

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8608 OF 2012

Balkrishna s/o Gangabishanji Zawar,
Age : 47 years, Occu. Business,
R/o Plot No. 12, Friends Colony,
Kokanwadi, Aurangabad

PETITIONER

VERSUS

1. Azmat Khan s/o Suban Khan,
Age : 53 years, Occu. Business,
R/o Kokanwadi, Aurangabad

2. Municipal Corporation,
Aurangabad, through
its Commissioner

RESPONDENTS

Mr. Anil S. Bajaj, Advocate for the Petitioner
Mr. A.D. Kasliwal, Advocate for respondent No. 1
Mr. V.V. Pawar, Advocate holding for Mr. S.S.
Tope, Advocate for respondent No. 2

CORAM : SANGITRAO S. PATIL, J.

JUDGMENT RESERVED ON : 2nd SEPTEMBER, 2016
JUDGMENT PRONOUNCED ON : 27th SEPTEMBER, 2016

JUDGMENT :

Rule. Rule made returnable forthwith. With
the consent of the learned Advocates for the parties,
heard finally.

2. The petitioner, who is original defendant No. 1

in Special Civil Suit No. 21 of 2011, has impugned the order dated 2nd December, 2011, passed below application (Exh-34) by the learned Civil Judge, Senior Division (Corporation Court), Aurangabad, allowing the said application and appointing the City Survey Officer, Aurangabad as Court Commissioner for taking measurement of the disputed property and submitting the report.

3. Admittedly, plot No. 13 C.T.S. No. 18152 in Friends Cooperative Housing Society, Kokanwadi, Aurangabad, is owned by respondent No. 1 while plot No. 12 C.T.S. No. 18151, situate in the same Society to the East of plot No. 13 is owned by the petitioner. The above numbered suit has been filed by respondent No. 1 seeking possession of 97.99 square meters of land alleged to have been encroached upon by the petitioner from plot No. 13.

4. Respondent No. 1 filed application (Exh-34) under Order 39, Rule 7(1)(a) of the Code of Civil Procedure (for short, "the Code") seeking appointment of the City Survey Officer, Aurangabad as Court Commissioner for measurement of plot Nos. 12 and 13 in

order to resolve the dispute between the petitioner and himself about the alleged encroachment over plot No. 13. The said application was strongly opposed by the petitioner by filing reply, on the ground that plot No. 13 has already been measured and demarcated by the Officer of the Town Planning, Aurangabad on 13th October, 1998 and it was noticed that the petitioner had constructed a compound wall by encroaching upon plot No. 13 on the portion shown in yellow colour in the measurement map. It was stated that the law of limitation would come in the way of respondent No. 1 in claiming the alleged encroached portion of land out of plot No.13. Therefore, the application for appointment of the Court Commissioner to carry out measurement of plot No. 13 again in order to verify the encroached portion of land is required to be rejected.

5. The learned Trial Judge considered the pleadings of the parties, heard their respective Advocates and after considering the case law cited on behalf of respondent No.1 in support of his claim for appointment of City Survey Officer as a Court Commissioner for measurement of the disputed property,

allowed the application (Exh-34) as per the impugned order.

6. The learned Advocate for the petitioner submits that since the suit itself is not maintainable as it is ex facie barred by the law of limitation, there was no point in appointing the Court Commissioner to measure the disputed plots and consider the report of the Court Commissioner. Relying on the unreported judgment of this Court in the case of **Ramkrishna Santu Kakad Vs. Raojee Sahadu Kakad and another in Writ Petition No. 2749 of 2012**, decided on **4th March, 2013**, he submits that the issues are yet to be framed in the above numbered suit and therefore, the application for appointment of Court Commissioner for measurement of the disputed plots would be premature. He further submits that the Court Commissioner cannot be appointed for collection of evidence.

