

(2018) 01 BOM CK 0126
In the Bombay High Court
Case No : 1196 of 2017

Dhondiram Nivrutti Pawar (Since Deceased) & Ors.

APPELLANT

Vs

Laxman Khashaba Pawar & Ors.

RESPONDENT

Date of Decision : 23-01-2018

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2018) 01 BOM CK 0126

Hon'ble Judges : Dr. Shalini Phansalkar-Joshi

Bench : Single Bench

Advocate : Kalpesh U. Patil, Anand S. Shalgaonkar

Final Decision : Allowed

Judgement

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Patil, learned counsel for the Petitioners, and Mr. Shalgaonkar, learned counsel for the Respondents.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 17th January 2017 passed by the 8th Joint Civil Judge, Junior Division, Karad, below "Exhibit-41" in Regular Civil Suit No.231 of 2016.

3. The application at "Exhibit-41" was filed by the Respondents- Plaintiffs for appointment of "Court Commissioner", in order to bring on record the factual position of the suit property; as to whether the plots are already made in the suit land and whether each plot is having a separate water chamber.

4. Despite the objection raised by the Petitioners, who are Defendants in the Trial Court, contending, inter alia, that, the "Court Commissioner" cannot be appointed for the purpose of collecting evidence, the Trial Court has allowed the said application and appointed Advocate Shri A.S. Kale to inspect the suit property; especially to bring on record whether the Plots are already made in the suit property and whether each plot is having a separate water chamber.

5. This order of the Trial Court is challenged in this Writ Petition by the Petitioners and in my considered opinion, rightly so for the following reason.

6. The Suit filed by the Respondents-Plaintiffs is for injunction, restraining the Petitioners from causing obstruction to their possession in the suit land and to protect their separate possession in the suit land. In order to prove their possession in the suit land, Respondents had stated in the plaint that, in the year 1986-87, the suit land was levelled and Thirteen plots were made in the suit land and each plot is having a separate water chamber. As the Petitioners herein have started obstruction thereto, the Respondents have stated that they were constrained to file Suit for injunction. Along with the Suit, Respondents have filed application for interim injunction at "Exhibit-5", which is yet to be decided.

7. At this stage, Respondents have filed the present application for appointment of "Court Commissioner" and, that too, only for the purpose of bringing on record the factual position that the plots are already made in the suit land and each plot is having separate water chamber. Needless to state that, the appointment of "Court Commissioner" is just for collection of evidence, in order to enable the Respondents-Plaintiffs to prove their prima-facie case for getting the relief of interim injunction. The law is fairly well settled that, the "Court Commissioner" cannot be appointed for the purpose of collection of evidence and the impugned order of the Trial Court is exactly against this settled position of law.

8. Learned counsel for the Respondents has relied upon the Judgment of this Court in the case of Smt. Lalitprabha Krishnaji Ajgaokar (Since Deceased), through LRs. & Ors. Vs. Shri Yunus Khan (in Writ Petition No.354 of 2016, along with connected matters; dated 15th October 2016), to submit that, "Under Order 26 Rule 9 of CPC, a Commission to make local investigation can be issued, where the Court deems such a local investigation to be requisite or proper for the purpose of "elucidating any matter in dispute" or for ascertaining the market-value of any property, or, the amount of any mesne profits or damages or annual net profits to the properties."

9. However, in the instant case, there is nothing to be elucidated by appointment of "Court Commissioner", as it is for the Respondents- Plaintiffs to prove the existence of the plots and also the water chambers and they can very well do so by producing necessary documentary evidence on record; like the "N.A. Permission" obtained for making of the plots and they can also prove separate water chambers for such plots by producing "Water Bills", or, the documents showing that such separate water chambers were obtained. They cannot seek appointment of "Court Commissioner" for the purpose of proving their case.

10. As regards the authority relied upon in this Judgment of this Court, that of Bhupendra s/o. Bhagwat Turkar Vs. Shri Homraj, s/o. Zituji Meshram, 2014 (3) ALL MR 635, in the said case, it was clearly held that, "Only in the cases of boundary disputes, which are clearly distinguishable, in which the identity of

land, measurement thereof and area of the land is needed to be considered, preferably on the basis of the authentic evidence and map of the land drawn by the competent public official on behalf of the Central or State Government, the Trial Court is benefited by such map of the land authentically drawn and produced, in order to decide the Suit correctly, effectively and finally in the larger interest of justice, so that no such disputes shall remain pending in the Courts for long time in respect of alleged encroachments over the suit land."

11. However, it was specifically held that, "Normally, the Court of Law would not exercise its discretion for to assist the Plaintiff to prove fact as to who is in possession of the disputed property."

12. It was further held that, "When oral evidence cannot help the Court, when it is in the form of words against words by rival parties in case of encroachment on the land, such an appointment of T.I.L.R. may be useful."

13. Here in the case, Respondents have not raised any boundary dispute. It is also not their case that the Petitioners have made encroachment on their land. Conversely, they want appointment of "Court Commissioner" to bring on record the factual position of the suit land, to prove the fact that the plots are already made and there are separate water chambers for each of the plots.

14. As stated above, Respondents can definitely prove the same by producing the documentary evidence on record to that effect, which can be easily made available. Hence, the machinery of the Court cannot be used for the purpose of collecting evidence, in order to enable the Respondents-Plaintiffs to prove the facts on the basis of which they are claiming the relief of interim injunction.

15. Hence, the impugned order passed by the Trial Court for appointment of "Court Commissioner", in the facts of the present case, cannot be justified, or, cannot be called as legal and correct. This Court is, therefore, constrained to exercise its writ jurisdiction to quash and set aside the impugned order passed by the Trial Court directing appointment of "Court Commissioner".

16. Accordingly, the Writ Petition is allowed. The impugned order passed by the Trial Court stands quashed and set aside.

17. Rule is made absolute in the above terms.