

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5786 OF 2021

M/s. Avnee and Tejas Associates

....Petitioner

V/s.

Vimal Hirachand Rathod,

Thr. Her Duly Constituted Attorney,

Shri. Ramesh Kundanmal Oswal & Ors.

....Respondents

AND

WRIT PETITION (ST.) 14976 OF 2021

Smt. Vimal Hirachand Rathod

....Petitioner

V/s.

M/s. Avnee and Tejas Associates

and Ors.

....Respondents

Mr. G.S. Godbole, Senior Advocate i/by. Mr. Ajinkya M. Udane,

*Advocate for the petitioner in WP-5786-2021 and for respondent in
W.P. (St.) No. 14976-2021.*

Mr. A.V. Anturkar, Senior Advocate i/by. Mr. Ajay A. Joshi, *Advocate for the petitioner in WP (St.) No. 14976-2021 and for respondent no.1 in WP-5786-2021.*

Mr. Rohit Sakhadeo, *Advocate for respondent no.2 in WP-5786-2021.*

CORAM : SANDEEP K. SHINDE, J.

CLOSED FOR ORDERS ON : 28TH JULY, 2022.

PRONOUNCED ORDER ON : 9TH NOVEMBER, 2022.

P.C. :

1. These petitions are disposed of by this common order :

BACKGROUND FACTS :

2. Smt. Vimal Hirachand Rathod, petitioner in WP No.14976-2021 instituted Regular Civil Suit No. 2199/2019, through Power of Attorney, against Shri. Sanjeev C. Arora and Others; yet the reliefs therein were sought only against M/s. Avnee and Tejas Associates-the defendant no.6. For the sake of brevity, hereinafter the petitioner and M/s. Avnee and Tejas Associates, shall be referred to as “**plaintiff**” and “**defendant no.6**” respectively. The plaintiff claims that, vide sale-deed dated 22nd September 1994, she purchased land bearing Survey No.256/6/2 admeasuring 1 hectare and 43 ares (hereinafter called as “the said land”) from one, Mr. Nathu Sakhare. The plaintiff’s case is, that the defendant no.6 encroached upon the

said land to the extent of 17.42 Ares (hereinafter called "the suit property" for short) and thus seeks Decree to remove the encroachment and its' vacant possession. Pending suit, temporary injunction was sought, to restrain the defendant no.6, its partners, agents, servants from carrying out any activity including, but not limiting to the construction activity, in and upon the suit property and from dealing with or creating any third party interest therein. Pending application for temporary injunction, plaintiff moved another application, below Exhibit-9, seeking appointment of the Court Commissioner, to measure the entire Survey No.256 alongwith its' sub-survey numbers and to demarcate the same. Supposedly, after arguing the application seeking temporary injunction, the plaintiff pressed application below Exhibit-9, for appointment of the Court Commissioner. The said application was heard. However, pending order, the plaintiff moved yet another application below, Exhibit-60 seeking order of status-quo in respect of the suit property. Application, Exhibit-60 avers;

"It is submitted that plaintiff and defendant no.6 have already argued upon the injunction application filed below Exhibit-5. Today the matter is fixed for hearing on application for appointment of Court Commissioner. It will take time for hearing on Court Commissioner application and further procedure. Considering the situation, it is necessary to pass status-quo order against the defendant no.6."

AND, Paragraph-4 of the application avers that,

"It is submitted that, if defendant no.6 is allowed to carry on illegal activity/construction then situation will be irretrievable and rights of the parties would be buried forever."

3. The application, Exhibit-60 (for status-quo) was filed on 29th January, 2021 and decided on 18th March, 2021; Whereas, the learned trial Court appointed the Court Commissioner on 3rd February, 2021.

4. Feeling aggrieved by the order appointing the Court Commissioner, the defendant no.6 filed Writ Petition No. 5786/2021 wherein this Court, vide order dated 21st October, 2021 recorded statement of Counsel appearing for the plaintiff, that the, order appointing Court commissioner shall not given effect to, and measurement shall not be carried out, till the next date of hearing.

