

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6555 OF 2020

Kamalbai Shrikrushna Kolangade

... Petitioner
(Orig. Plaintiff)

Versus

Ashokkumar Badrinarayan Bharadiya

... Respondent
(Orig. Defendant)

....

Mr. M. V. Salunke, Advocate h/f Mr. V. D. Salunke, Advocate for the
petitioner

Mr. R. R. Mantri, Advocate for the respondent

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 29th JANUARY, 2021

PRONOUNCED ON : 03rd FEBRUARY, 2021

PER COURT :-

. Heard.

2. The challenge in this writ petition is to the order dated 25.08.2020 passed by the 4th Joint Civil Judge, Junior Division, Beed, below Exh.48 in the suit being Regular Civil Suit No.293 of 2016. By the impugned order, the application preferred by the petitioner-plaintiff for appointment of a Court Commissioner has been rejected.

3. The petitioner-plaintiff filed the suit (R.C.S. No.293 of 2016) for declaration of her title to the land described in paragraph 1 of the plaint. A consequential relief of perpetual injunction, restraining the defendant from obstructing her possession over the suit land has also been asked for. It has been specifically averred in the plaint that the respondent-defendant did not have right, title and interest over the suit land. It has been averred in paragraph 6 of the application Exh.48 (moved for appointment of Court Commissioner) that the property of the respondent-defendant is separate in Survey No.46. He is mixing with the suit properties, etc.

4. The respondent-defendant disputed the contentions made in the application for appointment of a Court Commissioner. It was his contention that the application was filed to delay the hearing of the suit, which is for removal of encroachment.

5. The trial Court rejected the application on the ground that the suit is for declaration of ownership and perpetual injunction. The burden of proof is on the plaintiff to prove her title and possession. There is no prayer for removal of encroachment and fixation of boundaries. There is no contention regarding boundary dispute. A measurement map has already been filed along with the

plaint. Court Commissioner cannot be appointed to find out who is in possession of the disputed property, etc.

6. Shri R. R. Mantri, learned Advocate for the respondent-defendant would submit that Second Appeal No.44 of 1993 was disposed of in view of the terms of compromise. Later on, it was found that the Court was misled, therefore, application for review of the compromise decree passed in the Second Appeal, was moved. The same has been allowed. According to the learned Advocate, Court Commissioner cannot be appointed for collection of evidence. The suit is not for removal of encroachment. Recording of evidence in the case has not been commenced. Learned Advocate relied on the following authorities of this Court.

(i) Ramkrishna Santu Kakad vs. Reojee Sahadu Kakad and another – Writ Petition No.2749 of 2012.

(ii) Chandrakant Kashinath Dike and others vs. Satyabhama Vishwanath Dike and another – Writ Petition No.8877 of 2013.

7. Section 75 of the Code of Civil Procedure empowers the Court to issue commission to make a local investigation. It is a discretionary power. True, discretion has to be exercised judiciously.

Each case has to be decided on its peculiar facts and circumstances. There can be no dispute over the proposition that Court Commissioner cannot be appointed for collection of evidence. Court Commissioner cannot also be directed to report as to who is in possession of property in suit.

8. It is a suit for declaration of plaintiff's title to the suit land, with a relief of perpetual injunction. According to the petitioner-plaintiff, respondent-defendant has his land in Survey No.46, whereas the petitioner-plaintiff's land is in Survey No.47. The respondent-defendant disputes boundaries of the respective land. In the case of ***Haryana Waqf Board vs. Shanti Sarup & Ors – 2008 DGLS (SC) 934***, the Apex Court remanded the matter to the High Court. The facts of the said case indicate that it was a suit for declaration and injunction. The facts in the present case indicate it to be a dispute relating to boundary of each other's land. The Apex Court in the case of ***Haryana Waqf Board (supra)*** has observed thus:

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Therefore, it cannot be in dispute that the dispute was in respect of the encroachment of the suit land. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for

the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 of the CPC. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per paragraph 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial court was wrongly rejected. It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the fact of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.

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9. The lands of the petitioner-plaintiff and the respondent-defendant are adjacent to each other. The respondent is alleged to have been claiming his land to be in the survey number owned and possessed by the petitioner-plaintiff. As such, it is a dispute relating to a boundary. Although there is no prayer for removal of encroachment, the petitioner-plaintiff has claimed for relief of declaration of her title to the suit land. To elucidate the matter in controversy, the trial Court ought to have allowed the application.

10. The Commissioner - a Surveyor, would visit the site, measure the land, demarcate the boundary and report the same, since it is necessary to demarcate the intervening boundary of the lands of the petitioner and respondent so as to decide the matter in controversy, application for appointment of Court Commissioner is required to be allowed.

11. The writ petition, therefore, succeeds. The impugned order dated 25.08.2020 passed by the 4th Joint Civil Judge, Junior Division, Beed below Exh.48 in Regular Civil Suit No.293 of 2016, is set aside. The application Exh.48 is allowed. The petitioner-plaintiff to pay the necessary charges of the measurement.

12. The writ petition is accordingly disposed of.

[R. G. AVACHAT, J.]

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