

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11282 OF 2013**

Pramila Jaywant Kowley	)	
Age 76 years, occ Business	)	
R/at 124, Kadolkar Colony, Taluka Maval	)	
District Pune	)	..Petitioner

Versus

1 Madhukar Narayan Patil	)
Age Adult Occ Profession	)
R/at Patil House, Behind Shiv Sena	)
Shakha, Bhavani Shankar Road,	)
Off Dadar, Kabutarkhana, Dadar,	)
Mumbai (since deceased through LRs	)

1(A) Uday Madhukar Patil	)
Present respondent No.6	)

1(B) Smita Deven Mhatre	)
Age 49 years, Occ Household	)

1(C) Manda Mahukar Patil	)
Age 78 years Occ Household	)

1(D) Mira Viren Pathare	)
Age 52 years, Occ Household	)
Respondent No.1B to 1D R/at 5th floor	)
Bhawani Shankar Road, Mumbai-28	)

2 Smt. Meena Kamalakar Salvi	)
Age Adult, Occ Household	)

3 Mr. Chandrashekhar Kamalakar Salvi	)
Age Adult Occ Profession	)

4 Sou Gauri Vishweshwar Karve	)
Age Adult Occ Household	)
Respondent No.2 to 4 R/at Meena	)
House Dr. Madhukar B. Raut Road,	)
Shivaji Park, Mumbai	)

5 M/s. Atom Plast)
a partnership firm through its partner)
Uday Madhukar Patil)
R/at Near Atom Plast, Talegaon Dabhade)
Tal Maval, District Pune)

6 Uday Madhukar Patil)
Age 45 years Occ Business)
R/at Near Atom Plast, Talegaon Dabhade)
Tal Maval, District Pune)

..Respondents

Mr. Ketan Joshi for the Petitioner

Mr. M. W. Padgaonkar i/b Mr. Vikas Kapile for the Respondent Nos.1A,
5 & 6

CORAM : R. M. SAVANT, J.
DATE : 10th MARCH, 2015

ORAL JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order dated 3-4-2013 and the order dated 3-7-2013 passed by the Learned 2nd Joint Civil Judge Junior Division, Wadgaon, Maval. By the first order, the application Exhibit 82 filed by the Petitioner/Plaintiff for appointment of the Court Commissioner under Order XXVI Rule 9 of the Civil Procedure Code, came to be rejected. By the second order dated 3-7-2013 the application for Review filed by the Petitioner came to be dismissed.

3 It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the Suit in question being Regular Civil Suit No.178 of 2005 has been filed by the Plaintiff for declaration and for removal of the encroachment. It appears that between the parties there are two more Suits being Regular Civil Suit No.125 of 1993 filed by the Plaintiff for injunction and Regular Civil Suit No.202 of 2008 filed by the Respondent Nos.5 and 6 herein for specific performance of the agreement to sale in respect of the plot of land against the Petitioner herein. The instant application being Exhibit 82 was filed by the Plaintiff so as to report about the alleged encroachment carried out by the Defendant Nos.5 and 6. It appears that the said Defendants have agreed to sell the plot of land on which the construction is put up. The fact of putting up the construction by way of a bungalow has been accepted by the Defendant Nos.5 which is a partnership firm of which the Defendant No.6 is the partner. In view of the acceptance of the said fact by the Defendant No.5, the Trial Court did not deem it appropriate to appoint the Court Commissioner. It seems that the Trial Court proceeded on the premise that it was the case of the Plaintiff that the Defendants have not admitted the measurement carried out by the Government Officer whereas in fact it was the case of the Plaintiff that "the encroachment is to be measured by the government officer as the same is not admitted by the defendant." The Petitioner/Plaintiff therefore filed an application for review Exhibit 83. The Trial Court did not deem it

appropriate to exercise the review jurisdiction as the said fact according to the Trial Court would not impinge upon the ultimate decision that was rendered by the Trial Court rejecting the application Exhibit 82.

4 The Learned Counsel for the Petitioner sought to contend that since the Plaintiff has raised an issue of encroachment carried out by the Defendant No.5, the appointment of the Court Commissioner is necessitated to report by the same. The Learned Counsel sought to place reliance on the Judgment of a Learned Single Judge of this Court in the matter of **Kolhapuri Bandu Lokade Vs. Yallappa Chinappa Lokade, Decd., through Pooja @ Poojari Y. Lokade & Ors.**¹ The said Judgment is an exposition as to when the powers under Order XXVI Rule 9 can be exercised. The Learned Counsel would contend that in view of the said Judgment (supra) Exhibit 82 was required to be allowed by the Trial Court.

5 Per contra the Learned Counsel for the Respondent Nos.5 and 6 would support the impugned order. The Learned Counsel would contend that the dispute in fact is in respect of the plot of land which has been agreed to be sold by the Plaintiff to the Defendant Nos.5 and 6 in respect of which the instant Suit has been filed and for specific performance of which agreement the Defendant Nos.5 and 6 have filed a Suit. The Learned Counsel would contend that in the facts of the present case, there is no necessity for appointment of

1 2011(3) Bom.C.R.807

the Court Commissioner as the rights of the parties would be determined in the Suit that has been filed for specific performance by the Defendant Nos.5 and 6. The Learned Counsel sought to place reliance on the Judgment of this Court in the matter of **Syed Mushtaque Ahmad Syed Ismail & Ors. Vs. Syed Ashique Ali Khan Haidar Ali**².

6 Having heard the Learned Counsel for the parties, in my view there is no merit in the above Petition. As indicated above, the instant Suit being Regular Civil Suit No.178 of 2005 is one of the Suits pending between the parties. The other Suit being Regular Civil Suit No.202 of 2008 has been filed by the Defendant Nos.5 and 6 for specific performance of the agreement to sale in respect of the plot of land. It is on the said plot of land that the construction has been put up by the Defendant Nos.5 and 6 which has been admitted by the said Defendants in their Written Statement. Once that be so, there is no matter which requires elucidation through the medium of the Court Commissioner. It is well settled by catena of judgments of this Court amongst which are the two judgments cited by the Learned Counsel appearing on either side that the powers can be exercised if the circumstances so warrant. The facts of the instant case make it amply clear that the dispute in the Suit filed between the parties is as regards the plot of land which has been allegedly agreed to be sold to the Defendant Nos.5 and 6 by the Plaintiff of the instant Suit. The fact of the construction being put up by the Defendant Nos.5 and 6

2 2012(2) Bom.C.R. 790

has already come on record. The Trial Court was therefore right in rejecting the application Exhibit 82 on the ground that since the factum of putting up the construction has been accepted by the Defendant Nos.5 and 6, there was no warrant to appoint the Court Commissioner.

7 In my view, in the facts as prevailing in the instant Petition, the rejection of the application by the Trial court is unexceptional. The Judgments cited (Supra) by the Learned Counsel for the Petitioner would not further the case of the Petitioner having regard to the facts of the present case. In that view of the matter, no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed. Rule discharged with no order as to costs.

[R.M.SAVANT, J]