

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5209 OF 2015
WITH
CIVIL APPLICATION NO. 12207 OF 2015
IN WP/5209/2015

Lt. Col. Pandharinath Dwarkadas Adhaw (Retd.) ...Petitioner

versus

Satish Vishnu Wadane and others ...Respondents

.....
Mr. R.S. Deshmukh, advocate for the petitioner
Mr. A.K. Gawali, advocate for respondent Nos. 1 to 8.
Mr. B.A. Shinde, A.G.P. for respondent Nos. 9 and 10.
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CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 29.01.2016**

**Date of pronouncing
the Order: 25.02.2016**

PER COURT :-

1. By consent of the learned counsel for the parties, heard finally at admission stage.

2. Respondent No.1-original plaintiff has instituted a suit bearing Regular Civil Suit No. 369 of 2014 before the learned Civil judge, Junior Division, Shevgaon, for removal of alleged encroachment and injunction. Respondent No.1-original plaintiff has also filed an application Exh.11 for seeking appointment of Court Commissioner

under Order XXVI Rule 9 of Code of Civil Procedure. The petitioner-original defendant No.1 has strongly resisted the said application Exh.11. After considering the documents on record and after hearing submissions of both sides, the learned C.J.J.D. Shevgaon, by impugned order dated 13.4.2015 has allowed the application Exh.11 seeking appointment of Court Commissioner. Learned Judge of the trial court has appointed Deputy Superintendent of Land Records, as a Court Commissioner to carry out joint measurement of land Gat No. 548 and Gat No. 547 with certain directions, prominent amongst them (i) to show the encroachment, if any, in the report as well as in the map and (ii) while carrying out joint measurement and preparing map, to take help of Gat Book Nakasha of said Gat numbers.

3. Brief facts, leading to the present writ petition, are as follows:-

a) One Shri Narayan Babuji Wadane, who is ancestor of respondent No.1 was awarded 9 Acres 1 Gutnha of land situated in northern portion of the land survey No. 180. Part of the property bearing Survey No. 180/2A admeasuring 8 Acres 8 Gunthas and 12 Gunthas potkharaba, owned by Shaikh Amarmiya Abdul Gafur, was purchased by the petitioner after complying with the procedure as provided under Section 32(P) of the Maharashtra Tenancy and Agricultural Lands Act, 1948.

b) After consolidation scheme, land survey No. 180 was converted

into Gat Nos. 546, 547 and 548. After implementation of consolidation scheme, land survey No. 180/3C admeasuring 1 Hectar and 3 Are and land Survey No. 180/4B admeasuring 1 Hectar 61 Are (total 3 Hectare 44 Are) came to be numbered as Gat No. 547 and was allotted to the petitioner.

c) According to the petitioner, apart from the aforesaid area of 3 Hectare 44 Are, Gat No. 547 also comprised Potkharaba of 53 Are created by a river known as "Kalpana", which passes through the said land. The said 'Kalpana' river divided Gat No. 547 in two parts. According to the petitioner, Gat No. 547 was measured by the competent authority and map in respect thereof was drawn in the years 1976 and 2001, respectively. Petitioner further contends that said maps clearly reflect that the potkharaba area of 53 Are created by 'Kalpana' river in Gat No. 547 is not so recorded. Consequently, cultivable area of part of Gat No. 547, in possession of the petitioner, appeared to be larger than what it actually is. According to the petitioner, despite being aware of the actual status of potkharaba in Gat No. 547, the neighbouring land owners started to take undue advantage of the said fact and this led to commencement of dispute of boundaries in the area surrounding to Gat No. 547.

d) In order to avoid further dispute, petitioner submitted an application to the office of respondent No.9 with a copy thereof, to the

Deputy Director of Land Records, Nashik, seeking measurement of land Gat No. 547 throughout, thereby enabling the authorities to correct the official record by recording potkhabara of 53 Are, created by 'Kalpana' river in Gat No.547. Petitioner, accordingly, prayed to correct the land record with respect of Gat No. 547. The Deputy Director of Land Records was pleased to issue appropriate orders and directions to respondent No.9 to measure and ascertain the status of Gat No.547 and put up appropriate report in respect of his findings and observations. In pursuance of said directions, in January, 2014, respondent No.10 prepared a map showing the potkahraba of 53 Are created by 'Kalpana' river in Gat No.547. Thereafter, respondent No.1-original plaintiff has filed suit bearing R.C.S. No. 369 of 2014 against the petitioner and other defendants for removal of alleged encroachment and injunction. As stated above, respondent No.1 also filed an application seeking appointment of Deputy Superintendent of Land Records, as a Court Commissioner and the same is allowed by the trial court. Hence, this writ petition.

