

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3203 OF 2019

Mukesh Suresh Bhanushali and Ors. ...Petitioners
vs.
Praful Sadanand Bhanushali ...Respondent

Mr. Pavan Patil, for the Petitioners
Mr. Harshvardhan Khambete a/w. Mr. G.J. Jain, for Respondent

CORAM : M. S. SONAK, J.

DATE : APRIL 24, 2019

ORAL JUDGMENT:

. Heard Mr. Pravin Patil, learned counsel for the Petitioners
and Mr. Khambete, learned counsel for the Respondent.

2. The challenge in this Petition is to the order dated 28th
September, 2018 made by the learned trial Judge appointing the
Dy. Superintendent of Land Records as Court Commissioner for
carrying joint measurement of land bearing City Survey No. 1638
(i.e. suit property) & 1642. The operative portion of the impugned
order 28th September 2018 reads thus:

1) *This application is hereby allowed.*

2) *The Deputy Superintendent of Land Records,
Wada is hereby appointed as a Court
Commissioner for carrying out joint measurement of*

the lands bearing City Survey No. 1638 (i.e., suit property) & 1642.

3) The Court Commissioner is hereby directed to measure the lands bearing City Survey No. 1638 (I.e., suit property) & 1642 and point out the length & width of lands bearing City Survey No. 1638 (i.e., suit property) & 1642 as well as point out the length & width of the open space situated between the suit property & the road passing western-ward of the suit property & also to show encroachment area, if any made, by the defendants, in his report.

4) The Court Commissioner is also directed to take help of the Gat Book Map of the lands bearing City Survey No. 1638 (i.e., suit property) & 1642 for executing commission work and for drawing map of the same.

5) The Court Commissioner is also directed to submit his report along with map on or before 19/11/2018.

6) The plaintiff is hereby directed to pay requisite measurement fees of Court Commissioner in the office of Deputy Superintendent of land record, Wada on or before 17/10/2018 and receipt of the same be produced before this Court along with affidavit of compliance on or before 17/10/2018. It is further provided that, if the plaintiff failed to do so, this application automatically stands rejected.

3. Mr. Pravin Patil, learned counsel for the Petitioners submit that the learned trial Judge has exceeded the jurisdiction in appointing the Court Commissioner even before the issues were framed and the evidence in the suit commenced. He relies upon the

decision of this Court in (1) ***Ramkrishna Santu Kakad vs. Reojee Sahadu Kakad, Writ Petition No. 2749 of 2012 dated 4th March, 2013*** (2) ***Chandrakant Kashinath Dike and Ors. vs. Satyabhanma Vishwanath Dike and Ors., Writ Petition No.8877 of 2013 dated 17th January, 2014*** (3) ***Balkrishna Mahadeo Dongre and Ors. vs. Niketan English School, Kopargaon and Ors., Writ Petition No. 234 of 2015 dated 19th January, 2015*** and ***Sitaram Suklal Patil and Ors. vs. Vasudeo Suklal Patil, Writ Petition No. 9626 of 2016 dated 31st July, 2017*** in support of his contention that in no case a Court Commissioner can be appointed before framing of issues or commencement of the evidence. Mr. Patil points out that in the present case the only relief applied for the Plaintiff is for injunction simplicitor and this is an additional reason as to why no Court Commissioner ought to have been appointed.

4. Mr. Khambete, learned counsel for the Respondent defends the impugned order on the basis of reasoning reflected therein. He points out that neither Section 75(b) nor Order 26 Rule 9 of the Code of Civil Procedure bars the appointment of Court

Commissioner in a suit seeking relief of injunction and at the stage prior to the framing of issues or commencement of evidence.

5. In the present case, the reasoning which promoted the learned trial Judge to appoint the Court Commissioner is reflected in paragraph No. 5 of the impugned order which reads thus:

It seen from pleadings of rival parties that there is a boundary dispute between the rival parties in respect of their respective lands bearing City Survey No. 1638 (i.e. suit property) & 1642. In the present suit, the Plaintiff has made allegations in respect of encroachment made by the defendants in his land. There is also dispute between the rival parties in respect of the length & width of lands bearing City Survey No. 1638 (i.e. suit property) & 1642 as well as the length & width of the open space situated between the suit property & the road passing westernward of the suit property. The Deputy Superintendent of Land Record is expert persons in carrying out joint measurement of the land and pointing out the length & width of lands bearing City Survey No. 1638 (i.e. suit property) & 1642 as well as the length & width of the open space situated between the suit property & alleged encroachment, if any made, over the suit property. In this view, I am of the opinion that it is necessary to appoint the Deputy Superintendent of the Land Record, Wada as a Court Commissioner for carrying joint measurement fo the lands bearing City Survey No. 1638 (i.e. suit property) & b1642 in order to bring factual position on the record and to resolve real controversy between the

parties. In the result, this application deserves to be partly allowed. Hence, I proceed to pass the following order.”

6. From the aforesaid, it is clear that Court Commissioner has been appointed to assist the Court in resolving the real controversy between parties. This is not a case whether some private surveyor has been appointed as Court Commissioner but a Dy. Superintendent from Land Records office has been appointed as Court Commissioner. In fact, in the case of **Ramkrishna Kakad** (supra) on which a strong reliance is placed, it is clearly recorded that appointment of advocate as Court Commissioner for local inspection/ investigation. It was submitted that it would have been different matter, if any, expert is appointed from the office of TILR for the local inspection of the spot. The decision in the **Ramkrishna Kakad** (supra) was in the context of appointment of an advocate as Court Commissioner and not in the context of appointment of any official from the TILR office as Court Commissioner. In this background, there was observation that even the issues were yet to be framed. However, the observation should not be concerned as some sort of bar for appointment of Court Commissioner prior to framing of issues. Not in a routine

manner but in a situation where the Court itself is of the opinion that such appointment will assist the Court to resolve the real controversy between the parties.

7. The decision relied upon by the learned counsel for the Petitioners themselves state that the issue of appointment of Court Commissioner is in the discretion of the Court. No doubt, such discretion is a judicial discretion and in that sense not some unfettered discretion. In the peculiar facts of the present case, if the learned trial Judge was of the opinion that the appointment of Dy. Superintendent of Land Record as Court Commissioner will assist the Court in resolving the real controversy between the parties, then it cannot be said that discretion has been exercised unreasonably or contrary to the parameters prescribed under section 75(b) or Order 26 Rule 9 of CPC.

8. For the aforesaid reasons, this is not a fit case in exercise of supervisory jurisdiction under Article 227 of the Constitution which even otherwise is required to be exercised only sparingly when it is demonstrated that the learned trial Judge has exceeded the jurisdiction or failed to exercise the jurisdiction. Since there is

no jurisdictional error in making of the impugned order, it can not be said that the discretion has been exercised unreasonably. Hence, no case is made out.

9. For the aforesaid reasons, this Petition is dismissed.

10. The interim order granted earlier is vacated.

11. There shall be no order as to costs.

12. All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)