

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

WRIT PETITION NO. 6845 OF 2019

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|---|-----|----------------|
| 1. Mr.Arun Pandurang Killedar, |] | |
| Aged about 38 years, Agriculturist. |] | |
| 2. Mr.Kiran Pandurang Killedar |] | |
| Aged about 40 years, Agriculturist |] | |
| 3. Smt. Shakuntala Pandurang Killedar, |] | |
| Aged about 62 years, Household work. |] | |
| All residing at Sarambalwadi, |] | Petitioners |
| Taluka Ajara, District Kolhapur |].. | (Orig. Defts.) |
| Versus | | |
| 1. Mr.Dashrath Ishwara Devkar | | |
| Aged about 71 years. Agriculturist |] | |
| Residing at Sarambalwadi, Taluka Ajara, |] | |
| District Kolhapur. |] | |
| 2. Grampanchayat Sarambalwadi, |] | Respondent |
| Through it Gramsevak, Taluka Ajara, |].. | No.1- Orig. |
| District Kolhapur. |] | Plaintiff |

Mr. Pradeed S. Gole for petitioners.

Mr. Tejas S. Ingale for respondent No.1.

CORAM : N.J. JAMADAR, J.
DATE : 27TH SEPTEMBER 2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and, with the consent of the learned counsels for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India

assails legality, propriety and correctness of an order dated 13th July 2018 passed by the learned Civil Judge, Junior Division, Ajara on an application Exh.24 in Regular Civil Suit No.52 of 2018 under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 ('the Code'), whereby the learned Civil Judge was persuaded to appoint the Deputy SLR of Ajara as a Court Commissioner to measure Gat No.84 ('suit land').

3. The petition arises in the backdrop of the following facts :

(i) The respondent No.1/plaintiff had instituted a suit against the petitioners-defendants with the averments that the petitioners have threatened to cause obstruction to the peaceful possession and enjoyment of the plaintiff over the suit land admeasuring 5 Are out of Gat No.84 situated at Sarambalwadi, Taluka Ajara, District Kolhapur. The plaintiff has averred that the defendants had brought material to erect construction over the west-north corner of the suit land and, despite resistance, had erected construction of about one feet above the surface.

(ii) During the pendency of the suit, the plaintiff filed

an application for appointment of the Court Commissioner alleging encroachment at the hands of the defendants. It was asserted that the appointment of the Court Commissioner would elucidate in the matter in controversy and assist the Court to arrive a just decision of the case.

4. The petitioners-defendants resisted the application. It was, *inter-alia* contended that the boundaries of the land allegedly purchased by the plaintiff under the registered sale deed dated 26th June 1987, have yet not been fixed and thus, the Court Commissioner cannot be appointed to collect the evidence.

5. The learned Civil Judge was persuaded to allow the application on the premise that it was the specific case of the plaintiff that the defendants have committed encroachment on a portion of the suit land. The trial court was also of the view that the report of the Court Commissioner would assist the Court in adjudicating the matter in controversy and no harm would be caused to the defendants if the cadestral surveyor is directed to measure the entire Gat No.84.

6. The learned counsel for the petitioners urged with a

degree of vehemence that what the plaintiff has purchased is an undivided interest, to the extent of 5 Are, out of Gat No.84. The suit for injunction as such is not maintainable. The proper remedy for the plaintiff is to institute a suit for partition and separation of the said 5 Are portion out of Gat No.84. Since the boundaries of the land, over which the plaintiff claimed title, have not been fixed, the application for appointment of Court Commissioner was misconceived and, thus, the learned Civil Judge committed an error in allowing the application by making general observations as regards the utility of the appointment of the Court Commissioner.

7. In contrast to this, the learned counsel for the respondents-plaintiffs pointed out that the original owner of Gat No.84, namely, Laxman Baburao Mokashi had, in the year 2007, executed a mortgage deed in respect of rest of the 19 Are land in favour of Mahatma Phule Gramin Bigar Sheti Sahakari Pat Sanstha Maryadit. In the said mortgage deed, the portion of the land, i.e., Gat No. 84 admeasuring 19 Are was described with reference to the boundaries including the lands situated towards the western side, which is owned by Hirabai Desai and Dashrath Ishwar Devarkar, the plaintiff.

8. The learned counsel for the respondents drew the attention of the Court to the sale deed executed on 5th August 2016, in pursuance of the auction sale, on account of default on the part of the said Laxman Mokashi in the repayment of the mortgage money. In the sale deed, an area admeasuring 19 Are out of the land bearing Gat No.84, which was mortgaged to the Mahatma Phule Gramin Bigar Sheti Sahakari Pat Sanstha Maryadit was shown to have sold to Pandurang Babu Killedar, the predecessor-in-title of the defendants. Thus, it was submitted that there is clear identification of area which was sold to the plaintiff and the area which was purchased by the defendants in auction sale.

9. It is true that in the sale deed, executed in favour of the plaintiff, the land purchased by the plaintiff has not been described with reference to the boundaries. However if the material on record, especially the mortgage deed and sale deed in favour of the defendants, is considered in the backdrop of the affidavit of the original owner of Gat No.84 namely Laxman Babu Mokashi, it becomes abundantly clear that there is clear identification of the extent of the area of the plaintiff and the defendants. In this view of the matter, though the suit is one for injunction, it cannot be lost

sight of that there are averments in the plaint itself to the effect that the defendants had threatened and, in fact, committed encroachment over a portion of the suit land. It is trite that if the dispute between the parties revolves around the boundaries of the property and there are allegations of encroachment, a joint measurement of both the disputed lands is imperative for a just adjudication of the dispute. A useful reference, in this context, can be made to the judgments of the Supreme Court in the case of *Haryana Waqf Board Vs. Shanti Sarup & Ors.*¹ and of this Court in the case of *Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, Decd., Thru' Pooja @ Poojari Y. Lakade & Ors.*², which followed the judgment of the Supreme Court in the former case.

10. In this view of the matter, the exercise of the discretion by the learned Civil Judge to appoint the Court Commissioner to measure Gat No.84, cannot be said to be either perverse or arbitrary. Resultantly, no interference is warranted in the impugned order, which is in the nature of a proceeding supplemental to the advancement of the cause of just decision of the suit.

1 (2008) 8 SCC 671

2 2011 (3) Bom. C.R. 807

- 11.** The petition, therefore, stands dismissed. No costs.
- 12.** Rule stands discharged.

[N.J. JAMADAR, J.]