4. Learned counsel for the petitioner submits respondent No.1-original plaintiff had participated in the entire process of measurement carried out by respondent No.10 in the month of January, 2014 pursuant to the directions issued by the Deputy Director of Land Record, Nashik, and respondent No.1-original plaintiff was aware of the said measurement of land Gat No.547. Learned counsel submits that in

pursuance to the application submitted by petitioner, not only potkharaba land on account of said 'Kalpana' river revealed during measurment, but the factum of excessive land holding by one Kisan Lavale and the respondent-original plaintiff also revealed. Learned counsel submits that respondent No.1-original plaintiff has suppressed all material facts regrading process of correcting defective land record maintained by the office of respondent Nos. 9 and 10. Learned counsel submits that appointment of Court Commissioner was sought by respondent No.1-original plaintiff only to collect evidence on the basis of defective land record maintained after implementation of consolidation scheme.

5. Learned counsel further submits that petitioner is an ex-service man and he was performing his military duties at the border area when consolidation scheme was being implemented in Ahmednagar district. After implementation of consolidation scheme, certain changes occurred in land record with respect to the aforesaid property. The land was exchanged amongst the land holders of Gat Nos. 179 and 180 without actual measurement and without assigning any reason. The petitioner, sometime in the year 2012, submitted an appropriate application before the Revenue authorities to secure details of the record with respect of Gat No. 546, 547 and 548 (erstwhile survey No. 180). After measurement of land pursuant to the application filed by petitioner, it was revealed that the implementation of consolidation

scheme with respect to the said land was defective. Changes made in the Gat number books were not only defective, but also suffer from numerous mistakes i.e. flow of 'Kalpana' river itself was not shown in the map of Gat No.547. Learned counsel submits that prior to implementation of consolidation scheme i.e. in the year 1973-74, Survey No. 180/2B was containing potkharana of 40 gunaths covered by flow of 'Kalpana' river and said river equally divided Survey No. 180/2B and the same is also evident from Mutation entry Nos. 2516 and 2517 dated 16.8.1970. However, after implementation of the consolidation scheme, flow of 'Kalpana' river was not shown to have been existed in Gat No. 547 (erstwhile survey No. 180/2B) and said 40 gunthas (41 Are) being ptotkharaba covered by flow of Kalpana river was shown as cultivable land owned by Kisan Ganpati Lavale and Ashru Ganpati Lavale, when they were shifted to adjoining lands. The said Lavale brothers were allotted with different land Gat Nos. 546 and 545, respectively, after implementation of consolidation scheme. After implementation of consolidation scheme a part of survey No. 180/2B (Gat No. 547) was allotted to the petitioner. Since, the map drawn after implementation of consolidation scheme, did not reveal presence of 'Kalpana' river in new Gat No.547, the land record erroneously referred 40 Gunthas as a part of cultivable area owned by the petitioner in Gat No. 547 i.e. part of 3.44 Hectares. Learned counsel submits that the correction in the land record is yet to be taken place. Learned counsel submits that if the measurement is carried out as per the previous

record even the same would lead to incorrect measurement resulting denial of substantial justice to the parties.

6. Learned counsel further submits that apart from the aforesaid area of 3 H 44 R, the land Gat No.547 also comprises area of 53 R covered by flood of 'Kalpana' river that passes through the land Gat No. 547 and same was noticed during the actual physical measurement on 16.1.2014 and on 7.2.2014. Learned counsel further submits that in view of discrepancy in the earlier map, as revealed after measurement of said Gat number carried out on 16.1.2014 and on 7.2.2014, the authorities issued notice dated 11.9.2014 to all concerned neighbouring land owners, calling upon them to raise objection for the measurement and map to be drawn. The petitioner has also submitted his reply to the said notice. However, in view of the pendency of R.C.S. No. 369 of 2014, the authorities recommended not to proceed with correction of the land record maintained after implementation of the consolidation scheme. Learned counsel further submits that in this backdrop, the appointment of Court Commissioner, which is sought by filing application is only to collect the evidence on the basis of defective land record maintained after implementation of consolidation scheme. The learned counsel thus submits that the impugned order is thus liable to be quashed and set aside by allowing writ petition.

6. Learned counsel for respondent Nos. 1 to 8 submits that the

petitioner has tried to impress upon the court that the civil suit has been instituted by the present respondents with malafide intention and in order to give counter blast to the application made by the present petitioner for amendment of consolidation scheme in respect of Gat No. 547. The office of Deputy Director of Land Records, Nashik, by giving detail reasons, after referring proposal dated 24.2.2014 forwarded by the District Superintendent of Land Records, Ahmednagar, has rejected the proposal for amendment in consolidation scheme in respect of land Gat No. 547 and further directed respondent No.9 i.e. District Superintendent of Land Records, Ahmednagar to communicate the order to the present petitioner. The District Superintendent of Land Records, by his letter dated 21.4.2015 communicated the present petitioner that the proposal for amendment of consolidation scheme in respect of Gat Nos. 547 and 548 filed by the petitioner has been rejected. Learned counsel submits that even though the said communication was served on the present petitioner much prior to filing of present writ petition, the petitioner has consciously suppressed this fact and tried to impress upon this Court that the proposal filed by the petitioner for amendment of consolidation scheme in respect of Gat Nos. 547 and 548 has reached at final stage and controversy as is raised in the Regular Civil Suit No. 369 of 2014, is the subject matter of proceedings pending before the Deputy Superintendent of Land Record.

