

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3564 OF 2015

SHIVKUMAR VENKATI MAHAJAN AND ANOTHER
VERSUS
BABURAO HANMANTRAO DEVADWAR AND OTHERS

Mr.R.R.Kazi h/f Mr.PR.Katneshwarkar, Advocate for the petitioners.
Mr.A.A.Mukhedkar, Advocate for respondent Nos. 1 and 2.

(CORAM : BHARATI H. DANGRE, J.)

DATE : JANUARY 12, 2022

PER COURT :

1. Heard the learned counsel for the petitioner and the learned counsel for the respondent.
2. The petitioner is the original plaintiff, who has instituted RCS No.18/2012, seeking a declaration and injunction in respect of the property described in paragraph No.1 of the plaint, being described as land in S.No.179/2 admeasuring 42 R of village Mukhed, Dist.Nanded to the extent of eastern 27.50R portion of land with the boundaries as mentioned in the claim clause of the plaint and shown in the map attached with the palint. The plaintiff also averred in paragraph No.1

that the said map may be treated as part and parcel of the plaint and the said property is referred to as "suit property".

The plaintiff sought declaration that the owners and possessors of the said suit property and a perpetual injunction restraining the defendants, their persons and family members from interfering with the peaceful possession and enjoyment of the plaintiffs over the suit property, was also claimed.

3. The plaintiff filed an application vide Exh.5. The defendant Nos. 1 and 2 appeared in the suit, filed their written statement and contested the claim of the plaintiff.

During the pendency of the application filed vide Exh.5, defendant Nos. 1 and 2 filed an application vide Exh.48 by invoking Order XXVI Rules 9 and 10 of the CPC, making a prayer for appointment of the District Inspector of Land Records as Court Commissioner to measure the land Survey Nos.179/2 and 181/A.

Keeping the said application pending, the hearing of Exh.5 filed by the plaintiff was deferred till the hearing of Exh.48, by an order passed on 31/07/2012 by recording as under :- "The application below Exh.48, admittedly, has to be decided, but the same could be

decided after the verdict of the application below Exh.5". In paragraph No.9, the learned Judge has recorded as under :-

"9. In view of aforesaid factual matrix, considering the preliminary stage of this suit and the present stage of the application below Exh.5, keeping reserve the hearing of the application below Exh.48, I am of the opinion that, it would be justifiable to proceed with the T.I. application and decide the same. After its verdict the said application below Exh.48, shall be taken into consideration. Hence the order."

This order postponing the hearing of Exh.48 was challenged by the defendant in WP No.6970/2012 before the High Court, which was withdrawn on 23/08/2012. Though the parties are not sure about the date when Exh.48 came to be rejected, but there is no dispute about the fact that Exh.48 filed by the defendant seeking appointment of Court Commissioner was rejected.

4. Exh.5 being pending for consideration, the learned Judge suo-motu passed an order for appointment of Court commissioner on 07/12/2012, which reads as under :-

"Both the parties are directed to maintain status-quo upon their properties and to preserve the same."

5. The petitioner/the plaintiff filed an application vide Exh.62 for setting aside the order dated 07/12/2012 w. It was an exercise undertaken by the Court suo-motu and this application came to be rejected by the impugned order passed on 19/01/2015 by the learned Judge, which is assailed by the petitioner in the present writ petition. The petitioner has also assailed the original order dated 07/12/2012, which was challenged before the very same Court by preferring an application below Exh.62.

6. Heard the learned counsel for the petitioners and the learned counsel for the respondents. Perusal of the plaint as well as the written statement filed by the respective parties would reveal that the plaintiff specifically seek a declaration to be the owners and possessors of land Survey No.179/2 of village Mukhed, Dist.Nanded and the description of the land alongwith the boundaries is set out in the plaint. The defendant No.1 in their written statement specifically pleaded that the plaintiffs have got their land Survey No.179/2 measured on 30/05/2008 and defendant No.2 also measured his land Survey No.181/A on 17/02/2006 and there are 2 reports from the TILR Office, Mukhed on record, one prepared after measurement of the land of the

