



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 WRIT PETITION NO. 13825 OF 2024

JAMIL YAR KHAN HASAN YAR KHAN THROUGH GPA SHAIKH MAJED
MOHAMMAD ILIYAS

VERSUS

MUNICIPAL CORPORATION THROUGH MUNICIPAL COMMISSIONER

.....

Mr. A. P. Sonpethkar, Advocate for the Petitioner

CORAM : R. M. JOSHI, J.

DATE : 18th DECEMBER, 2024

PER COURT :-

1. The petitioner/original plaintiff in R.C.S. No. 58 of 2010 seeks to challenge order passed by the Trial Court rejecting application Exhibit 129 filed under Order 26 Rule 9 of the Code of Civil Procedure.
2. The plaintiff has filed suit for perpetual injunction against respondent Municipal Corporation. Respondent appeared and denied the contention of the plaintiff so also disputed existence of the suit property. It is the contention of the plaintiff, therefore, in application Exhibit 129 that since the identification of the suit property as described in a plaint is challenged/denied, it is just and necessary to appoint Court Commissioner under Order 26 Rule 9 of CPC. This application came to be rejected, hence, this petition.
3. Learned counsel for the petitioner placed reliance on the

judgment of this Court in case of *Goverdhan s/o Narayan Gaikwad Versus M/s. Sai Baba Estates in Writ Petition No. 7594/2020* to contend that when there is a dispute as to the identification of the property in suit for injunction, it would be appropriate to take assistance of survey authorities who are based equipped in matter.

4. Perusal of the said judgment cited indicates that it was a suit for permanent injunction in respect of land bearing gut no. 29. The defendant therein had resisted the suit contending that the boundaries were wrong/incorrect. The order passed by this Court, therefore, was passed in the different set of facts.

5. In the present case the Trial Court has framed following issues.

"01. Does plaintiff prove his ownership and possession over the suit property?

02. does plaintiff prove that defendants are intending to obstruct and dispossess the plaintiff from the suit property?

03. Do defendants No.1 & 2 prove that plaintiff is trying to encroach upon the property of defendant No.2?

04. Is plaintiff entitle injunction as prayed for?

05. Relief and Costs?"

6. A bare perusal of the issues indicate that a question of identification of property is not in dispute/issue. It is settled position of

law that the party cannot be permitted to collect evidence through Court. The law is also fairly settled as to the circumstances in which the Order 26 Rule 9 of the CPC can be invoked. Here is not the case wherein there is any issue of encroachment or dispute with regard to the measurement of the property in order to appoint survey authorities as a Court Commissioner.

7. Having regard to the facts, there is no merit in the petition. Learned Trial Court has rightly appreciated the facts on record. For want of perversity in the said findings and order, petition stands dismissed.

(R. M. JOSHI, J.)

ssp