

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7582 OF 2021**

Eknath Laxman Karale .. Petitioner

Vs.

Govind Pandurang Karale & Ors. .. Respondents

...

Mr. S.S. Kanetkar i/b Mr. Shivraj Patne for the petitioner.

Mr. Siddhesh Bhole i/b Mr. Namitkumar S. Pansare for the respondents.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 29TH NOVEMBER, 2021.

P.C:-

1. The petitioner is aggrieved by the rejection of an application filed by him in the suit by invoking the provisions of Order 39, Rule 7 of the CPC. Pertinent to note that in the suit, the present petitioner is the defendant, who has filed his written statement and also raised a counter-claim.

2. The defendant applied for inspection of the suit properties on the ground that while preparing the village map after

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consolidation scheme, some mistakes have occurred in the map and, therefore, it would be appropriate to appoint a Commissioner for taking inspection of the actual location of the suit properties when the contest is between the plaintiff, who is cultivating the land located in Gat No.2130 whereas, the defendant claimed to be cultivating land in Gat No.2664.

3. During the course of hearing of this writ petition, attempt is made by both the parties to depict the actual location of their respective properties to contest the claim, whether a right of way in the form of cart way, passes through Gat No.2130. The photos on record do not depict the actual scenario as the entire portion of the respective lands of the plaintiff and the defendants cannot be captured in a singular photo, however, when referring to the plaint, which include a pictorial vision of properties of the plaintiff and the defendants, which is at page No.43 of the writ petition, it reveals the position of Gat No.2130. It is submitted that the application filed by the plaintiff vide Ex-5 is pending for hearing and was interjected by the application filed by the defendants under which the impugned order has been passed.

4. Taking into consideration the position of law revolving around the provisions of Order 39 Rule 7 of the CPC, while adjudication of application under Rules 1 and 2 of Order 39 of the CPC, the learned Judge determined whether it was open to collect evidence by appointment of the Commissioner. It has

been recorded in the impugned order that the burden is on the respective parties, who claim a particular way or deny its existence, by bringing on record proper evidence, which can be either oral or in the form of photos or necessary maps drawn on the basis of the revenue record. The fact that there was a mistake in the map after the consolidation scheme is not disputed. The injunction is sought on the ground that there was apprehension expressed that there is a possibility of change of the road itself. In such circumstances, the application filed below Ex-5 needs to be expeditiously decided in the wake of the well known parameters viz. prima facie case, balance of convenience and irreparable loss. By recording that to ascertain the the existence of the alleged road, the parties are at liberty to produce on record the photos, the learned Judge has rejected the application.

5. On consideration of the legal position revolving around the provisions of Order 39 Rule 7 of the CPC, it is very apparent that the Commissioner cannot be appointed to collect the evidence. It is incumbent upon the petitioner to make good the pleadings on the basis of which the relief is sought. Though certain photos are tendered before him during the course of hearing, without taking them on record, leaving it open to the respective parties to bring it before the learned Judge while hearing Ex-5, the writ petition is dismissed.

[SMT. BHARATI DANGRE, J.]