

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11170 OF 2011

HARIRAM TUKARAM SHINDE

...Petitioner

Versus

VASANT BHAUSO PATIL, SINCE DECEDASED,
THROUGH LEGAL HEIRS

PRUTHVIRAJ VASANT PATIL AND ORS

...Respondents

....

Mr.Sandeep Koregave, Advocate for the Petitioner.

Mr. Rajesh B. Parab, Advocate for Respondent Nos.1A, 1B, 3A
and 3B.

....

CORAM : R. G. KETKAR, J.

DATE : 30th MARCH, 2016

P.C.

1. Heard Mr.Sandeep Koregave, learned Counsel for the petitioner and Mr. Rajesh Parab, learned Counsel for respondent Nos.1A, 1B, 3A and 3B, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 15.10.2011 passed by the learned 15th Joint Civil Judge, Junior Division, Kop below Exhibit-139 in R.C.S. No.240/2002. By that order, the learned trial Judge allowed the application made by the defendants under Order 26 Rule 9 of CPC for

appointment of the Court Commissioner to measure Revision Survey No.528 and the suit property.

3. The petitioner, hereinafter referred to as the plaintiff, has instituted the suit for perpetual injunction against the defendants restraining the defendants from causing the obstruction to his possession over the property open space having revision survey No.528/A-1 admeasuring 1 Acre and 23 and 3/4 Gunthas. Mr. Koregave submitted that the suit is for injunction simplicitor. It does not raise any boundary dispute or also is not for recovering possession of encroached portion. Defendant Nos.1 and 3 filed written statement raising boundary dispute. Defendant Nos.1 and 3 contended that the boundaries of Revision Survey No.528/A-1 are not correctly given. They came with the case that the suit property is part of Revision Survey No.528/2. The defendants thereafter filed application for appointment of the Court Commissioner *inter alia* contending that the suit property is in fact part of Revision Survey No.528/2 and, therefore, it is necessary to appoint Taluka Inspector of Land Records [for short, 'TILR'], Karveer as Court Commissioner for carrying out measurement and drawing

the map as also fixing the boundaries of entire Revision Survey No.528. By the impugned order, the learned trial Judge has allowed the application. While allowing the application, the learned trial Judge also considered the decisions of this Court in the case of ***Kashinath Chanduji Shastri vs. Haribhau Nathuji Bawanthade, 2004(2) Mh.L.J. 722*** and in the case of ***Tajmulhussain vs. Satish, 1994 Mh.L.J. 664***. Aggrieved by that decision, the petitioner has instituted the present petition.

4. Mr. Koregave strenuously contended that the defendant Nos.1 and 2 are attempting to collect evidence. They are creating confusion by raising disputes about the boundaries. The petitioner is concerned with Revision Survey No.528/A-1. As the suit is for injunction, the plaintiff has to establish his possession over the suit property. In case if the plaintiff does not establish his possession over the suit property, he will fail. He relied upon the following decisions to contend that appointment of Court Commissioner cannot be made for collecting evidence :

[I] *Sanjay s/o. Namdeo Khandare vs. Sahebrao s/o. Kachru Khandare & Ors., 2001(1) ALL MR 653;*

[II] Syed Mushtaque Ahmad s/o Syed Ismail and others vs. Syed Ashique Ali Khan s/o. Haidar Ali, 2011(6) Mh.L.J. 334; and

[III] Efigenio Dias and another vs. Malaquias D'Costa and others, 2000(2) Mh.L.J. 209.

5. On the other hand, Mr. Parab supported the impugned order. He submitted that basically the suit property is not in existence. It is the specific contention of defendant Nos.1 and 3 that the suit property is part and parcel of Revision Survey No.528/2. Since the description of the suit property as also the boundaries are in dispute, it is necessary to appoint Court Commissioner for carrying out measurement as also fixing the boundaries. He relied upon the decision of this Court in the case of **Ramzan Sheikh Chand Sheikh (since deceased) through his L.Rs and others vs. Panjab s/o. Nathuji Gawande, 2014(6) Mh.L.J. 97.**

6. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

7. While allowing the application for appointment of

Court Commissioner, the learned trial Judge has considered the written statement filed by defendant Nos.1 and 2 and more particularly paragraphs-5 and 7 thereof. In paragraph-8 of the impugned order, the learned trial Judge observed that the plaintiff is coming with the case that vide sale deed dated 12.7.1963 he became owner and possessor of the suit property. As against this, the defendants came with the case that the suit property is not in existence and it forms part of Revision Survey No.528/2. The identity of the suit property is in question. The rival contention of the parties is that part portion of the land forms part of Revision Survey No.528/A-1 or 528/2. Therefore, there is need of the Court having for assistance of an independent authority for the purpose of elucidating the matter in dispute. In paragraph-9, the learned trial Judge observed that in case of demarcation of disputed land, in case of encroachments, and in case of identity of properties, the Court Commissioner must be appointed by the Court to take joint measurement. The learned trial Judge relied upon the decision of ***Kashinath Shastri (supra)***. In that decision it was held that where there is a dispute about an encroachment or dimension of site, Court Commissioner must be appointed.

8. Mr. Koregave relied upon the decisions referred in paragraph-4 above. In the case of **Sanjay Khandare** (supra), the trial Court directed the Court Commissioner to visit and inspect the spot of the suit field and to submit report regarding actual possession. It is in that context this Court observed that, that would amount to appointing Court Commissioner for collecting evidence. In the case of **Syed Mushtaque** (supra), the petitioners had instituted the suit for declaration that the sale deed dated 12.1.2000 is null and void and for its cancellation. They also prayed for recovery of possession after demolishing the construction carried out thereon. As a consequential relief, the plaintiffs claimed relief of injunction against defendant No.1 restraining him from carrying out construction on the suit site. In paragraph-4, after reproducing two issues framed by the learned trial Judge, it was observed that there was no issue of encroachment or boundary dispute, or identity of the property in question. In the case of **Efigenio Dias** (supra) the petitioners had instituted the suit for perpetual injunction restraining the defendants from entering and interfering in the suit property. Initially the plaintiff filed an application for temporary injunction. The defendants made a counter claim claiming suit

access through the property of the plaintiffs and sought injunction on the plaintiffs from causing obstruction of suit access. Learned trial Judge dismissed the plaintiff's application and allowed the defendants application. Appeal From Order was allowed and the matter was remanded to the trial Court for fresh disposal. After remand, the learned trial Judge allowed the application of the plaintiff and dismissed the application of the defendants. Appeal from Order was decided on 16.7.1998. It was held that in the absence of requisite pleadings, the defendants could not succeed in proving their alleged right of way and the learned trial Judge also rightly pointed that the defendants had another way available to take access to the road. It is thereafter application under Order 39 Rule 7 read with Section 151 of CPC was taken out by the defendants. In paragraph-7, this Court held that by application under Order 39 Rule 7 of CPC the defendants intend to collect evidence on the findings of the Court that there does exist an alternate way from the house of the defendants to the road. This Court held that the defendants perhaps could have sought appointment of the Commissioner before the controversy regarding the alternate access had been decided for the purpose of temporary

injunction. The sole purpose of filing the application was to reagitate the question of alternate access pending final disposal of the suit by collecting evidence through the Commissioner.

9. In my opinion, the decisions relied upon by Mr.Koregave do not advance the case of the plaintiff. The facts obtaining in those cases are materially different from the facts in the present case. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, the Petition fails and the same is dismissed.

10. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of CPC.

(R. G. KETKAR, J.)