IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9224 OF 2022

Dinanath Supdu Joshi
Died through his Legal Heirs
Sharda Wd/o Dinanath Joshi,
Age : 80 Years, Occu. : Household,
R/o Plot No. 23, Sharda Shantinagar,
Janta Raja Chowk, Nandurbar,
Tq. & Dist. Nandurbar. .. Petitioner

Versus

1. Shriram S/o Shrikrushna Dautkhane,
Age : 45 Years, Occu. : Service,
R/o Maniknagar, Behind LIC Office,
Nandurbar, Tq. & Dist. Nandurbar.

2. Nandurbar Municipal Council,
Through its Chief Officer,
Nandurbar Municipal Council Office,
Tq. & Dist. Nandurbar. .. Respondents

Shri D. A. Mane, Advocate h/f Shri Durgesh M. Pingale,
Advocate for the Petitioner.
Shri Ruchir S. Wani, Advocate for the Respondent No. 1.

CORAM : SANDEEP V. MARNE, J.
DATE : 07TH DECEMBER, 2022.

ORAL JUDGMENT :

. Rule. Rule is made returnable forthwith. With the consent of parties taken up for final hearing.

2. By this petition, petitioner challenges order dated 12th August, 2022 passed by the 02nd Joint Civil Judge Senior Division, Nandurbar allowing application of the defendant No. 1/ respondent No. 1 for appointment of Court Commissioner for

measurement of plot Nos. 23 and 24 at Survey No. 284, Shanti Nagar, Nandurbar. Application was moved by the defendant No. 1 in the suit filed by the plaintiff/petitioner. The suit is filed by plaintiff seeking injunction against the defendant No. 1 from encroaching upon common road in the colony and for removal of unauthorized construction. Municipal Council is also arrayed as defendant No. 2 to the suit. The defendant No. 1 has filed counter claim alleging encroachment by plaintiff and a prayer is made for measurement of Plot Nos. 23 and 24 and for removal of encroachment allegedly committed by plaintiff. An additional prayer is made for construction of road by defendant No. 2 between plot Nos. 23 and 24. Plaintiff has filed application for temporary injunction to restrain defendant No. 1 from encroaching upon the common road, which is pending. Defendant No. 1 has not filed application in his counter claim seeking any temporary injunction against the plaintiff.

3. During the pendency of application for temporary injunction filed by plaintiff, defendant No. 1 filed application dated 03rd March, 2021 for appointment of Court Commissioner for measurement of plot Nos. 23 and 24 alleging that plaintiff has committed encroachment upon the road and that by ignoring encroachment committed by the plaintiff, the Municipal Council has attempted to construct a road in plot No. 24 belonging to the defendant No. 1. Application was resisted by the plaintiff. By order dated 12th August, 2022, the application has been allowed directing the Deputy Superintendent of Land Records, Nandurbar to measure Plot Nos. 23 and 24 and to fix boundary marks and to verify whether there is any encroachment over 30 feet road. The Deputy Superintendent of Land Records has also

been granted liberty to carry out measurement of entire Survey No. 284 to determine exact encroachment in respect of Plot Nos. 23 and 24. Plaintiff has challenged the order dated 12.08.2022 in the present petition.

4. I have heard learned counsels appearing for the parties and have perused records of the case.

5. In the present case, application for appointment of Court Commissioner for measurement of land has been filed by the defendant No. 1 during pendency of application for temporary injunction filed by Plaintiff. Mr. Wani, the learned counsel appearing for the defendant No. 1/Petitioner strenuously submits that the report of the Court Commissioner would bring on record the real picture on the site about the encroachment, if any, committed by both the parties and the same would assist the Court in deciding application for temporary injunction.

6. In support of his contention Mr. Wani has relied upon following judgments :

I Kishore H. Desai Vs. Lilawati Virji Chheda and others reported in 1993 Mh.L.J. 1155.

II. Balkrishna Gangabishaji Zawar Vs. Azmat Khan Suban Khan dated 27.09.2016 in Writ Petition No. 8608 of 2012.

III. Lalitprabha Krishnaji Ajgaonkar Vs. Yunus Khan reported in (2017) 1 Bom CR 179.

IV. Kalyan Santram Kawade and others Vs. Khanderao @ Khandu Ganpati Kawade reported in 2015(4) Mh.L.J. 429.

V. Dattatray Namdev Kalake Vs. Bapu Bhairu Bhivungade

and others reported in 2015(1) Mh.L.J. 892.