Learned counsel further submits that, in fact, the Deputy Director of Land Records, Nashik, who is the only competent authority to entertain the application for amendment of consolidation scheme, had never entertained the application made by the present petitioner and had never issued any directions to respondent No.9 for submitting his report after carrying out measurement. In fact, respondent No.9, without any authority and jurisdiction, entertained the application filed by the present petitioner and after carrying out measurement, had submitted a report to the office of the Deputy Director of Land Records, Nashik by his letter dated 24.2.2015. Learned counsel further submits that the petitioner has filed several documents alongwith writ petition and lower court had no occasion to consider the said documents when the impugned order came to be passed.

Learned counsel further submits that the cause of action for filing Regular Civil Suit No. 369 of 2014 has arisen on 30.4.2014 i.e. subsequent to carrying out measurement, as reflected in the map at Exhibit "B". The cause of action is dated 30.4.2014, wherein the present petitioner had demolished the east-west bandh on the southern side of land Gat No. 548 encroached upon the land to the extent of 38 R to 40 R in the land of present respondent Nos. 1 to 8. The suit is instituted for mandatory and perpetual injunction seeking restoration of land, which has been encroached by the petitioner and further restraining him from carrying out further encroachment. Learned counsel further submits

that the dispute involved is in respect of boundary, wherein the respondents, by giving sketch map had placed on record the extent of encroachment, which has been carried out by the petitioner on the southern side of Gat No.548 by demolishing east-west Bandh. Learned counsel submits that for proper adjudication of boundary dispute, the appointment of Court Commissioner is necessary. Learned counsel submits that the trial court has justified in passing the impugned order thereby appointing the Court Commissioner for measurement of land bearing Gat Nos. 547 and 548 for proper adjudication of the dispute. Learned counsel submits that no prejudice is likely to be caused to the petitioner if the Court Commissioner carries out the measurement, especially when Deputy Director of Land Records has rejected the proposal of the petitioner for amendment of consolidation scheme. Learned counsel further submits that respondent Nos. 9 and 10 have prepared the map as per the document annexed at Exhibit "B" considering the application filed by the petitioner for amendment of consolidation scheme. Thus, the object of measurement was altogether different. The said map cannot be the basis for any further measurement, so far as the cause of action shown in the suit instituted by the respondents. Learned counsel submits that the Court Commissioner so appointed by the impugned order, is the Deputy Superintendent of Land Records, who is an expert in his field. Learned counsel submits that the impugned order thus calls for no interference. Writ petition is devoid of any merits and the same is liable to be

dismissed with costs.

The learned counsel for respondent Nos. 1 to 8 in order to substantiate his submissions, places reliance on the judgments in following cases:-

- I) Habibkhan Inauttalakhan and Ors. vs. Waman Govind Rathod and others, reported in 2012 (2) Mh.L.J. 541,
- II) Dattatraya Namdeo Kalake vs. Bapu Bhairu Bhivungade and others, reported in 2015 (1) Mh.L.J. 892
- III) Malhar Ganpat Bokerphod and others vs. Shivaji Vishwanath Pawal, reported in 2014 (4) Mh.L.J. 237
- IV) Sulemankhan Mumtajkhan & Ors. vs. Smt. Bhagirathibai wd/o Digambar Asalmol & Anr, reported in 2014 (5) ALL MR 552
- V) Shyam Janardan Choudary vs. Asha Ramdas Katkar and another, reported in 2014 (5) Mh.L.J. 770.
- VI) Manikrao Ramji Chawake vs. Ashok Ambadas Gawande and Anr, reported in 2014 (2) Mh.L.J. 840
- VII) Surya Dev Rai vs. Ram Chander Rai and others, reported in (2003) 6 SCC 675

7. Learned A.G.P. appearing for respondent Nos. 9 and 10 submits that as per the record, land survey No. 180/3C and 180/4B(1) subsequently numbered as Gat No. 547, came to be allotted to the

petitioner. The learned A.G.P. further submits that potkharaba land of 53 Are is divided into two Gat numbers. Potkharaba land measuring 32 R is placed in Gat No. 547 whereas remaining potkharaba measuring 21 Are is in Gat No. 548. The petitioner has submitted an application to the office of the respondent No.9 with a copy thereof the Deputy Director of Land Record, Nashik requesting to measure the land Gat No. 547 thereby enabling the authorities to correct the final record by recording potkharaba 53 Are created by 'Kalpana' river in Gat No.547. Learned A.G.P. further submits that respondent No.9 scrutinized measurement sheet of Gat No. 547 and found that 'Kalpana' river is included in Gat No. 547 and therefore, there is no question to create additional area in Gat No.547. Accordingly respondent No.9 disposed of the application submitted by the petitioner.

