

IN THE HIGH COURT OF JUDICATURE OF BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 2283 OF 2015

Sau. Premdevi w/o Chandmal Jangid ... Petitioner

Versus

Murlidhar s/o Giridharilal Bajaj
& others ... Respondents

.....
Mr. S.J. Salunke , Advocate for petitioner
Mr. B.S. Kudale, Advocate for respondent Nos. 2 & 3
.....

CORAM : RAVINDRA V. GHUGE, J.

DATED : 5th MARCH, 2015

PER COURT :

1. I have heard the learned Advocate for the petitioner and the respondents at length.

2. The petitioner is aggrieved by the order dated 19-01-2015 passed by the Trial Court in R.C.S. No. 89 of 2010 by which the T.I.L.R. Majalgaon was appointed as a Court Commissioner.

3. The petitioner has filed the said suit for perpetual injunction. The petitioner claims to be the owner of plot Nos. 21 to 25 in land Survey No. 384. The respondents are owners of plot Nos. 27 & 28. The petitioner had purchased the plots from one Shivilal in

1998. The defendants were previous owners of plot No. 21 which was sold to the vendor of the plaintiff on 13-03-1982. The plots were not occupied and no development took place for a long time. The petitioner contends that plot Nos. 21 to 25 have been rightly possessed by them and occupied.

4. Grievance is that a Court Commissioner has been appointed to measure the plots and identify as to whether there is any encroachment on the plots belonging to the defendants. The defendants have admitted in cross-examination that the petitioner /plaintiff owns plot Nos. 21 to 25.

5. The petitioner contends that the defendants, who have filed a common written statement, have admitted in paragraph 18 that there is a road having 9 meters width adjacent to plot No. 21. Yet, the defendants have raised an issue in application Exhibit 103 as to whether the petitioner is occupying plot Nos. 21 to 25 or whether he occupies plot Nos. 23 to 27.

6. Exhibit 103, therefore, amounts to collecting evidence and the impugned order is unsustainable in the light of the observations of this Court in the case of *Sanjay S/o Namdeo Khandare Vs. Sahebrao S/o Kachru Khandare & Ors., reported at*

2001 (1) ALL MR 653 and in the matter of Syed Mushtaque Ahmad s/o Syed Ismail and others Vs. Syed Ashique Alikhan s/o Haidar Ali, reported at 2011 (6) Mh.L.J. 334.

7. The petitioner further submits that Exhibit 103 is struck by *res-judicata* since the earlier application for appointment of a Court Commissioner Exhibit 26 filed by the defendants has already been rejected on 20-06-2011.

8. The defendants have filed an affidavit-in-reply through respondent Nos. 2 & 3. It is conceded as like in the written statement, that the petitioner owns plot Nos. 21 to 25. The defendants own plot Nos. 28 and 29. The petitioner had not taken possession of his plots for almost five years. Location, identity marks and boundaries of the particular plots as were prepared at the time of the lay out, got erased.

9. As such, the plaintiff, by inadvertence and over sight, occupied plot Nos. 23 to 27 instead of 21 to 25. Plot Nos. 26, 27 and 30 have already been sold out by the petitioner. The defendants are owners of plot Nos. 28 and 29 which is also not disputed.

10. The defendants have relied upon the lay out map of Survey No. 384 which is placed on record.

11. The undisputed position before this Court, therefore, is that the petitioner owns plot Nos. 21 to 25 and the defendants own plot Nos. 28 and 29.

12. The issue, therefore, is as to whether the petitioner has mistakenly / inadvertently occupied plot Nos. 23 to 27 due to lack of markings and identity marks, instead of occupying plot Nos. 21 to 25. If the petitioner has erroneously occupied plot Nos. 23 to 27, the owners of plot Nos. 26 & 27 have been pushed side ways to occupy plot Nos. 28 and 29. Consequentially, the defendants are pushed side ways to occupy two plots i.e. plot Nos. 30 & 31.

13. The observations of this Court in the case of *Sanjay s/o Namdeo Khandare* (supra), in paragraph Nos. 2 & 3 are as under :-

2. This revision application takes exception to the order passed passed by the Civil Judge, Junior Division, Mahagaon, dated July 24, 1998, directing appointment of Court Commissioner. On going through the said order, it could appear that the Court has appointed the Court Commissioner empowering him to visit and inspect the spot being suit field and to submit report regarding actual possession of the suit field. This would tantamount to appointing Court Commissioner for

collecting evidence regarding possession. It is well settled law that the Court Commissioner cannot be appointed for collecting evidence. The learned counsel for the respondent has supported the order by contending that in the peculiar facts and circumstances of the case, there is no reason to interfere with the order passed by the court below.

