

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9456 OF 2021

Babasaheb @ Shrikrishna Shankarrao Patil ..Petitioner

Versus

Madhukar Ramchandra Patil ..Respondent

Mr. Kuldeep U. Nikam, for the Petitioner.

Mr. Sandesh Patil i/by Chintan Y. Shah, for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : 29th MARCH, 2022

PC.

1. Heard.

2. This petition is by the defendant to the Special Civil Suit No.255 of 2018 for removal of encroachment.

3. Application Exh.29 for appointment of Court Commissioner taken out by the respondent/plaintiff came to be allowed vide order impugned dated 11th October, 2021.

4. Submissions of counsel for the petitioner are, the Court has exceeded its jurisdiction in calling report from the Court Commissioner to the extent of clauses (3) and (4) of the order impugned, which reads thus :-

“3. The Court Commissioner is directed that after getting the total area of Survey No.511 on measurement, he shall draw and show the middle line of $\frac{1}{2}$ portion each by dividing the land North & South as shown by allotting Gat No.511/1 & 511/2.

4. The Court Commissioner is directed to designate the portion of encroachment, if found on any of two part or portion North and South beyond the middle line.”

5. Counsel as such submits that order impugned is nothing less than attempt on the part of the respondent/plaintiff to collect evidence. He would further urge that the order impugned i.e. aforesaid clauses is almost amount to decreeing claim based on the Commissioner’s report. He would further urge that the said clauses adversely impact his defence as according to him, he was compensated for having been received infertile land by allocating more portion.

6. In response, Mr. Sandesh Patil appearing for the respondent/plaintiff supports the order impugned. According to him, the order impugned is already acted upon as the report is produced by the Court Commissioner on record of the Court. As such, he has sought dismissal.

7. Having appreciated the submissions, what can be noticed is the Court below at this stage ought not to have gone to the extent of ordering Court Commissioner to demarcate the

properties by equally dividing the same.

8. The said issue, in my opinion, is subject matter of the suit, which can be decided on merits after appreciating evidence of the rival parties.

9. Be that as it may, of course, Mr. Sandesh Patil appearing for the respondent/plaintiff was justified in claiming that even report of the Court Commissioner is subject to scrutiny, as the petitioner will have an opportunity to demolish the said report of the Court Commissioner. Keeping right of the petitioner in tact to that extent, if required, by examining additional witnesses on the said issue.

10. I do not see any reason, which warrants interference in the order impugned.

11. The petition as such stands dismissed.

[NITIN W. SAMBRE, J.]