5. Thus, to be noted that, (i) application for temporary injunction, though heard has been kept in abeyance by the trial Court and (ii) order appointing the Court Commissioner, has not been acted upon.

6. In any case, application Exhibit-60 filed by the plaintiff was heard, and vide order dated 18th March 2021, trial Court restrained the defendant no.6 from creating the third party interest in and upon the suit property, till the decision in the suit. Yet, for the reasons stated therein, permitted the defendant no.6 to carry on the construction, at

his risk and consequences. Feeling aggrieved by said order, defendant no.6 filed Misc. Civil Appeal before the District Court. The learned District Judge, vide order dated 26th July, 2021, set aside the order of the trial Court and rejected the application, Exhibit-60. As well, directed the trial Court to decide the application, Exhibit-5.

7. Feeling aggrieved by the order dated 26th July, 2021 in Misc. Civil Appeal No. 79/2021 passed by the District Judge-14, the plaintiff has preferred the Writ Petition No. 14976/2021.

8. In that way, the defendant no.6 has challenged order dated 3rd February 2021, inter-alia, appointing the Court Commissioner to measure said land; whereas the plaintiff has challenged the order dated 26th July, 2021 passed in Miscellaneous Civil Appeal, by which, order of trial Court restraining the defendant no.6 from creating the third party interest in and upon the suit property has been set aside. Thus, these two Writ Petitions.

9. Before advertng to the impugned orders, I deem it appropriate to note following facts, emerging from the pleadings and record.

(i) The defendant no.6 is builder-land developer.

(ii) On 15th January, 2019 defendant no.6 applied to Superintendent of Land Records, for measuring Land Survey No.

256/7 and 256/6/1 (a Project Land). That application was registered as, 1090/2019.

(iii) At the time of measuring and demarcating the land, all adjoining land owners as per the 7/12 Extract, were given notices.

(iv) The plaintiff was not given notice since his name was not shown in the 7/12 Extract.

(v) The plaintiff therefore objected to, the measurement vide application dated 8th February, 2019 contending that, his land bearing Survey No. 256/6/1 abuts the Project Lands and disputed the boundaries fixed and demarcated by the Deputy Superintendent of Land Records (D.S.L.R.).

(vi) The objections were overruled by the Deputy Superintendent of Land Records (D.S.L.R.) on 1st July, 2019.

(vii) Aggrieved by the order dated 1st July, 2019 the plaintiff has preferred an Appeal before the District Superintendent of Land Records. The said Appeal is pending for consideration.

WHEREAS:

(a)(i) The defendant no.6 is a Developer developing the plot no.256, Hissa No.6, 7 at Hinjewadi, a Project Terminal-1; (ii)The project is registered under Section 5 of the Maharashtra Estate and Regulatory Authority.

(b) Pune Metropolitan Regional Development Authority ("PMRDA" for short), granted Commencement Certificate to the Project.

(c) On 12th April, 2022 P.M.R.D.A. granted the part Occupation Certificate to the Project.

10. Thus, could be seen that, the plaintiff's Appeal disputing the boundary demarcated by the D.S.L.R. is pending for consideration. However, regardless of this fact, plaintiff applied for appointment of the Court Commissioner, to measure the suit land alleging, the defendant no.6 has encroached on his land to the extent of 17.42 Ares.