3. I am afraid, this submission cannot be accepted since the law cannot change on the basis of facts of the case, but has to be applied evenly to all situations. The learned counsel for the respondent No. 1 further contends that since the order passed by the Court below is discretionary order, same ought not to be interfered with in revisional jurisdiction. I have already taken a view that the order passed is contrary to the well settled position which have the inevitable effect of Court having acted in excess of jurisdiction and that is the good ground for interference in revisional jurisdiction.

14. The observations of this Court in the case of *Syed Mushtaque Ahmad s/o Syed Ismail & others* (supra), in paragraph Nos. 3, 4 & 5 are as under :-

3. Facts in brief can be stated thus -

The petitioner herein are the original plaintiffs in Regular Civil Suit No. 19/2002 wherein the main substantive relief claimed is the declaration of the said sale deed dated 12-1-2000 as null and void and for its cancellation. The petitioner-plaintiffs have also prayed that they be put in possession of suit site A,B,C,D shown in amended plaint map, after demolishing the whole construction thereon. The consequential relief of injunction that the respondent-defendant No. 1 should not construct on suit site at any time was also sought by the plaintiffs. The respondent herein, who was the defendant No. 1, in the said suit along with other defendants filed their written statement wherein they have denied the claims and contentions of the plaintiffs. It appears

that the application for temporary injunction filed by the petitioners came to be rejected and it was held that the defendant i.e. the respondent herein is in possession of the suit property in question.

4. On the basis of the pleadings of the parties, the issues were framed in the said suit. It would be relevant to note that the Issues Nos. 2 and 4 have been framed on the basis of the prayer sought by the plaintiffs in the said suit. The said two issues are reproduced hereunder -

Issue No. 2	Whether the plaintiffs prove that the sale deed dated 12-01-2000 is null and void? and
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Issue No. 4	Whether the plaintiffs prove that they are entitled to possession of suit site A, B, C, D?
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It is pertinent to note that there is no issue of any encroachment or boundary dispute or identity of the property in question.

5. The respondent herein, who is the defendant No. 1 in the said suit filed an application for appointment of Court Commissioner to survey the suit property and prepare a map thereof. The said application came to be allowed by the impugned order dated 01-04-2011 on the ground that since the issue is relating to the suit site A, B, C, D portion, it is proper to appoint an expert. It was further held that the same would help the Civil Court to decide the suit effectively. The Trial Court was of the view that the issue relating to the alleged construction on the suit site A, B, C, D and whether the suit site A, B, C, D is in possession of the plaintiff or defendant No. 1 could be determined on the basis of the report of the Commissioner. As indicated above, it is the said order, which is impugned in the present petition.

15. The petitioner in the instant case submits that issue No. 4 “*Do defendants prove that the plaintiff is not in possession of plot No. 21?*”, therefore, lays the burden on the defendants. The Court Commissioner cannot be appointed for finding out the possession or encroachment at the behest of any party. The impugned order, therefore, is unsustainable in the light of the above referred reports.

16. The contention of the petitioner as regards *res-judicata* and as regards issue No. 4 framed by the Trial Court, deserves to be rejected. The Trial Court by order dated 20-06-2011 had rejected Exhibit 26 since the recording of evidence had not commenced and the Court felt that the said application was not tenable at that stage in the matter. So also, rejection of an earlier application for appointment of Court Commissioner filed at a premature stage, would not prohibit the defendants from moving an application for appointment of Court Commissioner after the recording of evidence has commenced.

17. From the record and the submissions of the rival parties, I find that the issue is purely as regards a confusion or an inadvertent or mistaken possession of plot Nos. 23 to 27 instead of 21 to 25. Both the sides have admitted that plot Nos. 21 to 25

belongs to the petitioner and plot Nos. 27 and 28 belong to the defendants. The impugned order, in my view, would therefore, surely assist the Trial Court in clearing this confusion.

18. The Trial Court has rightly observed in paragraph Nos. 6 and 7 of the impugned order that the boundary marks and the identity of the plots need to be checked. The T.I.L.R. would be well equipped to conduct the said exercise and submit his report. In my view and in the light of the admitted position, the Court Commissioner would assist the Trial Court by identifying the boundary marks and the inadvertent possession of plot Nos. 23 to 27 by the petitioner.

19. These facts in the case in hand are apparently different from the facts appearing in the *Sanjay S/o Namdeo Khandare & Syed Mushtaque Ahmad s/o Syed Ismail and others* cases (supra). It is in the light of the facts of the present case that the ratio laid down by this Court in the said two reports would not apply to the case in hand.

20. The petition is devoid of merit and, therefore, dismissed with no order as to costs.

(**RAVINDRA V. GHUGE, J.)**

SDM*March-2015