

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9260 OF 2024

Prabhavati Namdev Gaikwad

.. Petitioner

Versus

Shahaji Tukaram Gaikwad & Ors.

.. Respondents

-
- Mr. Rahul Vitthal Shinde for Petitioner
 - Mr. Mohan B. Jadhav for Respondents
-

CORAM : MILIND N. JADHAV, J.

DATE : JULY 29, 2024

P. C.:

1. Heard Mr. Shinde, learned Advocate for Petitioner and Mr. Jadhav, learned Advocate for Respondents.

2. Mr. Jadhav, learned Advocate Respondents who are the Plaintiffs before the Trial Court, in his usual fairness, has drawn my attention to the reliefs prayed in the Suit plaint in paragraph No. 10 appended at page No. 22 of the Petitioner. Perusal of the reliefs in the Suit plaint reveal that the principal relief is a declaratory relief sought in respect of the Suit property to be declared as ancestral property of the Plaintiffs. Thereafter in prayer clause (c), Plaintiffs have prayed for permanent injunction in respect of the Suit property and prayer clause (d), the relief sought by the Plaintiffs against the Defendant is for removal of encroachment / structure which has been constructed by Defendant purportedly on the Suit property.

3. It is seen that though the names of the Plaintiffs and the Defendant *prima facie* show that they may be relatives but Mr. Bansode would submit that they are owners of the adjacent properties. Be that as it may, once the Suit is not for simplicitor for injunction and declaratory and injunctive reliefs are prayed for, the declaratory as well as the injunction reliefs are based upon entitlement of the Plaintiffs to occupy the Suit property. It is seen that prayer clause (d) which is the prayer for removal of encroachment is in fact a consequential relief / prayer to the principal prayer clauses (b) and (c). Hence to allow the Application filed under O. XXVI, R. 9 of the CPC at the stage of inception i.e. filing of the Suit proceedings itself will not be appropriate as it would lead to collection of evidence. Plaintiffs have to approach the Court to prove its case strictly in accordance with law. It is not the case of the Plaintiffs that the Suit is filed only for seeking prayer clause (d). In that view of the matter, I am not inclined to accept the submissions made by Plaintiffs. The impugned order dated 25.04.2024 is not sustainable at this stage and hence, the impugned order is quashed and set aside.

4. Needless to state that all rights of the Plaintiffs and the Defendant are expressly kept open to file an appropriate Application seeking appointment of Court Commissioner pursuant to both parties leading their respective evidence and completing their witness action

in the Suit proceedings. It is however clarified that filing of Application for appointment of Court Commissioner will not be a matter of right of parties but it will be entirely the discretion of the learned Trial Court who shall consider and ascertain the evidence led by the parties and only in case of any ambiguity therein, shall appoint the Court Commissioner or otherwise.

5. Writ Petition stands allowed and disposed in the above terms.

Amberkar

[MILIND N. JADHAV, J.]

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