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

WRIT PETITION 3982 OF 2018

1. Gurappa Tamanna Ghejji & 4 Others. ... Petitioners.

Versus

1. Bapu Appanna Nagrale 6 Others. ... Respondents.

Mr. Ramdas A. Shelke, Advocate for the Petitioners.

Mr. Umesh R. Mankapure, Advocate for Respondents 1 to 5.

CORAM : ROHIT B. DEO, J.

DATE : JULY 19, 2022

(Order Reserved on : 13.06.2022)

(Order Pronounced on : 19.07.2022)

P.C. :-

1. This petition is directed against the order dated 13.03.2018 rendered by the learned Civil Judge, Junior Division, Jath (learned trial Judge) below exhibit 116 in Regular Civil Suit 31 of 2010; whereby the application preferred by defendants 1 to 5 for appointment of court commissioner to measure land, Gat 904, Gat 944 and Gat 945, is allowed.

2. The petitioners are the plaintiffs, who have instituted

Regular Civil Suit 31 of 2010, seeking decree of perpetual injunction, restraining respondents-defendants from interfering with the possession of the petitioners qua the suit property which is described as land assigned Gat 944, admeasuring 250 HR and land assigned Gat 945, admeasuring 6.38 HR, situated at Mouge Billur, Taluka Jath, District Solapur.

3. The respondents-defendants have filed their written statement and lodged counter claim, seeking recovery of possession of area admeasuring 00.10.50 R which according to the respondents-defendants is portion of land assigned Gat 904 which is in illegal occupation of the plaintiffs.

4. In the interest of clarity and convenience, the petitioners shall be referred to as 'plaintiffs' and respondents shall be referred to as 'defendants'.

5. Plaintiffs claim to be the joint owners of land, assigned Gat 944 and 945, which is an ancestral property. According to the plaintiffs to the East side of their land is situated the

land owned by defendant 1, which is assigned Gat 901 and 904. Defendants 2 to 4 are the sons of defendant 1. The plaintiffs aver that the defendants are attempting to interfere with the possession of the plaintiffs qua the land, assigned Gat 944 and 945. The plaintiffs aver that in the presence of prominent and respectable persons, it was agreed that land, assigned Gat 901 and 904 belonging to the defendant 1, shall be got measured. It is then averred that while the measurement work is pending, no notice is issued to the plaintiffs. This is broadly the case of the plaintiffs, on the basis of which the decree for perpetual injunction is sought.

6. Defendants have filed written statement, denying each and every allegations in the plaint. According to the defendants it is the plaintiffs who have encroached upon the portion of the land, assigned Gat 904. The defendants stated that in the year 2009, the defendants deposited the requisite charges for the measurement of Gat 904 and the measurement was conducted vide measurement register number 876 of 2009. According to the defendants, the

measurement clearly reveals the encroachment committed by the plaintiffs. The defendants contended that on the basis of the measurement, the plaintiffs were asked to deliver the possession of the encroached portion, which request the plaintiffs declined.

7. It is discernible from record that the plaintiffs too, preferred an application under Order 26 Rule 9, seeking appointment of court commissioner to measure the suit property. However, vide order dated 04.02.2015, the learned trial Judge was pleased to reject the application for appointment of court commissioner on the ground that the suit is for injunction simpliciter and that the plaintiffs are required to prove their possession and cannot seek appointment of court commissioner for local inspection. The trial Judge relied on the decision in **Smt. Nalubai Narayan Shinde & Ors. Vs. Gopinath Dagdu Shinde** - [2011 (1) ALL MR 608].

8. The defendants then preferred a similar application under the provisions of Order 26 Rule 9. In the context of

the controversy, it would be necessary to consider the grounds on which the defendants sought appointment of court commissioner to measure land, assigned Gat 944 and 945 belonging to the plaintiffs and land, assigned Gat 904 belonging to the defendants.

9. The defendants contended that in the measurement, which was conducted in the year 2009-10, it was noticed that the plaintiffs have encroached over portion admeasuring 00.10.50 HR of Gat 904. Defendants further contended that in order to overreach the measurement disclosure, the plaintiffs instituted the suit seeking decree of perpetual injunction. Defendants further contended that after the counter claim was lodged, the plaintiffs preferred an appeal, questioning the measurement in measurement register number 876 of 2009, which was allowed by the Deputy Director, Land Records, Pune on the premise that the measurement was done on the basis of incomplete documents. The defendants contended that in the meanwhile, the evidence in the trial commenced. The defendants contended that after depositing the requisite

charges and submitting complete documents, a request was made for fresh measurement of the land, assigned Gat 904. The fresh measurement was scheduled on 19.05.2017. However, since the plaintiffs obstructed, after recording a panchanama, the cadastral surveyor returned without conducting the measurement. The defendants further contended that the dispute is, in essence, in respect of the boundaries and considering the case in the counter claim that there is an encroachment committed by the plaintiffs, it is necessary to appoint a court commissioner to proceed and complete the measurement.