Learned A.G.P. further submits that respondent No.9 vide his letter dated 9.2.2013 directed respondent No.10 to measure and ascertain the status of land Gat No. 547 and submit an appropriate report. Pursuant to the said letter, office of respondent No.10 issued notice to the petitioner as well as the adjoining land owners of Gat Nos. 547 and 548. After service of notice to all concerned parties, the measurement has been carried out on 16.1.2014 and verification of measurement also done on 7.2.2014 by the Deputy Superintendent of Land Records. The petitioner and respondent Nos. 1 to 7 submitted their objections and therefore, respondent No.10 again issued notice on

16.12.2014 directing the petitioner and others to remain present on the spot for verification on 26.12.2014. After following due procedure and issuing notice to all concerned, who are neighbouring land owners of Gat No. 547, respondent No.10 prepared a map evidencing potkharaba of area measuring 53 Are created by 'Kalpana' river in two Gat numbers i.e. Gat Nos. 547 and 548. Learned A.G.P. further submits that in view of the above facts and circumstances, the petitioner is not entitled to any relief as claimed in the petition.

8. It appears that the Deputy Director of Land Records, Nashik Division, Nashik by giving reasons after referring to the proposal dated 24.2.2014, forwarded by the District Superintendent of Land Records, Ahmednagar, had rejected the said proposal filed for amendment of consolidation scheme in respect of land Gat No. 547. It also appears that in consolidation scheme, survey No. 180/3C and 180/4B(1) subsequently numbered as Gat No. 547, came to be allotted to the petitioner. It is also a matter of record that potkharaba land admeasuring 53 R is divided into two Gat numbers i.e. 32 Are in Gat No. 547 whereas 21 Are has become a part of Gat No. 548.

9. So far as the present Regular Civil Suit No. 369 of 2014 instituted by the respondent-original plaintiff is concerned, the cause of action for filing the said suit has arisen on 30.4.2014 wherein the present petitioner alleged to have demolished the east-west bandhs on the

southern side of land Gat No. 548 and encroached upon the land of respondent No.1-plaintiff to the extent of 38 Are to 40 Are.

10. Respondent Nos. 9 and 10 by way of their affidavit in reply specifically pointed out that the present petitioner has not taken land in his possession as per the land shown in Gat numbers and he cultivates more land than he possesses.

11. Respondent No.1 plaintiff has instituted the suit for recovery of possession of encroached area and also for decree of perpetual injunction. It appears from the pleadings that there is dispute in respect of east-west boundary between the land Gat No. 548 admeasuring 3 H 44 Are and potkharaba 21 Are possessed by the respondent-original plaintiff and the land Gat No. 547 admeasuring 3 H 44 R including potkharaba area of 32 Are owned and possessed by the petitioner. In view of this, the appointment of Court Commissioner for ascertaining the boundaries is necessary. The respondent-plaintiff has submitted a sketch map alongwith the plant which is part and parcel of the plaint, showing extent of encroachment by the petitioner on southern side of Gat No. 548 by demolishing east-west bandh. The measurement, as carried by the authorities at the behest of the petitioner, has at least no relevance so far as the subject matter of R.C.S. No. 369 of 2014 is concerned. It is well settled that the dispute regarding boundaries and allegations about encroachment can be adjudicated best way by taking

assistance of the experts, such as T.I.L.R., who on measurement, can express his opinion. The learned Judge of the trial court has rightly allowed the application Exh.11 directing the Deputy Superintendent of Land Records to carry out joint measurement of Gat Nos. 548 and 547 and further directed that the encroachment, if any, revealed during joint measurement, point out the same specifically in the report and the map. I do not find any fault in the impugned order directing the Deputy Superintendent of Land Records to take help of Gat Book Map of Gat Nos. 548 and 547 while carrying out the joint measurement as directed by the Court. So far as the contention of the petitioner about area occupied by Kalpana river etc. is concerned, the authorities would take appropriate decision in the matter in due course. It is not desirable at this stage to enter into that controversy, as the same is also not the subject matter of suit pending before the Civil Court. Hence, the following order.

O R D E R

- I. Writ petition is hereby dismissed.
- II. In the circumstances there shall be no order as to costs.
- III. In view of disposal of writ petition, nothing further survives in the civil application and civil application No. 12207 of 2015 stands disposed of accordingly.

(V. K. JADHAV, J.)