

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4078 OF 2018

1. **Arjun Rambhau Dhankude**

Age : Adult, Occupation : Business,
R/at : Baner, Dhakude waste,
Tal. Haveli, Dist. Pune.

2. **Shivlal Dhondiba Dhankude**

Age : Adult, Occupation, Agriculturist,
R/at : Vitthal Rukmini Mandir, Baner,
Pune 411 045.

...Petitioners

Versus1. **Bhanudas Ramchandra Murkute**

Age : 58 Years, Occupation : Agriculturist

2. **Kalpana Balkrishna Murkute**

Age : 60 Years, Occupation : Household

3. **Shraddha Balkrishna Murkute**

Age : 33 Years, Occupation : Household

4. **Shubham Balkrishna Murkute**

Age : 30 Years, Occupation : Business

5. **Bhagwan Ramchandra Murkute**

Age : 66 years, Occupation : Agriculturist

6. **Vitthal Ramchandra Murkute,**

Age : 71 Years, Occupation : Agriculturist

7. **Yashwant Ramchandra Murkute,**

Age : 73 Years, Occupation : Service
All R/at : Survey No. 261, Laxman Park,
Baner, Pune 411 045.

8. **Ratnamala Pandurang Tapkir**

Age : Adult, Occupation : Household
R/at : Baner, Tapkir Waste,
Tal. Haveli, Dist. Pune.

9. **Sharmila Manohar Nakhate**

Age : Adult, Occupation : Household,
R/at : Baner, Dhakude Waste,
Tal. Haveli, Dist. Pune

10. **Nirmala Patilbua Pawar**

Age : Adult, Occupation : Household,
R/at : Tathawade, Tal. Mulshi, Dist. Pune

11. **Pramila Bhanudas Pawar,**

Age : Adult, Occupation : Household,
R/at : Thergaon, Tal Haveli, Dist. Pune.

...Respondents

Mr.Chaitanya Nikte a/w. Ms. Sneha Bhange for petitioner.

Mr.Arvind P. Purohit for respondent Nos.1 to 7.

CORAM: N. J. JAMADAR, J.

RESERVED ON : 22nd July, 2019

PRONOUNCED ON : 28th August, 2019

JUDGMENT :-

1. This petition under Article 227 of the Constitution of India assails legality, propriety and correctness of the order passed by the learned 5th Joint Civil Judge, Junior Division, Pune, on 22nd November 2017, whereby a Court Commissioner was appointed to measure the land bearing survey No.70, Mouje Baner, Pune and submit report, and the order dated 27th March 2018, whereby the review application preferred against the first order came to be rejected.

2. The background facts, necessary for the determination of the petition, can be stated in brief as under :-

(a) The respondent-plaintiff instituted the suit for perpetual injunction restraining the defendants-petitioners from committing encroachment over the suit land, bearing survey

No.70/6 admeasuring 15 are, out of survey No.70 situated at Baner, Pune. A decree for perpetual injunction was also sought against the defendants from causing obstruction to the possession and enjoyment of the plaintiffs over the suit land. [The parties are hereinafter referred to in the capacity in which they are arrayed in Regular Civil Suit No.98 of 2008, wherein the orders impugned herein, have been passed.]

(b) The plaintiffs averred that they have acquired ownership over the suit land being the donee, under the registered Gift Deed executed by Sitabai Tukaram Dhankude-the original owner thereof. The plaintiffs have been put in possession of the suit land under the said Gift Deed. The plaintiffs names have been mutated to the record of rights of the suit land. In the year 2007, the defendant Nos.1 and 2 have made efforts to authorizedly erect structure over the suit land by committing encroachment thereon. The defendants made an attempt to grab an area admeasuring 3 Gunthas from southern and northern directions of the suit land and thus the plaintiffs were constrained to seek injunction against the defendants from committing encroachment and causing obstruction to the peaceful possession and enjoyment of the plaintiffs over the suit land.

(c) The defendant resisted the suit. The plaintiff No.1 was cross-examined. Thereafter, an application for appointment of Court Commissioner (Exh.100) came to be tendered by the plaintiffs. It was averred in the said application that for elucidation of the the controversy and determination on merits it was necessary to measure the suit land, bearing survey No.70/6, and thus, Taluka Inspector of Land Records, (T.I.L.R.), Pune be appointed as a Court Commissioner with a direction to measure the suit land and submit report.

(d) The defendants resisted the application on the ground that the suit is not for removal of encroachment but for injunction simplicitor. No reason was assigned in the application as to why the appointment of a Court Commissioner was necessary and how it would assist the Court in adjudication of the dispute.