10. The learned trial Judge has allowed the application preferred by the defendants under Order 26 Rule 9, reasoning that the dispute is regarding the boundaries and encroachments revealed in measurement register number 876 of 2009 and the application preferred by the defendants for re-measurement on the basis of the complete document is pending since the plaintiffs obstructed and prevented the surveyor from completing the measurement. The issue is considered thus by the learned

Judge :

6. According to advocate for defendants, in case of dispute regarding boundaries and area, can be adjudicated by taking assistance of the experts such as T.I.L.R. The present suit is for simplicitor injunction restraining defendants from obstructing possession of plaintiffs. In simplicitor injunction suit, burden to prove possession is on plaintiffs. Therefore, in such a case for local investigation to find possession, Court commission cannot be appointed. But in case of disputes regarding boundaries and encroachment, disputes can be adjudicated by taking assistance of T.I.L.R. Measurement conducted vide measurement Register No. 876/2009 was set aside by District Superintendent of Land Record, Sangli and Additional Commissioner, Pune on Appeal filed by Siddappa Gajapgol and plaintiffs. Therefore, M.. No. 876/2009 is nonest in the eyes of law. On re-commission application of plaintiffs, measurement work of Gat No. 904 is yet not completed. It was adjourned on the obstruction raised by plaintiffs. So, in my opinion, for proper adjudication of boundary and area dispute between both parties, appointment of T.I.L.R. Jath as Court Commissioner is required for measurement of Gat No. 904. Hence, I proceed to pass following order.

ORDER

1. Application is allowed.
2. T.I.L.R. Jath is appointed as Court-Commissioner for measurement of Gat No. 904, 944 and 945 situated at Village- Blur, Taluka-Jath, District-Sangli and directed to submit report along with Map within one month from the date of receipt of commission writ.

3. *Parties to pay commission fee as per rule.*
4. *Defendants to supply relevant documents.*
5. *Issue commission writ accordingly.*

11. Notably, the learned trial Judge has directed the T.I.L.R to measure not only Gat 904 but also Gat 944 and 945 owned by the plaintiffs. This assumes some significance since the plaintiffs themselves had sought appointment of court commissioner in the year 2011 which application was rejected by the learned trial Judge on the ground that the suit is for injunction simpliciter.

12. The first ground raised in the petition is that the oral evidence of the plaintiffs is over and the evidence of the defendants is partly recorded and, therefore, the application for appointment of court commissioner was preferred at an extremely belated stage. The other ground raised in the petition is that the appointment of court commissioner is sought for the purpose of collection of evidence which is not permissible.

The third ground raised in the petition is that the measurement conducted vide measurement register 876

of 2009 was set aside by the appellate authority and the said order had assumed finality.

13. The learned counsel for the plaintiffs Mr. Ramdas A. Shelke has canvassed submissions on the lines of the grounds raised in the petition which are noted supra. He would rely on the decisions in **Arjun Rambhau Dhankude & Anr. Vs. Bhanudas Ramchandra Murkute & Ors.** [2019 (6) ALL MR 180 and in **Shaikh Isak s/o. Shaikh Amir Vs. Stte of Maharashtra & Anr.** [2011 (3) ALL MR 361.

14. The learned counsel for the defendants Mr. Umesh R. Mankapure has pressed in service the decisions in **Meenadevi w/o. Vasdev Vatnani Vs. Narmadabai @ Leelabai w/o. Gopaldas Zanwar** -[2015(6) Mh.L.J. 578, **Hemraj s/o. Gangaram Iname & Ors. Vs. Suryabhan s/o. Bhuiva Dhawas** - [2014(5) Mh.L.J. 60 and **Ushabai w/o Sharadchandra Bannore** - [2004 (2) Mh. L.J. 594.

15. Let me first consider the submission of the learned

counsel for the petitioners/ plaintiffs that the application is preferred at a belated stage and therefore, ought to have been rejected on that ground alone. I have already noted that the measurement was conducted in the year 2009-10 vide measurement register number 876 of 2009 and it was at the behest of the plaintiffs, during the pendency of the suit, that the measurement was set aside in appeal on the premise that the measurement was done on the basis of incomplete and insufficient documents. The defendants applied for fresh measurement after completing necessary formalities and removing the earlier lacuna and, as a fact in the year 2017, the measurer did make an attempt to conduct the measurement afresh and could not complete the measurement since the plaintiffs obstructed. That apart, the power to appoint court commissioner for local inspection is not fettered by the stage of the proceedings. Ultimately, the endeavor of any court should be to ascertain the truth. While no straight jacket formula can be applied, the power under Order 26, Rule 9 can be exercised at any stage of the proceedings and even at the appellate stage, if the condition necessary for exercise of such power exists.

In the present case, the dispute indubitably involves the boundaries and the encroachment. In the absence of report of an expert it may not be possible for the learned trial Judge to ascertain the truth and effectively and completely adjudicate the controversy merely on the basis of the oral evidence.

