

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 6524 OF 2018

Recilla Gajanan Barve

... Petitioner

Vs.

Ajit Laxman Gupte & Anr.

... Respondents

Mr. C.G. Gavenkar i/b. Mr. Rakesh Bhatkar a/w. Mr. Mohan Devkule,
Advocate for the petitioner.

Mr. Sumit S. Kothari, Advocate for the respondent nos. 1 and 2.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 20th June, 2018.

P.C.:

Rule. Rule made returnable forthwith. By consent, Writ
Petition is heard finally and decided at the stage of admission.

2. This Writ Petition is filed invoking the writ jurisdiction of this Court under Article 226 and 227 of the Constitution of India, taking exception to the order dated 6th March, 2018 passed by the Joint Civil Judge Junior Division, Dapoli below Exhibit 48 in Regular Civil Suit No. 70 of 2015 thereby partially allowing this Application of appointment of Court Commissioner, which was filed by the original plaintiff, i.e., respondent no. 1. The plaintiff/respondent no. 1 has filed the suit for injunction on the ground of encroachment. The land bearing survey No. 76 of 2014 owned by the plaintiff and survey No.

76 of 2013 is owned by petitioner/original defendant. There is no dispute about the ownership of the land. However, the parties have conflict in respect of boundary between the land. In the said suit, the plaintiff as well as defendant both have appointed privately their persons and they got their respective lands measured from the Government surveyors. After the cross-examination of the plaintiff, he moved an application under Rule 9 Order 26 of Code of Civil Procedure and the said application was objected by the petitioner/defendant, however, it was partially allowed. It is informed that the Court Commissioner, i.e., TILR has carried out the measurements of suit properties on 5th June, 2018. Hence, this Petition.

3. The learned counsel for the petitioner has submitted that the suit is filed on 1st June, 2015 along with the plan and measurement map of the suit land prepared by the surveyor was filed. The written statement was filed on 25th June, 2015 and map carried out by TILR was produced along with the written statement. The issues were framed on 20th June, 2016. The cross-examination was completed on 5th August, 2016 and thereafter the application for appointment of Court Commissioner was made on 20th September, 2016. The

learned counsel has submitted that these dates are very relevant with a view to point out that this Application was made with some ulterior motive after cross-examination of the plaintiff. The learned counsel has submitted that when the two maps are before the trial Court, there was no necessity to appoint the Court Commissioner for the measurement of suit land. The learned counsel placed reliance on the admissions given by the plaintiff in the cross-examination that he was present at the time of survey carried out by TILR who was appointed by the defendant/petitioner. He submitted that this admission is not to be washed out because of the appointment of Court Commissioner. He further submitted that the respective maps filed by the parties are to be proved through respective witnesses. He submitted that the learned trial Judge has passed illegal order. In support of his submissions, the learned counsel relied on the judgment of this Court in the case of **Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade (Decd.) through Pooja @Poojari Y. Lakade & Ors., reported in 2011(3) Mh. L.J. 348.**

4. The learned counsel for the respondent/original plaintiff while opposing this Application has supported the order passed by the learned Civil Judge Junior Division. The learned counsel has

submitted that the learned trial Judge has taken into account the maps produced by both the parties and with a view to elucidate the matter in controversy, has allowed the Application and the Court Commissioner has already measured the suit land and report is awaited. In support of his submissions, the learned counsel relied on the following decisions:

- (i) Judgment of Hon'ble Supreme Court in the case of **Haryana Waqf Board vs. Shanti Sarup & Ors., reported in (2008) 8 SCC 671.**
- (ii) Judgment of this Court in the case of **Ushabai w/o. Sharadchandra Bannore vs. Wasudeo Baliramji Mehare & Ors., reported in 2004(2) Mh. L.J. 594.**
- (iii) Judgment of this Court in the case of **Dattatray Namdev Kalake vs. Bapu Bhairu Bhivungade & Ors., reported in 2015 (1) Mh. L.J. 892.**

5. Perused the rulings relied and referred by the learned counsel for both the parties. In the case of **Kolhapuri Bandu Lakade** (*supra*), the learned Single Judge of this Court has declared his own judgment as *per incuriam* and has placed heavy reliance on the ratio laid down in the case of **Haryana Waqf Board** (*supra*) and held that

the appointment of Court Commissioner would assist the Court in arriving at the just decision.

6. In the case of **Haryana Waqf Board** (*supra*), there was an issue of demarcation of suit land and throughout there was concurrent finding of three Courts, i.e., trial Court, District Court and High Court has summarily dismissed the Second Appeal. However, the Hon'ble Supreme Court has taken into account that the appellants have filed an Application before the trial Court as well as Appellate Court for appointment of a Local Commissioner for demarcation of the suit land and the demarcation of the suit land is the essence of the controversy and has taken a view that the Court Commissioner ought to have been appointed to solve the issue. The ratio laid down in the case of **Haryana Waqf Board** (*supra*) and **Kolhapuri Bandu Lakade** (*supra*) helps the respondent.

7. The facts in the case of **Dattatray Namdev Kalake** (*supra*) are identical with the present set of facts where two measurement maps were produced by the plaintiff and defendants and the issue was of encroachment. The trial Court has taken a view that as there are two reports in respect of measurement maps, then the appointment of

Court Commissioner was not necessitated. However, this Court relied on the ratio laid down in the case of **Kolhapuri Bandu Lakade** (*supra*) and has held that if the material having been found to be insufficient by the trial Court in deciding the application Exhibit 5 filed for temporary injunction, the appointment of Court Commissioner in such a situation cannot be said to result in collection of evidence through the medium of Court.

8. The learned counsel for the petitioner tried to distinguish the case of **Dattatray Namdev Kalake** (*supra*) on the point that this Application was considered and allowed at the interim stage of Exhibit 5 and in this case, the evidence is recorded. These submissions are not convincing, as the Court has power to appoint the Court Commissioner under Rule 9 Order 26 of Code of Civil Procedure at any time to arrive at proper and just conclusion , if at all the Court thinks that the evidence before the Court or the matter before the Court is insufficient to decide the issue and the matter in controversy is to be elucidated.

9. In the case of **Ushabai w/o. Sharadchandra Bannore** (*supra*), this Court has taken a view that if two maps produced by the

parties are different and there is dispute over the correctness of the map, then the appointment of Court Commissioner is justified.

10. In the present case, the situation is same. There are two maps prepared by the TILR or surveyors, as the parties have approached the authority privately. None of these surveys were carried out by the order of the Court where Court Commissioner is appointment by invoking the power of the Court under Rule 9 Order 26 of Code of Civil Procedure.

11. Under such circumstances, the order passed by the learned trial Court cannot be faulted with. There is no merit in the Writ Petition, hence dismissed.

(MRIDULA BHATKAR, J.)