11. In the backdrop of above facts, Mr. Godbole, learned Senior Counsel appearing for defendant no.6, vehemently submitted that, the trial Court could not have appointed the Court Commissioner, in view of the fact that the plaintiff's Appeal disputing the measurements carried out by the D.S.L.R. is pending for consideration, before the Appellate Authority. Mr. Godbole submitted, jurisdiction of the trial

Court to grant temporary injunction and appointment of Commissioner are distinct and not interdependent. Therefore, the trial Court could not have kept the Exhibit-5 in abeyance, pending report of the Court Commissioner. Mr. Godbole, submitted, though it is a discretion of the Court to appoint the Commissioner as per Section 75 of the Civil Procedure Code, but the discretion has to be exercised as per the judicial norms. Mr. Godbole, relied on the order of this Court in Writ Petition No. 8877/2013 to contend that the application moved by the plaintiff for appointment of the Court Commissioner was premature, in the sense, according to Mr. Godbole, the material on record does not justify the appointment of the Court Commissioner at the initial stage of the suit and that too, after arguing application for temporary injunction. Mr. Godbole, submitted, even otherwise, there is sufficient material on record indicating that the plaintiff is not in possession of the suit land. On this aspect, Mr. Godbole, has invited my attention, to the judgment and decrees passed in Regular Civil Appeals No. 389/2012, 956/2012 and 196/2015. I have perused the same. Wherefrom it appears, the plaintiff had purchased the property bearing Survey No.256/6/2 admeasuring 1 Hectare and 43 Ares, from Nathu Sakhare in the year 1994. Whereafter, land admeasuring 77 Ares out of the said land, was sold by Mr. Nathu Sakhare to Mr. Prashant Chopde and others under different agreements. Mr. Prashant Chopde and other purchasers, instituted Suit No. 979/2001, for specific performance of contract against the legal heirs of Nathu Sakhare. The suit was decreed by the Civil Judge Senior Division by Judgment dated 21st November, 2009. In the said Suit, the plaintiff herein, filed the counter-claim asserting her rights therein. The counter-claim was dismissed.

The Appeals were filed against the Decree dated 21st November 2009, being Regular Civil Appeal No. 389/2012 and two others. In the Appeal, the Decree of specific performance passed by the trial Court was set aside and counter-claim of the plaintiff herein (defendant therein) was allowed. The judgments and decree in the Civil Appeal show that, Prashant Chopde and others (plaintiffs therein) were directed to handover vacant possession of land admeasuring 0.77 Ares out of Survey No.256 (1A) to the plaintiff herein. The judgments and decree in the said Appeals have been carried in the Second Appeals. The Second Appeals are pending before this Court for consideration. However, pending Second Appeals, this Court directed the parties to maintain the status-quo in respect of the suit lands i.e. 0.77 Ares out of Gat No. 256/6/2.

12. Thus, apparently, it is evident from the judgment and decree passed in the Civil Appeals and order passed in the Second Appeals, that part of the land purchased by the plaintiff to the extent, 0.77 Ares, was not in her possession, as on the date of instituting the Suit.

13. Thus, taking into consideration, the above facts coupled with the fact that the boundaries of the 'said land' and the 'suit land' described in the plaint, do not match or tally, with the boundaries described in the plaintiff's sale-deed dated 22nd September, 1994, prima-facie, it can be inferred that, plaintiff himself was uncertain and indefinite about the boundaries of the suit property. Moreover, the plaintiff has already filed an Appeal before the D.S.L.R., wherein he

disputes the boundaries of the Project Lands. Therefore, plaintiff having adopted appropriate remedy, inter-alia, disputing the boundaries of Project Land, fixed and demarcated by the D.S.L.R., the trial court ought not to have appointed the Court Commissioner to measure Survey No. 256 and further could not have kept the application for temporary injunction, in abeyance till Commissioner submits the Report. This approach of the trial Court, frustrates the object of seeking and granting temporary injunction. Now, whether the trial Court could entertain the application seeking appointment of Court Commissioner, while pending decision on application for temporary injunction, Mr. Godbole, learned Senior Counsel for the defendant no.6, relied on the judgment of this Court in the case of **Sandeep Sangle (Writ Petition No. 6392/2013)**, wherein it was held that, "It would obviously be open for the parties to take steps as permissible in law after framing issues and while leading evidence. However, at the stage of consideration of temporary injunction, to secure appointment of Court Commissioner for measurement of the property, would be an attempt to collect evidence, which may not be permissible." Mr. Godbole, would also rely on the judgment in the case of **Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and Others, 2001 (2) Mh. L.J. 959**, which says, the Court Commissioner cannot be appointed for collecting the evidence. On the other hand, Shri. Anturkar, learned Senior Counsel submitted that the provisions of Order 26 Rule 9, is enabling provision and does not contemplate particular stage at which, party can seek appointment of Commissioner. On the other hand, Mr. Anturkar, learned Senior