3. By the impugned order dated 22nd November 2017, the learned Civil Judge was persuaded to appoint the Court Commissioner holding, *inter-alia*, that the dispute between the parties was regarding boundaries and possession over the suit land. Though the land bearing survey No.70 was got demarcated through TILR by the plaintiffs, yet, the entire survey

number 70 was not measured. Thus, it was necessary to measure the entire survey No.70 to ascertain alleged encroachment. The learned Civil Judge has, thus, appointed the TILR, Pune to measure entire survey No.70 and demarcate and fix the boundaries of said survey number along with sub-plots (Pot Hissa) of respective lands as per possession of parties and actual revenue record and submit report indicating the possession of the respective parties and encroachment, if any, over survey No.70(6).

4. The petitioners-defendants sought review of the order by filing application (Exh.105). The learned Civil Judge, however, rejected the application for review on the ground that no case for review was made out. Being aggrieved by, and dissatisfied with, the order of appointment of TILR as a Court Commissioner to measure survey No.70 and subsequent order of rejection of the prayer to review the first order, the defendants have invoked the writ jurisdiction of this Court.

5. I have heard Shri Chaitanya Nikte, the learned counsel for the petitioners and Shri Arvind Purohit, the learned counsel for the respondent Nos. 1 to 7 at a considerable length.

6. The learned counsel for the petitioners strenuously urged that the impugned order of appointment of the Court Commissioner is wholly unwarranted and in dissonance with the settled legal position in the matter

of appointment of the Court Commissioner. Drawing the attention of the Court to the plaint in the suit, which has been instituted for injunction, it was urged that, in the absence of a clear assertion that there is a dispute regarding the alleged encroachment over the suit land, appointment of a Court Commissioner, that too, after the plaintiff No.1 has been cross-examined, is legally impermissible. The learned counsel for the petitioners further submitted that the cross-examination of the plaintiff No.1 demolishes the very substratum of the plaintiffs case that they are in possession and occupation of the suit land. In view of the clear and unequivocal admissions in the cross-examination that the plaintiffs have not been in possession of the suit land since the year 1983, the endeavour of the petitioners to fill in the lacuna and collect evidence under the guise of court commission to elucidate the situation, could not have been acceded to by the learned Trial Judge, urged the learned counsel for the petitioners. In substance, the thrust of the submission on behalf of the petitioners was that since the suit has been instituted for injunction simplicitor, without there being a specific case of encroachment at the hands of the defendants, the Court Commissioner could not have been appointed.

7. In opposition to this, the learned counsel for the respondents would support the impugned order. The learned counsel for the respondents stoutly contested the claim of the petitioners that there are no averments in

the plaint regarding the encroachment at the hands of the defendants. Taking me through the plaint, wherein certain averments regarding the encroachment and construction of a school namely 'Parvatibai Dhondiba Dhankude Prathamik Vidyalaya', has been made, it was submitted that the very foundation of the suit is the alleged encroachment at the hands of the defendants. It was further submitted that it is settled legal position that, when there is a dispute regarding the boundaries of the disputed property and allegation of encroachment, the appointment of a Court Commissioner is imperative and in the absence of such report of the competent surveyor, the Court is not equipped to effectively adjudicate the dispute. In any event, according to the learned counsel for the respondents, no prejudice would be caused to the defendants as the defendants will have adequate opportunity to object to the report of the Court Commissioner. In this view of the matter, in exercise of the extraordinary jurisdiction, this Court should not interfere with the order passed by the learned trial Court which would aid the adjudication of the dispute between the parties effectively, urged the learned counsel for the respondents.

8. I have given anxious consideration to the submissions advanced across the bar. At the outset, it is imperative to note that the plaintiffs sought the appointment of cadastral surveyor to measure the suit land bearing survey No.70/2016 and submit a report thereof along with a map

to the Court. In the said application (Exh.100), the only assertion which is of relevance is that, the appointment of the Court Commissioner to measure the suit land, bearing survey No.70/6, would assist the court in adjudicating the dispute on merits. In the reply to the said application, the defendants-petitioners categorically asserted that the suit has not been instituted for removal of encroachment but only for perpetual injunction simplicitor. In that backdrop, the defendants contended that the appointment of the Court Commissioner and the measurement of the suit land would be of no assistance in determination of the controversy.

9. In the light of the aforesaid rival contentions, the learned Civil Judge, in the impugned order, recorded that the dispute between the parties was regarding boundaries and possession over the suit land. It was further observed that though the plaintiffs have measured survey No.70/2, the entire survey No.70 was not measured. The trial Court was of the view that in order to ascertain encroachment, measurement of the entire survey number was imperative, and, thus, the trial Court directed the appointment of TILR, Pune to measure entire survey No.70 situated at Mouje Baner, Dist. Pune. Evidently, the trial Court has proceeded on the premise that the real question in controversy was the alleged encroachment over the suit land at the hands of the defendants. Whether this approach of the trial Court is justifiable in the backdrop of the facts borne out by record?