plaintiff on an application filed by the plaintiff seeking measurement of their land and another prepared after measurement of the land of defendant No.2 on application filed by defendant No.2. The defendants, in their written statement, has specifically pleaded that the defendant No.2 had purchased the land Survey No.181 admeasuring 6 Hectre 81R to the extent of 5 acres situated at village Mukhed and through the registered sale deed for a valuable consideration. He has also set out the boundaries of Survey No.181 and specifically pleaded that the land of the plaintiff vide Survey No.179/2 is not upto Shirur-Tajband Road towards Northern side. In the wake of this specific pleading, the plaintiff filed an application vide Exh.5 under Order XXXIX Rule 1 and 2 praying for injunction, on 24/09/2010.

The parties jointly submit that the said application is still pending and not decided.

7. After rejecting the application filed for appointment of Court Commissioner, by an order, though the order is not on record, but since it is not disputed by the respective parties that the said application was rejected, the learned Judge suo-motu passed an order on 07/12/2012, in which he record that, "On perusal of the pleadings of both parties

and that of the documents put forth by them, it is not possible to ascertain the boundaries of both the lands put forth by both the parties. and the maps put forth by the parties to unfold their boundaries are appearing to be vague towards each other and for effective adjudication of the application Exh.5, it would be justifiable to appoint one Commissioner for local investigation of the subject properties of the plaintiff and the defendant, and to submit the report to the Court." It is pertinent to note that it is a settled position of Law that the parties have to stand on their own footing and adduce evidence in support of their respective pleas. The plaintiff/petitioner in the present case claimed the declaration of ownership and being in possession of the lands specifically set out by him in the first paragraph of the plaint and described by the map appended thereto with an averment that the said map should be treated as a part and parcel of the plaint. The defendant also set out his defence by specifically referring to the piece of land owned by him and by pointing out the boundaries of the land of which he is owner and in possession thereof. Merely on the ground of vagueness of the map, the learned Judge was not right in making an appointment of the Court Commissioner to find out the boundaries of the properties belonging to the parties, since it is a settled position of

Law that, the Court Commissioner cannot be introduced in the proceedings for bringing evidence on record, in absence of the parties pleading their respective case justifying the relief sought in the plaint. The plaintiff and the defendant are conscious of the respective properties owned and possessed by them and have so pleaded in the plaint and the written statement, the learned Judge despite rejecting the application filed below Exh.48 by the defendants, suo motu deemed it appropriate to appoint the Court Commissioner.

When the application is taken out by the plaintiff for setting aside of the said order dated 07/12/2012 passed by him, the learned Judge record that there is no ground warranting recalling of the said order since he has no power to recall the same by invoking Section 151 of the CPC. In the result, the application filed by the plaintiff, seeking recalling of the order, is set aside.

Since in the present writ petition, not only the order passed by the learned Judge on 19/01/2015 is questioned, but even the original order passed by the learned Civil Judge, Jr.Division on 07/12/2012, exercising suo-motu power to appoint the Court Commissioner, despite rejection of the application vide Exh.48 is a subject matter.

The learned Judge has adopted an unusual course of action, of appointing the Court Commissioner, in utter violation of the principle underline the appointment of Court Commissioner under Order XXVI Rule 9 of the CPC. Surprisingly, he has not yet decided the application below Exh.5 on the pretext that unless and until the report of the Court Commissioner is obtained, he is not in a position to determine the application for temporary injunction. On top of it, the proceedings are stayed by this Court from 08/04/2015, necessarily as on date, Exh.5 filed by the plaintiff in the suit instituted by him in the year 2012 is still remain undecided. In the aforesaid facts, since the exercise of power by the learned Judge in passing the impugned order initially on 07/12/2012 and then rejected the application filed by the petitioner vide Exh.62 on 19/01/2015 are liable to be quashed and set aside. The writ petition, therefore, stand allowed to that extent. However, since the learned Judge has refrained himself from determining Exh.5 filed by the plaintiff, he is directed to take up the said application forthwith for hearing and decide the same within the period of 3 months from today.

With the aforesaid directions, writ petition is disposed off.

(BHARATI H. DANGRE, J.)