7. As against this, the learned Advocate for respondent No. 1 submits that the issue of limitation cannot be decided at the initial stage of the suit since it is a mixed question of law and facts. He submits

that the averments made in the plaint sufficiently show that the suit is within limitation. He then submits that when there is a dispute about the boundary in respect of the landed property, it is well settled that, it has to be resolved by appointing an expert as Court Commissioner for final and effective adjudication of the dispute between the parties. In support of this contention, he relied on the judgments in the cases of ***Yeshwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar 2010 (3) Mh.L.J. 956*** and ***Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, deceased, through Pooja @ Poojari Y. Lakade and others 2011 (3) Bom.C.R. 807***. He submits that the learned Trial Judge has rightly considered the controversy between the parties and rightly ordered appointment of the City Survey Officer as Court Commissioner for measurement of the respective plots. He supports the impugned order and prays that the writ petition may be dismissed.

8. So far as the issue of limitation is concerned, it would be sufficient to say that it being a mixed question of law and facts, cannot be decided at the initial stage of the suit without recording the evidence

of the parties. Moreover, from the averments made in the plaint, it is prima facie clear that the suit is within limitation. However, the issue of limitation would be open for being agitated by the petitioner before the Trial Court at the appropriate stage.

9. In the cases of **Kolhapuri Bandu Lakade** (supra) and **Yeshwant Bhaduji Ghuse** (supra), it has been held that when there are boundary disputes and the disputes about the identity of the lands, the Court should order local investigation under Order-XXVI Rule 9 of the Code by appointing the Court Commissioner. It has been further held that in case of a dispute about demarcation of lands, it would be appropriate to direct investigation by a Court Commissioner under Order-XXVI Rule 9 of the Code, which would be necessary for just decision of case. To ascertain whether defendants have encroached upon the suit property or not, the Court Commissioner would assist in arriving at a just decision. In the case of **Kolhapuri Bandu Lakade** (supra), there is a reference of a number of judgments delivered by the Hon'ble the Supreme Court and the Bombay High Court wherein the appointment of Court Commissioner for

local investigation under Order-XXVI Rule 9 of the Code for resolving the disputes as to boundaries or identity of lands has been justified.

10. In the case of **Ramkrishna Santu Kakad** (supra), cited on behalf of the petitioner, it is observed that the Court Commissioner cannot be appointed for collecting evidence. In that case, the dispute was relating to the existence of way. In the present case, the dispute is not in respect of existence of way. It relates to the alleged encroachment by the petitioner over plot No. 13 belonging to respondent no.1. For resolving such type of disputes, the local investigation by the City Survey Officer would be very useful for deciding the controversy between the parties finally and effectually. Moreover, in the case of **Ramkrishna Santu Kakad** (supra), reliance was placed on the case of **Sanjay Namdeo Khandare Vs. Sahebrao Kachrau Khandare and others 2001 (2) Mh.L.J. 959**, wherein the appointment of the Court Commissioner was sought for the purpose of finding out as to who was in actual possession of the suit land. In that view of the matter, it was held in that case that the Court Commissioner cannot be appointed for

collecting evidence. In the present case, the appointment of the Court Commissioner has been sought to ascertain the boundaries of the plots of the parties and to verify whether the petitioner has encroached upon plot No. 13. In view of these distinguishing facts, the judgment in the case of **Ramkrishna Santu Kakad** (supra) would be of no assistance to advance the case of the petitioner.

11. Respondent no.1 has prayed for inspection of the disputed property through Court Commissioner vide Order XXXIX, Rule (7)(1)(a) of the Code. As per Rule 8(1) of the said Order, an application by the plaintiff for an order under Rule 7 may be made at any time after institution of the suit. In view of this provision, the application (Exh.34) cannot be said to be premature.

12. Considering the controversy involved in the above numbered suit, the appointment of the City Survey Officer as the Court Commissioner would be essential for resolving it finally and effectually. The learned Trial Judge has rightly considered the facts of the case and rightly allowed the application (Exh-34). I do not find

any reason to interfere with the said order. Hence, the order:-

O R D E R

- (i) The Writ Petition is dismissed.
- (ii) The parties shall bear their own costs.
- (iii) The Rule stands discharged accordingly.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

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