

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

WRIT PETITION NO. 927 OF 2013

Sou Anjali K.Lasalkar

..Petitioner

Vs

Shri Sudhas Gangadhar
Borgaonkar and ors

.. Respondents

Shri Parag Pokale, Advocate for the Petitioner.
Ms.M.S.Bane, A.G.P. for Respondent no.8.

CORAM : R.G.KETKAR,J.
DATE : 31/01/2013

PC:

1. Not on Board. Mentioned due to urgency. At the request of the petitioner, petition is taken up in production board.
2. Heard Shri Parag Pokale, learned counsel for the petitioner and Ms.M.S.Bane, learned A.G.P. for respondent no.8.
3. By this petition under Articles 226 and 227, the petitioner (original defendant no.7) has challenged the order dated 3.1.2013 passed by the learned Second Jt.Civil Judge, Sr.Dn, Kalyan below Exhibit-113 in Special Civil Suit No.147 of 2007. By that order, the learned trial Judge rejected the application made by the petitioner under Order 26 rule 9 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.) for appointment of Court Commissioner for the local investigation.
4. In support of this petition, Shri Pokale invited my attention

to the impugned order. He submitted that the petitioner has made application on 3.1.13 at Exhibit 113 for appointment of Court Commissioner on the ground that the petitioner has purchased shop no.1014 plus 54 sq.ft carpet area from the first respondent (original plaintiff) under a registered Sale Deed dated 26.4.2012. However, the balance consideration remained to be paid by the petitioner to the first respondent. Since respondent no.2 (original defendant no.1) committed encroachment while it was in possession of the first respondent-plaintiff, the first respondent instituted Regular Civil Suit No.147 of 2007. The petitioner filed written statement and admitted the claim made in the suit. Since the petitioner has purchased the property from the first respondent, she is vitally interested in the suit. In order to decide the boundary, encroachment area, valuation and present position of the suit property which is illegally encroached by the second respondent herein, application for appointment of Court Commissioner for bringing the factual position on record was made. He, therefore, submitted that the learned trial Judge committed serious error in rejecting the application on the ground that the Court Commissioner cannot be appointed for collection of evidence.

5. I have considered the submissions made by Mr Pokale. In paragraph 3 of the impugned order, the learned trial Judge has

recorded that the suit is instituted in the year 2007. Issues were framed on 26.8.2008. Respondent no.1-plaintiff and defendant nos 1 to 6 have closed their oral evidence. On the last three occasions, the matter was kept for recording evidence of the petitioner. Instead of recording evidence, the petitioner has taken out the present application for appointment of Court Commissioner. After perusing the contents of the application the learned trial Judge came to the conclusion that the petitioner desires to bring on record evidence through the Court Commissioner and if such relief is granted at this stage it will amount to abuse of process of law.

6. After hearing the learned counsel for the petitioner and after considering the reason given by the learned trial Judge, I do not find that the learned trial Judge has committed any error in rejecting the application. In my opinion, the impugned order is purely an interlocutory order. It is expressly made clear that where a decree is appealed from by the petitioner/s, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. The petition fails and the same is dismissed.

(R.G.KETKAR, J.)