

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.7937 OF 2021**

Ramesh Shivajirao Sutar & Ors. .. Petitioners

Versus

Vitthal Ramchandra Potdar and Ors. .. Respondents

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Mr.Narendra V. Bandiwadekar with Mr.Vinayak R. Kumbhar  
i/b Ms.Ashwini Navjyot Bandiwadekar for the Petitioner.

Mr.Utkarsh Desai i/b Mr.Prashant Bhavake for the  
Respondent.

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**CORAM: BHARATI DANGRE, J.  
DATED : 02<sup>nd</sup> DECEMBER, 2021**

**P.C:-**

1. The petitioners, who are the original defendants in the suit instituted by the plaintiffs, are aggrieved by an order passed by the Principal District Judge, Kolhapur dated 30/09/2021 below Exh.86 in Misc.Civil Application No.108 of 2013.

2. Heard learned counsel Mr.Bandiwadekar for the petitioners and learned counsel Mr.Naik for the respondents.

3. In order to appreciate the arguments assailing the impugned order, I must necessarily refer back to the proceedings between the parties.

4. The respondents/original plaintiffs filed Regular Civil Suit No.1 of 1998 for perpetual injunction. On 28/09/2012, the suit was dismissed by recording that the plaintiffs have failed to prove ownership and possession over the suit property. Being aggrieved, Civil Appeal No.458 of 2012 was filed alongwith an application for grant of temporary injunction. On 20/02/2013, the Appellate Court directed the parties to maintain the status-quo and specifically directed that till the final decision of the appeal, the defendants shall not create any third party interest in the subject property or shall in no way deal with the suit property. Pending the said Appeal, the plaintiffs filed an application under Order 39 Rule 11 read with Sections 94 and 151 of the C.P.C., alleging that there was a breach of order dated 20/02/2013 and they should be restrained from taking any further steps in continuation of their action. Another application was again taken out on 20/06/2013, seeking a similar relief. On 03/05/2014, learned Ad hoc District Judge 3, Kolhapur, rejected the said application with the following observations :

“Heard both the sides. Perused the record. It is found that as per the order below exh.7 in this appeal the defendants are restrained from causing the obstruction into the peaceful possession of the plaintiffs over the suit property. Here, by filing the application though the Plaintiffs have claimed that there is disobedience of order of the court by the defendants, the plaintiffs are required to bring the strict proof in support of their say. The plaintiffs are required to bring the supporting evidence in support of their claim. Here in the present matter no such evidence is brought to show the breach of the order committed by the defendants and so, in such circumstances it cannot be held that there is breach of injunction by the defendants and defendants are disobedient. And so on this count, the plaintiffs are not entitled for their claim of police aid. So, the application of the plaintiffs is required to be rejected.”

5. Admittedly this order was not subjected to challenge. Pertinent to note that immediately thereafter, the Appellate Court allowed the Appeal on 16/09/2014 and the impugned judgment and decree passed by the learned Civil Judge, Junior Division, Ratnagiri was set aside. Necessarily, the suit came to be decreed and the defendants were perpetually restrained from causing any sort of objection and interference in the peaceful possession of the plaintiffs over the suit property. It is to be noted that the said decision being ex-parte, the present petitioners filed Second Appeal before this Court, which was withdrawn on 04/02/2015, with liberty to approach the District Court for setting aside the ex-parte judgment passed in Appeal. In spite of an application being preferred for setting aside the ex-parte order, the Appellate Court maintained its order and rejected the application on 31/01/2017. Against this order, an Appeal From Order has been preferred in this Court, being Appeal From Order No.408 of 2017, which is admitted on 03/02/2020 and the hearing of the same is expedited.

6. From the aforesaid narration it can be seen that since the initiation of the proceedings at the instance of the plaintiffs/respondents and its culmination in the Appeal From Order, which is pending, the original plaintiffs/respondents herein took out the application on 26/08/2021 in the Misc.Civil Application No.108 of 2013 which all the while was kept pending, though the Appellate Court had already allowed the Appeal and by the said application vide Exh.86, the plaintiffs sought appointment of the Court Commissioner by

invoking the provisions of Order 26 Rule 9 and 10 of the C.P.C. alongwith Sections 75 and 151 of the CPC. This application was taken out by alleging that the defendants have encroached upon certain portion despite the order of injunction and have disobeyed the said order and for measurement of the suit property, an appointment of the Court Commissioner is sought. This application was opposed by the petitioners, narrating the sequence of events and stating that such a course is not available.

7. Under the impugned order, the said application is allowed. The learned Judge has reasoned the order based on the decision of this Court in case of Ramzan Sheikh Chand Sheikh (D) thr. L.Rs & Ors. Vs. Panjab s/o Nathuji Gawande<sup>1</sup> in support of the argument that it is always desirable to have disputed property measured by the competent surveyor to find out encroachment. This clearly ignored the settled position of law that the Court Commissioner cannot be appointed under Order 26 of the CPC to collect the evidence and the parameters of appointment of the Court Commissioner being well settled that the parties should stand on its own pleadings and if he avers/pleads a particular fact, the burden will have to be discharged by him.

8. In the application filed vide Exh.86, the plaintiffs have levelled several allegations and depicted a position as on 2021, though the breach alleged is of the order passed by the Appellate Court on 20/02/2013. The learned Judge failed to

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consider the sequence of events and the fact that the Appeal has been allowed by the Court, necessarily, the interim order has merged into it. Even assuming for a moment that proceedings under Order 39 Rule 1 of the CPC can continue as an independent proceedings, the learned Judge ought to have considered the position of law as regards appointment of the Court Commissioner, which cannot be granted for the sake of mere asking. The Court Commissioner cannot be appointed only for carrying out measurement of the disputed suit property, particularly when the defendants have objected the same. The impugned order, therefore, cannot be sustained and is liable to be quashed and set aside.

9. Since the Misc.Civil Application No.108 of 2013 is pending on the file of the learned District Judge for the considerable length of time, steps shall be taken to conclude the hearing of the said application within a period of eight (8) weeks from today.

In the light of the aforesaid discussion, the writ petition is allowed.

**[ SMT. BHARATI DANGRE, J ]**