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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11950 OF 2022

Chandrabhan Rakhamaji Gore

PETITIONER

VERSUS

Vasant Anasaheb Gore and Others

RESPONDENTS

.....

Mrs. Manjushri V. Narwade, Advocate for the petitioner

Mr. Vinayak S. Bedre, Advocate for respondents No.1 to 4

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 27th APRIL, 2023

ORDER :

1. By this petition, filed under Article 227 of the Constitution of India, the petitioner / original defendant takes exception to the order passed by the learned Civil Judge, Junior Division, Rahata, District - Ahmednagar, below Exhibit-33 and 43 in Regular Civil Suit No. 238 of 2019.

2. The respondents - plaintiffs filed the suit for partition, separate possession and mandatory injunction in respect of the suit property. The petitioner resisted the suit, by filing written statement and counter claim. Temporary injunction application filed by the petitioner - defendant is allowed by the Trial Court, whereas the temporary injunction application filed by the

respondent – plaintiffs is rejected.

3. It is the case of the petitioner that in spite of grant of temporary injunction in his favour, the respondents are obstructing his peaceful possession and are not allowing him to cultivate the suit land. The suit land is, therefore, lying barren. The petitioner, therefore, filed application Exhibit-33, seeking police aid for removal of thorny bushes and trees to enable him to cultivate the suit land. The said application is rejected by the Trial Court. The petitioner, thereafter filed application Exhibit-43 for appointment of Court Commissioner for removal of thorny bushes and trees so that he can cultivate suit land. This application is also rejected by the Trial Court. Hence, the present petition.

4. Heard learned advocate for the petitioner and the learned advocate for the respondents. Perused the writ petition memo, documents annexed along with it, citations relied on by the learned advocate for the petitioner and the impugned orders.

5. Learned advocate for the petitioner placed reliance on Order 39, Rule 7 of the Civil Procedure Code in support of the petition. By relying on ***"Jayalakshmi Constructions and Another V/s Nawab Mehboob Ali Khan and Others"*** 2006 (2) ALT 132;

"Mayur Sakharam Paricharak V/s Ramesh Haridas Bhise" 2022

(6) AIL MR 354 and decisions of Single Judges of this Court in Writ Petition No. 7594 of 2020 dated 21st February, 2022 and in Writ Petition No. 8608 of 2012 dated 27th September, 2016, she submits that the writ petition deserves to be allowed, by setting aside the impugned orders and by allowing the said applications.

6. The learned advocate for the respondents vehemently opposed the prayer of the petitioner, contending that there is no material on record in support of his applications Exhibits-33 and 43 and the petitioner has approached this Court belatedly. He further submits that the suit is kept for evidence and the defendant /petitioner is prolonging the matter.

7. It is apt to reproduce the relevant provision -

“Order 39 Rule 7 – Detention, preservation, inspection, etc. of subject-matter of suit – (1) The Court may, on the application of any party to a suit and on such terms as it thinks fit, -

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c)”

8. Plain reading of the above provision makes it clear that the Trial Court is authorized to appoint Court Commissioner for preservation and inspection of the subject matter of the suit.

9. While passing the interim injunction order in favour of the petitioner, the Trial Court has *prima facie* held that he is in possession of the suit land. Admittedly, interim injunction order is operating in favour of the petitioner. The photographs placed on record by the petitioner, *prima facie* show that the land of the petitioner is lying barren and there are thorny bushes and trees in the said land. It therefore, appears that the petitioner is not in a position to cultivate the suit land. No prejudice is likely to be caused to the respondents, if the Court Commissioner is appointed for removal of thorny trees and bushes and the petitioner is permitted to cultivate the suit land, which is admittedly in his possession. The Trial Court appears to have adopted hyper technical approach while passing the impugned order.

10. In view of aforesaid facts and reasons, the petition deserves to be allowed. Hence, the following order:

ORDER

- I) Writ petition is allowed.
- II) Impugned order dated 29th July, 2022 passed by learned Civil Judge, Junior Division, Rahata, District – Ahmednagar below Exhibit-43 in Regular Civil Suit No. 238 of 2019 is hereby quashed and set aside.
- III) Application Exhibit-43 is allowed.
- IV) Hearing of the suit is expedited. The Trial Court shall decide the suit as early as possible and in any case within a period of one year from the date of receipt of writ of this order.
- V) Parties to cooperate in expeditious disposal of the suit.

[NITIN B. SURYAWANSHI]
JUDGE