

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

38 WRIT PETITION NO. 1756 OF 2015

**ABDUL MASHID ABDUL RAJJAK AND ANOTHER
VERSUS
JAVED ABDUL KADAR MUJAWAR**

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**Advocate for Petitioners : Mr. Shendurnikar Pushkar S.
Advocate for Respondent sole: Mr. V. B. Patil**

CORAM : V. K. JADHAV, J.

DATE : 15th February, 2016

PER COURT :

1. Heard finally by consent of the parties at admission stage.

2. The respondent/original plaintiff instituted the suit bearing RCS No.22/20013 seeking declaration of title and perpetual injunction. During pendency of the suit, the respondent/original plaintiff filed application Exh.28 for appointment of Court Commissioner. The petitioners /original defendants, have strongly resisted the said application by filing their say at Exhibit-29. Learned Judge of the trial court, by order dated 31.10.2014 passed below Exhibit 28, allowed the said application. Hence this petition.

3. Learned counsel for the petitioners/original

defendants has pointed out Clause-3 of the operative part of the impugned order wherein, the trial court has directed the court commissioner to visit land Gat No.55, 56/1 and 56/2 and submit the report within 15 days as to who is in actual physical possession of the said properties, apart from the entries in the revenue record. According to the learned counsel, same is not permissible as the Court is delegating power to the court commissioner to find out as to who is in actual physical possession of the properties, apart from the entries in the revenue record. The learned counsel further submits that even though the application for temporary injunction was pending, the respondent plaintiff filed application Exh.28 for appointment of court commissioner and accordingly same was allowed by the trial court.

4. The learned counsel for the respondent/original plaintiff submits that the suit property Gat No.55 was previously recorded as Survey No.42/2 and Gat No.56 was previously recorded as Gat No.42/1. The Suit property at Gat No.55 is owned by the respondent/plaintiff whereas land Gat No.56 is owned by petitioners/ defendants. The learned counsel submits that there is dispute over the map in respect of measurement carried out by the surveyor

and actual physical possession, so far as land survey No.42 is concerned. Even there is panchanama prepared by the surveyor dated 07.10.2006 wherein, it is mentioned that there is difference in actual possession and the map prepared by the surveyor. The learned counsel submits that in order to resolve the said controversy as to the identification of the suit property, the respondent plaintiff has filed application Exh.28 and the same is rightly allowed by the trial court.

5. The learned counsel for the respondent further submits that so far as the peculiar facts of the present case is concerned, evidence can be obtained only by local inspection and specific report in this regard. In order to substantiate his contentions, the learned counsel relied on the judgment of this Court in the case of **Malhar Ganpat Bokephod & ors. Vs. Shivaji Vishwanath Pawal**, reported in 2014 (1) Bom. C.R. 806.

6. It appears from the impugned order that the trial court has directed the court commissioner to find out as to who is in actual possession of Lands at Gat Nos.55, 56/1 and 56/2, apart from the entries in revenue record. There may be some deficiency in the sense that map in respect of measurement carried out by the surveyor and

the actual physical possession. However, the respondent plaintiff can point out the same to the court and even make submissions in that regard with reference to the documents available. However, in any manner, the trial court cannot delegate its power to the court commissioner to find out as to who is in actual physical possession of the suit property, apart from the entries in the revenue record. Thus, the impugned order amounts to collection of evidence and the same is not permissible.

7. So far as the case of **Malhar Ganpat Bokephod & ors (supra)** relied on by the respondent is concerned, in the said case, dispute is regarding boundaries and in the backdrop of the same, it was observed that the same can be adjudicated by taking assistance of expert such as T.I.L.R. and obtaining an evidence in such case can only be had on the spot.

8. In view of the above observation, the impugned order certainly calls for interference. Hence following order:

O R D E R

- i. The impugned order dated 31.10.2014 passed below Exhibit-28 in R.C.S. No.22/2013 is hereby quashed

and set aside.

ii. Exhibit-28 in R.C.S.No.22/2013 is hereby rejected.

iii. Writ petition is disposed of in the aforesaid terms. In the circumstances there shall be no order as to costs.

(V. K. JADHAV, J.)

JPC