16. The reliance placed by Mr. Shelke on the decision in Arjun Rambhau Dhankude, supra, is clearly misplaced. What weighed with the learned Judge was that the suit was not for removal of encroachment and recovery of possession and further that the application was preferred after certain admissions were extracted in the cross-examination of the plaintiffs from which the plaintiffs sought to wriggle out.

17. The relevant observations in Arjun Rambhau Dhankude , supra, read thus :

“19. The fact that in the application for appointment of the Court Commissioner (Exh. 100) also, there was no whisper about encroachment at the hands of the defendants could not have been ignored by the learned Civil Judge. As narrated above, a general assertion was made in the said

application that the appointment of the Court Commissioner to measure the suit land would assist the Court in the determination of the controversy on merits. In this view of the matter, it would be rather hazardous to draw an inference that the plaintiffs had instituted the suit for removal of encroachment and recovery of the possession of the portion of the suit land. Thus, the justifiability of the appointment of the Court Commissioner on the premise that there was a dispute about the encroachment over the suit land becomes questionable.

20. At this juncture, the stage at which the application (Exh. 100) was preferred assumes critical significance. The said application was, admittedly, filed after the plaintiff-Bhanudas was cross-examined. In the cross-examination of the plaintiff, it was elicited that the defendants and their predecessor-in-interest have been in occupation of the lands bearing Survey Nos. 70/6 (suit land), 70/7 and 70/8 since prior to the birth of the plaintiff. He further conceded that since the year 1998, a school, namely 'Parvatibai Dhondiba Dhankude Prathamik Vidyalaya' is operated from the land bearing Survey No. 70/6. The plaintiff had - the candour to concede that since the year 1983, the suit land has not been in the possession of the plaintiffs. It was further admitted in no uncertain terms that the defendants have been in the occupation of the suit land as the owners thereof and nobody has ever caused obstruction to the possession of the defendants over the suit land.

21. In the light of the aforesaid admissions, which substantially demolish the case of the plaintiffs based on proprietary title and possession over the suit land, the trial Court could not have directed the appointment of the Court Commissioner with a further direction to the Court Commissioner to ascertain the possession of the parties. In fact, even the plaintiffs have not sought such relief in the

application (Exh. 100). The appointment of the Court Commissioner, in this fact-situation, was nothing but an endeavour to indirectly collect the evidence to wriggle out of the aforesaid admissions, elicited during the course of cross-examination."

18. In **Shaikh Isak s/o. Shaikh Amir**, supra, the application for appointment of court commissioner was made after the conclusion of the trial and at the stage of judgment. The learned single Judge articulates thus :

"6. Having heard learned Counsel for the parties and on perusal of the material on record and the aforementioned provision, in my view the matter warrants interference. The stage at which the application is filed by respondent No. 2, would assume significance. It is an admitted position that evidence is already recorded in the suit and written arguments have also been filed by the parties. In these circumstances, the possibility of filing such an application to fill up certain lacunae, which are left out in the evidence, cannot be ruled out. Possibly, a cue may have been taken from the written arguments that has been filed by the petitioner in the suit and realizing that he may be on a sticky wicket, is what may have prompted the respondent No. 2 to file the aforesaid application. Allowing such an application at this stage, may result in prejudice being caused to a party inasmuch as there would be no opportunity for the affected party to dispute the Court Commissioner's report and to cross-examine him. No doubt, it would be open to such affected party to apply to

the Court to cross-examine the Court Commissioner on his report, but that would be reopening the evidence which is already closed. Unless an exceptional case is made out, such a eventuality needs to be eschewed.

7. It is significant to note that in the present case, there is not a whisper in the application as to why such application was not made at an earlier stage of the suit. In the facts and circumstances of present case, this ground was sufficient in itself to reject the application. Insofar as the decisions cited by the learned Counsel for the respondent are concerned, it is noticed that in all the aforesaid decisions, the stage of the suit at which the application was allowed, was not a stage as is in the present case and the said decisions would therefore not be of any assistance to the respondent No. 2."

19. In my considered view the observations of the learned single Judge in **Shaikh Isak**, supra, are in view of the factual matrix and cannot be understood, laying down the proposition that an application under Order 26, Rule 9 cannot be entertained after the completion of evidence. Indeed more often than not, it is only after the parties adduce evidence, that the need to appoint court commissioner arises if some elucidation or clarification of the material on record is considered necessary by the trial

Judge.

20. I need not consider the enunciation in the decisions on which the learned counsel for the defendants Mr. Umesh Malkapure has relied, since it is well settled that boundary disputes must ordinarily be decided on the basis of the measurement plan or map drawn by trained cadastral surveyor, which is the view taken in the said decisions.

21. I see no reason to interfere with the order impugned in exercise of writ jurisdiction.

22. Petition is dismissed.

23. Learned trial Judge is requested to expedite Regular Civil Suit 31 of 2010 and to finally dispose of the same within six months.

24. No order as to costs.

(ROHIT B. DEO, J.)