10. On the perusal of the copy of the plaint, it becomes abundantly clear that the suit was instituted for mandatory and perpetual injunction. The plaintiffs apprehend that the defendants would encroach upon the suit land bearing survey No.70/6, and, thus, sought to restrain the defendants from committing the encroachment. An injunctive relief was further sought to restrain the defendants from causing obstruction to the possession and enjoyment of the plaintiffs over the suit land. On a fair reading of the plaint, an inference becomes inescapable that the plaintiffs have approached the Court in anticipation of the alleged encroachment at the hands of the defendants. Undoubtedly, in the plaint, there are averments to the effect that the defendants have made an effort to commit encroachment from the southern and northern side of the suit land to the extent of 3 R land each, yet, the plaintiffs did not categorically assert that the defendants have committed encroachment over the particular portion of the suit land. Nor the plaintiffs sought recovery of the possession of the said land after removal of encroachment.

11. In this backdrop, the learned counsel for the petitioners placed reliance upon a judgment of this Court in the case of ***Dnyandeo Vithal Salke & Ors. Vs. Dagdu Kadar Inamdar***¹, wherein also the suit was instituted

1 2017 (3) Mh.L.J. 314

for injunction simplicitor and there was no prayer for removal of encroachment. In that context, the learned Single Judge of this Court had observed that when the suit has been filed for injunction simplicitor, the Court failed to understand as to how the Civil Judge could have passed order directing appointment of T.I.L.R., with direction to submit his factual report as regards possession and user of the land. This amounts to collection of evidence which is not the object of the provisions regarding appointment of the Court Commissioner, as contained in Order 26 Rule 9 of the Civil Procedure Code.

12. The learned counsel for the petitioner would urge that the aforesaid pronouncement is on all four with the facts of the instant case as herein also, the plaintiffs have instituted a suit for injunction simplicitor and sought appointment of the Court Commissioner to bring evidence as regards possession, on record.

13. Per contra, the learned counsel for the respondent Nos.1 to 7 banked upon a judgment of the Supreme court in the case of ***Shreepath Vs. Rajendra Prasad*** ² wherein, in the context of the fact that there was a serious dispute as regards the area and boundaries of the land in question, the Supreme Court observed that a survey commission to locate the identity of the plot in dispute ought to have been appointed. The

² JT 2000(7) SC 379

observations of the Supreme Court in paragraph 4 read as under :-

“4 In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No. 257/3 or Khasra No. 257/1. This having not been done has resulted in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law.”

14. A strong reliance was also placed on a judgment of this Court in the case of **Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, Decd., Thru' Pooja @ Poojari Y. Lakade & Ors.**³, wherein the learned Single Judge of this Court had taken a survey of the authorities on the aspect of the appointment of Court Commissioner, and, after placing reliance upon the judgment of the Supreme Court in the case of **Haryana Waqf Board Vs. Shanti Sarup & Ors.**⁴, culled out the legal position in paragraph 14 as under :-

“14. It can thus clearly be seen that the Apex Court in the case of Haryana Waqf Board cited supra in unequivocal terms has held that in the case of demarcation of disputed lands, it is appropriate for the Court to direct the investigation by appointing a Local Commissioner as provided under Order XXVI, Rule 9 of the Code of Civil Procedure. The other learned Judges of this Court, namely, M.S. Vaidya, J., S.T. Kharche, J., A.P. Bhangale, J., F.M. Reis, J., have also held that in case of dispute of encroachment of a site, an appointment of Court Commissioner who could be City Survey Officer or Cadastral Surveyor for taking joint measurement

3 2011 (3) Bom. C.R. 807

4 (2008) 8 SCC 671

of the property owned by the plaintiff and defendant for the purpose of local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure would be necessary for the just decision of the case. It has also been held by this Court that merely because a Court Commissioner is appointed, it will not prejudice the interest of either of the parties. It has been held that if any of the parties is aggrieved by the report of the Court Commissioner, an opportunity would be available to that party to cross examine the Court Commissioner and to point out as to how his conclusions were not correct. It has further been observed that the party who was not aggrieved would also prove how his conclusions are correct.”

[emphasis supplied]

15. The learned counsel for the petitioners also drew the attention of the Court to the observations of the learned Single Judge in paragraph 9 of the said judgment which reads as under :

“19. In that view of the matter, to find out as to whether the Defendants have, in fact, encroached upon the City Survey No.1894 or not, I find that the appointment of Court Commissioner would assist the Court in arriving at the just decision. Needless to state that, as has been consistently observed, the report of the Court Commissioner would not be conclusive and if any of the parties are aggrieved by the same, such a party would always be entitled to cross-examine the Court Commissioner, so as to challenge the veracity of the report.”

