

Sarnobat

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2034 OF 2014

Gunabia Laxman Ranpise & Ors.

.. Petitioners

Vs.

Bhima Uma Bahule & Ors.

.. Respondents

Mr. Nitin P. Deshpande, Advocate for the Petitioners.

Mr. Sanjay Jain I/b Mayur Thorat, Advocate for the Respondents.

CORAM : M. S. SANKLECHA, J.

DATE : 16th AUGUST, 2017.

P. C. :

1. Petitioners under Article 227 of the Constitution of India challenges the order dated 10th January, 2014, passed by the Ad-hoc District Judge, Pune. By this impugned order dated 10th January 2014 in appellate proceedings, T.I.L.R. was appointed as commissioner to visit the suit property and submit report along with map about the factual position of the suit property and construction thereon.

2. The petitioner nos. 1 to 4 (original plaintiffs) have filed a suit for declaration that, they are the owners of the property described in paragraph 2B, 2C and 2D (suit property) and injunction. The petitioners' interim application for temporary injunction restraining the respondents herein from disturbing their possession of the suit property was allowed. Being aggrieved, the respondents filed an appeal before District Judge, Pune. In the pending appeal respondent nos. 5 and 6 herein took out an

application for appointment of Court commissioner to report the status of the suit property. By the impugned order dated 10th January, 2014 the application for appointment of court commissioner was allowed.

3. Mr. Deshpande appearing on behalf of the petitioners submit that, the court commissioner could not have been appointed because, it was not the petitioners' case that there was any encroachment upon the suit land. Therefore, the appointment of the court commissioner for the purpose of finding out the exact status of the suit property, which essentially is a matter of leading evidence of the respective parties could not have been granted by the appellate court.

4. As against this learned counsel for the respondent submits that, the injunction which was granted by the trial court was in respect of the property which is not a part of the suit property. This is so, as according to the petitioners, some part of the property described in para 2 of the plaint is not the suit property. In these circumstances, it is necessary to appoint the court commissioner to find out the factual position of the property in respect of which injunction is granted. Further, once the discretion is exercised by the appellate court on the basis of facts before it, this court should not interfere with the jurisdiction, as the view taken by the impugned order is not perverse. Further Mr. Jain, learned counsel for the respondent relies upon the decision of this court in ***Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, since deceased through Pooja @ Poojari Y. Lakade & Others, 2011 (3) , Mh. L.J., 348*** to contend

that the appointment of the Court Commissioner in the present facts cannot be found fault with. In any event, the report of the Court Commissioner would not be conclusive as it would be subject to cross examination. Therefore, no interference is called for.

5. The aforesaid decision in **Kolhapur Bandu Lakade** (supra) for appointment of Court Commissioner was in the factual matrix of plaintiffs having filed the suit, not only for declaration that he is the owner of the suit land but also for the restoration of possession of the suit land after removing the possession of defendant. In the above context, this court placed reliance upon the decision of the Apex Court in **Haryana Waqf Board Vs. Shanti Sarup & Others, 2008(8), SCC 671**, to hold that in a suit for encroachment, a Court Commissioner has to be appointed. In this case, the dispute is not with regard to the encroachment of the suit property. In fact in Kolhapuri Bandu Lakade (supra) this court has distinguished the case of **Sanjay s/o Namdeo Khandare Vs. Sahebrao s/o Kachru Khandare and Ors. Reported in 2001(2) Mh.L.J. 959** which held that the court commissioner cannot be appointed for collecting evidence for the parties on the ground that it was not case of encroachment but, for finding out who is in possession. The same is the situation in this case. To my mind it is a settled law, as held in **Kolhapur Bandu Lakade** (supra) following the apex court's decision in **Haryana Waqf Board Vs. Shanti Sarup & Others** (supra) that, it is only when the dispute is with regard to the encroachment upon the suit land, that the

appointment of court commissioner become necessary, so as to demarcate the disputed land for the purpose of possession. In this case admittedly, the dispute is not with regard to any encroachment of the suit property by the respondents on the petitioners property and no possession is sought on that ground of illegal encroachment on the land.

6. I find that the suit filed by the petitioners, was only for declaration that they have become owners of the properties described in paragraph 2B and 2D of the plaint and the injunction is granted restraining the respondents from disturbing the possession of the petitioners, in respect of the suit land.

7. In the above view, the appellate court in the present facts went beyond its jurisdiction in appointing the court commissioner and thus enabled collection of evidence for the parties. This is particularly so as it is for the parties to the dispute to lead its evidence, which is subject to cross examination by the other side.

8. In the above view, impugned order dated 10th July, 2014 is quashed and set aside. Needless to state that, the parties are at liberty to make an application to the appellate court to decide the pending appeal, as expeditiously as possible and if such an application is made, the same would be considered and decided.

8. Petition disposed of in above terms.

[M. S. SANKLECHA, J.]