

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

CIVIL WRIT PETITION NO. 9102 OF 2016

Devidas Bhimrao Mundphane

..Petitioner.

Versus

Vijay Rajesh Kacharawat

..Respondents

Mr. Drupad S. Patil for Petitioner.

CORAM : SARANG V. KOTWAL, J.

DATE : 13 MARCH 2023

PC :

1. The order dated 13/02/2023 passed by this Court (Coram: Milind N. Jadhav, J.) mentions that the record indicated that the defendant had been duly served on 17/08/2022. The defendant is the respondent in this petition. However, one last chance was given to the respondent to appear in the matter. The petitioner was directed to serve a copy of that order on the respondent and to file appropriate affidavit of service on the respondent. Learned counsel for the petitioner states that the petitioner has filed his affidavit of service. The affidavit of service is on record. Even today, nobody appears for the respondent. Therefore, I am proceeding to

decide this petition.

2. In this petition, the order dated 31/03/2016 passed by learned 2nd Jt. C.J.J.D., Pune, below Exh.15 in R.C.S.No.27 of 2013 is challenged. By the impugned order the learned Trial Judge had rejected the petitioner's (original plaintiff) application for appointment of Commissioner.

3. The suit was filed by the petitioner (original plaintiff) for vacant possession of the suit land survey No.13/7 (old survey No.107/7) part area 0-H, 45-R. It is the case of the petitioner (original plaintiff) that the respondent has taken objection in carrying out measurement of the petitioner's own property. The respondent has, in fact, encroached upon the petitioner's land and he has illegally taken possession of 45R of the petitioner's land. Learned Trial Judge rejected the petitioner's application for appointment of the Commissioner on the ground that, it was not a boundary dispute between the adjacent owners, but it is the dispute of forcible possession. It was observed that the defendant's land was not adjacent to the petitioner's property.

4. Learned counsel for the petitioner makes a statement that, he is not pressing the challenge to the order passed below Exh.15 in R.C.S.No.27 of 2013; at this stage. He submitted that, though the observation of the learned Trial Judge regarding the boundaries is not correct, he reserves his right to point it out at the time of leading of the evidence.

5. Learned counsel for the petitioner relied on the order passed by a Single Judge of this Court (Coram: S. V. Gangapurwala, J.) in Writ Petition No.8877 of 2013 dated 17/01/2014; wherein it was observed that, at the stage of evidence, from the evidence on record i.e. documentary evidence, if the Court finds that appointment of the Court Commissioner is necessary, then at that stage, a party can file an application for appointment of T.I.L.R. as Court Commissioner, which application would be considered by the Court on its own merit. Learned counsel for the petitioner stated and submitted that the petitioner would made an appropriate application in consonance with these observations at the appropriate stage and with such liberty he seeks withdrawal of this petition.

6. Considering the submissions made by learned counsel for the petitioner and the observations made in the aforementioned order passed in W.P.No.8877 of 2013, the petition is allowed to be withdrawn with liberty to the petitioner to prefer an appropriate application for appointment of the Commissioner at the stage of leading of the evidence. If and when such application is preferred, it shall be decided on it's own merits in accordance with law, without being influenced by the observations made in the order dated 31/03/2016 passed below Exh.15 in R.C.S.No.27 of 2013 before learned 2nd Jt. C.J.J.D., Pune.

7. With these observations the petition is disposed of.

(SARANG V. KOTWAL, J.)