded to by the Plaintiff by filing Written Statement and the easementary right, which is claimed is specifically denied. In the aforesaid circumstances, the Plaintiff and the Defendants are duty bound to establish the claims raised by them in their respective pleadings by adducing cogent and reliable evidence before the court, which can be either oral or documentary evidence.

9. Learned counsel for the Petitioners argues that no oral or documentary evidence can come forward since the Plaintiff and the Defendants are owners of the adjoining lands is a question between the two and no stranger can depose in favour or against. In order to establish a right of way, sufficient evidence can be gained by either party by establishing the usage of the said way since time anterior and in the present case, according to the Petitioners, the 12 feet wide cart road is in existence and put to use since last 50 years. This evidence need not be a documentary evidence, but can be oral evidence.

Ultimately, the Plaintiff is the *dominus litis* and it is upto the parties to decide what type of evidence it should bring before the court. The application for appointment of Court Commissioner is made when the parties have staked their claim in the form of plaint and Counter-claim and have taken their stands. Once the stands being taken, which is contested, they are duty bound to establish the same by bringing cogent and reliable evidence on record. By appointment of Court Commissioner, the procedure prescribed for establishing the fact as contemplated under the Indian Evidence Act cannot be scuttled.

Learned Judge has rightly relied upon the decision in the case of **Dhondiram Nivrutti Pawar (since deceased) through L.Rs. Dhanaji Dhondiram Pawar and Ors. v. Laxman Khashaba Pawar & Ors. reported in 2018(2) Mh.L.J. 255,** where the parameters for appointment of Court Commissioner have been revisited and, in paragraph 9 therein, in the backdrop

of the facts, learned Judge has observed that there is nothing to be elucidated by appointment of Court Commissioner as it is for the Respondent-Plaintiffs to prove the existence of the plots and also the water chambers and they can very well do so by producing necessary documentary evidence on record for making of the plots and they can also prove separate water chambers for such plots by producing 'Water Bills', or the documents showing that such separate water chambers were obtained. It has been held that they cannot seek appointment of Court Commissioner for the purpose of proving their case.

Same analogy being applied qua the application, which has been made under Order 39 Rule 7 of the C.P.C. for spot inspection. It is for the parties to discharge their burden to prove the fact that they asserted. No legal infirmity is noticed in the impugned orders and they deserve to be upheld. The writ petition posing a challenge to the said orders deserves a dismissal and accordingly dismissed.

[SMT. BHARATI DANGRE, J.]