7. Per contra, Mr. Mane learned counsel appearing or the petitioner on the other hand submits that attempt on the part of the defendant No. 1 to measure the land at this stage amounts to collection of evidence. He would contend that Court Commissioner cannot be appointed for collection of evidence.

8. The issue about the stage at which Court Commissioner can be appointed for measurement of land under the provisions of Section 75 r/w Order 26 Rule 9 of the Code of Civil Procedure, 1908 has been dealt with by this Court in the case of **Shantaram Dattatray Kekan and others Vs. Bhausaheb Karbhari Kekan and another** vide judgment dated 05.12.2022 in Writ Petition No. 14046 of 2021. After analyzing divergent views taken in various judgments of this Court, it is held as under :

> 8. **After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fact Rule that Court Commissioner can be appointed only at a particular stage.** This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. **However, common thread that runs through all the above decisions is as regards the principle that a Court Commissioner can never be appointed in order to enable parties to collect evidence.** It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be

> circumscribed. It all depends upon facts and circumstances of each case.
>
> *(emphasis supplied)*

9. Thus, it is clear that there is no specific stage at which the Court can direct appointment of Court Commissioner for measurement of land.

10. In the present case, the defendant No. 1 wants the plots to be measured for the purpose of disproving that he has not encroached upon the road. Perusal of the application filed by the defendant No. 1 seeking appointment of Court Commissioner would indicate the real intention is to establish alleged encroachment on the road by plaintiff. It thus appears that the defendant wants to collect evidence to establish encroachment by plaintiff in support of his counterclaim. As held in **Shantaram Dattatray Kekan** (supra) court commissioner cannot be appointed to enable a party to collect evidence.

11. As of now, the Trial Court is seized with the application for temporary injunction filed by the plaintiff. That application will have to be decided on the basis of averments made by plaintiff and the entire burden of proving that the defendant No. 1 has committed encroachment on the common road rests squarely on the shoulders of plaintiff. In the event of plaintiff failing to discharge the burden, the application for temporary injunction would be liable to be rejected. In such a scenario, it is quite perplexing as to why the defendant No. 1 wants to jump in and have the plots measured for the purpose of disproving any encroachment by him over the common road.

12. True it is that in some of the judgments relied upon by Mr. Wani, Court Commissioner has been appointed at the stage of deciding application for temporary injunction as well. However, such appointment has not been made at the instance of a defendant. In the present case though defendant is stepping into the shoes of plaintiff *qua* his counterclaim, as observed earlier, he has not filed his own application for temporary injunction. Thus what defendant is really desiring is evidence of alleged encroachment by Plaintiff being brought on record to buttress his counterclaim. This, I am afraid, cannot be done both at the stage of pendency of application for temporary injunction of plaintiff as well as for assisting defendant to collect evidence in support of counterclaim.

13. In my view, therefore, the demand of the defendant No. 1 to appoint Court Commissioner for measurement of the plots at the stage of decision on application for temporary injunction was unwarranted. The Trial Court ought to have rejected the application.

14. Also of relevance is the fact that the plots in question form part of layout sanctioned by the defendant No. 2/Municipal Council, Nandurbar. Apparently, construction is carried out in pursuance of development permission granted by the Municipal Council. It is primary responsibility of the respondent No. 2/Municipal Council to take action in respect of any unauthorized construction in such a sanctioned layout. The Municipal Council possesses is empowered to determine existence of encroachment as well as unauthorized constructions. So far the Municipal Council has not issued any notices to either of the parties

alleging encroachment or unauthorized construction. This is yet another reason why appointment of Court Commissioner for measurement of the plots, atleast at this stage, was unwarranted.

15. Accordingly the petition succeeds. Order dated 12.08.2022 passed by the 02nd Joint Civil Judge Senior Division, Nandurbar on application Exhibit 45 in R.C.S. No. 86 of 2018 is set aside. This would not preclude either of the parties from applying for appointment of Court Commissioner for measurement of the property after elucidating their case by adducing their respective evidence. This order shall also not preclude the Court to direct appointment of Court Commissioner at any stage if the Court is satisfied that appointment of Court Commissioner is warranted to clear any doubt in its mind. The Trial Court shall decide application(s) if filed by parties on its own merits without being influenced by any of the observations made in the present order. The writ petition is accordingly allowed.

16. Rule is made absolute in above terms. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]

bsb/Dec. 22