16. Banking upon the aforesaid observations, it was urged that no prejudice as such would be caused to the petitioners if the Court Commissioner measures the land and submits the report as the defendants would have ample opportunity to file their objection to the report, and, if need be, cross examine the surveyor.

17. I find it rather difficult to accede to the broad submission on behalf of the respondents that the fact that the other side has an opportunity to object to the report of the Court Commissioner and may cross-examine the Court Commissioner would obviate the examination of the justifiability of the appointment of the Court Commissioner itself. It is pertinent to note that in the case of *Kolhapuri Bandu Lakade* (Supra), this Court had made it clear that the suit therein was instituted for declaration and restoration of possession after removing the encroachment by the respondent/defendant therein. A positive case of encroachment at the hands of the defendants was, apparently, made out in the said case.

18. In the case at hand, as observed earlier, the tenor of the plaint indicates that the suit was instituted to pre-empt the defendants from causing encroachment over the suit land. What tilts the scale is the fact that the area of the suit land bearing survey No.70/6 was stated to be of 15 Are. According to the plaintiffs, the defendants attempted to commit encroachment over an area admeasuring 3 are from the southern and northern side. In the context of the total area of 15 Are, the encroachment to the tune of 3 Are each from southern and northern side can be neither said to be insignificant nor in-consequential. It is not the case that even subsequent to the institution of the suit, the plaintiffs made a positive assertion that the defendants have committed encroachment over a

particular area of the suit land. Observations of the learned Civil Judge in the impugned order to the effect that the plaintiffs submitted that during the pendency of the suit, the defendants encroached upon the land to the extent of 3 Are, are not borne out by either the averments in the plaint or any other material on record.

19. The fact that in the application for appointment of the Court Commissioner (Exh.100) also, there was no whisper about encroachment at the hands of the defendants could not have been ignored by the learned Civil Judge. As narrated above, a general assertion was made in the said application that the appointment of the Court Commissioner to measure the suit land would assist the Court in the determination of the controversy on merits. In this view of the matter, it would be rather hazardous to draw an inference that the plaintiffs had instituted the suit for removal of encroachment and recovery of the possession of the portion of the suit land. Thus, the justifiability of the appointment of the Court Commissioner on the premise that there was a dispute about the encroachment over the suit land becomes questionable.

20. At this juncture, the stage at which the application (Exh.100) was preferred assumes critical significance. The said application was, admittedly, filed after the plaintiff-Bhanudas was cross examined. In the

cross examination of the plaintiff, it was elicited that the defendants and their predecessor-in-interest have been in occupation of the lands bearing survey Nos.70/6 (suit land), 70/7 and 70/8 since prior to the birth of the plaintiff. He further conceded that since the year 1998, a school, namely 'Parvatibai Dhondiba Dhankude Prathamik Vidyalaya' is operated from the land bearing survey No. 70/6. The plaintiff had the candour to concede that since the year 1983, the suit land has not been in the possession of the plaintiffs. It was further admitted in no uncertain terms that the defendants have been in the occupation of the suit land as the owners thereof and nobody has ever caused obstruction to the possession of the defendants over the suit land.

21. In the light of the aforesaid admissions, which substantially demolish the case of the plaintiffs based on proprietary title and possession over the suit land, the trial court could not have directed the appointment of the Court Commissioner with a further direction to the Court Commissioner to ascertain the possession of the parties. In fact, even the plaintiffs have not sought such relief in the application (Exh.100). The appointment of the Court Commissioner, in this fact-situation, was nothing but an endeavour to indirectly collect the evidence to wriggle out of the aforesaid admissions, elicited during the course of cross-examination.

22. For the foregoing reasons, I am impelled to hold that, in the facts of the instant case, the learned Civil Judge was not at all justified in directing the appointment of the Court Commissioner as the suit was instituted for injunction simplicitor; there was no positive case of encroachment at the hands of the defendants over the definite portion of the suit land and the plaintiffs had conceded in the cross examination that the plaintiffs were never in possession of the suit land and the defendants have been all along in possession thereof. Thus, the impugned order which borders on perversity, if viewed through the aforesaid prism, deserves to be quashed and set aside.

23. Resultantly, the petition deserves to be allowed. Hence I pass the following order :-

O R D E R

- (i) The petition stands allowed.
- (ii) The impugned order dated 22nd November 2017 of appointment of the Court Commissioner and the order dated 27th March 2018, whereby the prayer for review thereof was rejected, stand quashed and set aside.

(iii) The application preferred by the plaintiffs-respondents for appointment of the Court Commissioner (Exh.100) stands rejected.

(iv) Rule is made absolute in aforesaid terms.

No costs

[N.J. JAMADAR, J.]