

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7594 OF 2020

Govardhan s/o. Narayan Gaikwad,
Age: 65 years, Occupation : Agri.,
R/o.: Gut No. 29, Near Aggresen High School,
Itkheda, Taluka Aurangabad,
District Aurangabad. .. Petitioner

Versus

M/s. Sai Baba Estates
through its Partner
Arif Khan s/o. Samad Khan
Age : Major, Occupation : Business,
R/o. : Near Samarth Kirana Store,
Bhoiwada, Kotwalpura,
Taluka and District Aurangabad .. Respondent

...
Mr. D. P. Palodkar, Advocate for Petitioner
Mr. M. G. Mustafa, Advocate for Respondent
...

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 04-02-2022

PRONOUNCED ON : 21-02-2022

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the parties.

2. The petitioner is aggrieved by the Order passed by the learned 9th Joint Civil Judge, Senior Division, Aurangabad, below application Exhibit-16 dated 28.02.2020 in Regular Civil Suit

No. 886 of 2018, thereby allowing the application filed by the respondent-plaintiff for appointment of Taluka Inspector of Land Records as a Court Commissioner.

3. The respondent - original plaintiff filed the suit for permanent injunction against the petitioner-defendant in respect of land Gat No. 29 admeasuring 3 Hector 14 R, to the extent of 4.5 R situated at village Itkheda, Taluka and District Aurangabad, bounded by -

Towards East : Remaining land of Gat No. 28
Towards West : Remaining land of Gat No. 29
Towards South : Remaining land of Gat No. 29
Towards North : Land of Gat No. 47

. The petitioner - original defendant resisted the suit contending that the boundaries are wrong and the suit property is not in existence. He also denied the measurement carried out by the respondent-plaintiff on 14.08.2018 through cadastral surveyor.

. The respondent - plaintiff, thereafter, filed application Exhibit-16, under Order XXVI, Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (here-in-after, 'the CPC'), for appointment of T.I.L.R. as a Court Commissioner for measurement of the suit land. The petitioner - defendant resisted the said application. The trial Court has allowed the application. Hence, the present petition.

4. Heard the learned Advocate for the petitioner and the learned Advocate for the respondent.

5. The learned Advocate for the petitioner assailed the impugned order contending that the application is filed at a premature stage and the trial Court has erred in allowing the same. According to him, the burden is on the plaintiff to prove *prima facie* case and then if necessary, the Commissioner can be appointed.

. By relying on the decisions –

- (i) *Gangaram Baban Tagad and others Versus Sarubai Yashwant Tagad and others (Writ Petition No. 6700 of 2011),*
- (ii) *Chandrakant Kashinath Dike and others Versus Smt. Satabhama Vishwanath Dike and another, (Writ Petition No. 8877 of 2013),*
- (iii) *Dnyandeo Vithal Salke and others Versus Dagadu Kadar Inamdar (2017 (3) Mh.L.J. 314),*
- (iv) *Sanjay Kisan Thorat and others Versus Ramchandra Parsu Thorat and another, (2018 (2) Mh.L.J. 954),*
- (v) *Arjun Rambhau Dhankude and another Versus Bhanudas Ramchandra Murkute and others, [(2020) 2 Mah L. J. 145],*
- (vi) *Dhondiba s/o. Bapu Zaware Versus Santosh s/o. Paraji Zawere and others (Writ Petition No. 4756 of 2014),*
- (vii) *Ramkrishna Santu Kakad Versus Reojee Sahadu Kakad and another (Writ Petition No. 2749 of 2012).*

He submitted that the impugned order is unsustainable and same may be quashed and set-aside.

6. Per contra, the learned Advocate for the respondent supported the impugned order by relying on decisions -

- (i) *Raghunath Kashinath Chavan Versus Sakharam Maroti Chavan (Second Appeal No. 562 of 2005 [Aurangabad])*,
- (ii) *Shri Saunsthan Gokarn Partagal Jivottam Mutt Versus Shri Narayan Raghunath Dessi and others (2019 (2) All MR 588)*.

7. It is not disputed that the respondent - plaintiff has given description of the suit property along with the boundaries in the plaint. The petitioner-defendant has disputed the boundaries and denied the very existence of the suit property. The measurement carried out by the respondent - plaintiff through cadastral surveyor on 14.08.2018 is also denied by the petitioner - defendant. The application Exhibit-5 filed by the respondent - plaintiff for temporary injunction is already rejected by the trial Court. It appears that many litigations including criminal complaint are going on between the plaintiff and the defendant. The trial Court has recorded a finding that for deciding the suit on merit, it is necessary to carry out measurement of the suit property along with other properties to trace out exact location of the suit property. By appointing Court Commissioner, no prejudice is likely to be caused to the defendant.

8. In ***Kashinath Ramkrishna Chopade Versus Purushottam Tekade and others***, 2005(6) Bom.C.R., 267, it is observed that,

"It is clear that under Order XXVI Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local inspection or not. The object of the local inspection is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary disputes and disputes about the identify of lands are instances when a Court should order a local investigation under Order XXVI Rule 9 of CPC."

. In ***Sulemankhan and others Versus Bhagirathibai and others***, 2014(4) Mh.L.J. 250, it is observed that

"This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit, in which there is a boundary dispute. The Trial Court as well as First Appellate Court, which are Court of facts, are duty bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute if finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map."

. In *Shri Saunsthan Gokarn Partagal Jivottam Mutt (supra)*, this Court held ;

"When there is dispute as to identification of property in suit for injunction, it would be appropriate to take assistance of survey authorities who are based equipped in matter."

. The above ratio supports the case of respondent.

9. In *Gangaram Baban Tagad (supra)* relied by the petitioner, this Court (Coram: S. V. Gangapurwala, J.) considering the fact that Exhibit-5 temporary injunction application since was not decided held that,

".. .. if after the evidence is recorded and the court finds it necessary to appoint commissioner for proper disposal of the case, the Court at that stage can consider the application for appointment of Court Commissioner. "

. In the case in hand, application Exhibit-5 is already decided and the trial Court, considering the pleadings of the parties, was of the view that to identify the suit property, the existence of which is denied by the defendant, it is necessary to appoint Court Commissioner. Similar view is taken in the other citations relied on by the petitioner.

10. In the light of the above, this Court is of the view that in the facts of the present case, the trial Court has rightly exercised discretion in favour of the plaintiff and allowed the application Exhibit-16. There is no illegality, perversity or jurisdictional error in the impugned order.

11. Writ petition being devoid of merit, is dismissed.

12. Rule is discharged. No costs.

(NITIN B. SURYAWANSHI)
JUDGE

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