Advocate, relied on judgments of this Court in **Mayuresh Subhash Sonawane Versus. Yashwant Babu Bhoir and Another, (2022) SCC Online Bom 179** and order in **Sunita Ashok Kachre & Anr. V/s. Santram Bapurao Patkar (Writ Petition No. 6541/2017 dated 6th July, 2017)** passed by the Bench at Aurangabad. Mr. Anturkar, submitted, application moved by the plaintiff for appointment of Court Commissioner, pending application for temporary injunction, was maintainable. I have carefully considered the rival submissions. Although, Order 26 Rule 9, does not contemplate particular stage of the trial, at which appointment of Court Commissioner could be applied for, however, it is for the Court to find that such local investigation is necessary, for exemplifying any matter in dispute. Therefore, it is discretion of the Court. In the case at hand, having regard to the facts of the case, and particularly Report of D.S.L.R., judgments and decree in Regular Civil Appeal No. 389/2012, sale-deeds and boundaries described therein, in my view, application moved by the plaintiff for appointment of Court Commissioner, was premature. That apart, and besides merits, trial Court has committed gross irregularity, by keeping the application for temporary injunction in abeyance, for want of the Court Commissioner's Report. In the circumstances, the order of the Appellate Court in Miscellaneous Application directing the trial Court to decide the application for temporary injunction on its merits, calls for no interference.

14. Thus, having regard to the facts stated above, the order dated 3rd February, 2021 appointing the Court Commissioner, is quashed and set aside.

15. In so far as the petition filed by the plaintiff assailing order passed in the Misc. Civil Appeal No.79/2021 is concerned, in my view, the order requires no interference for a simple reason that, the order passed by the trial Court injuncting the defendant no.6 from creating the third party interest in the suit property pending application for temporary injunction was uncalled for. The Learned trial Court ought not to have entertained the application, below Exhibit-60, when the application under Order 39 Rule 1 filed by the plaintiff, was heard and posted for passing orders.

16. In any case, let me recapitulate, facts to appreciate case of the petitioner-plaintiff. Thus to say; plaintiff instituted Suit in 2019 (date not provided). Pending suit, application for temporary injunction was heard. However, pending order, application for appointment of Court Commissioner was moved. Supposedly, that application was listed for hearing on 29th January, 2021. On the same day, plaintiffs requested the trial Court, vide Exhibit-60, to pass status-quo order against the defendant no.6. On 18th March, 2021, trial Court partly allowed Exhibit-60, whereby defendant no.6 was restrained from creating third party rights in and upon the suit property and part of the property, till final decision of suit. That order was carried in Appeal under Order 43 Rule 1(r) Civil Procedure Code. Apparently, trial Court

was of the opinion that, in view of boundary dispute, it would be appropriate to restrain defendant no.6 from creating third party rights in construction, to avoid multiple proceedings. As also, it appears, the trial Court passed that order, presuming no prejudice will be caused to defendant no.6, if he is restrained from creating third party rights. However, this presumption of the trial Court was not well-founded. In the sense, the trial Court has ignored and/or overlooked the decree in Regular Civil Appeal No. 389/2012 and order/s in Second Appeals, which indicate part of the suit property, was in possession of Mr. Prashant Chopde and Others. Additionally, trial Court overlooked the fact that boundaries described in sale-deed dated 22nd September, 1994 do not match the boundaries of suit property described in the plaint. Although Mr. Anturkar, learned Senior Counsel for the petitioner-plaintiff produced compilation of documents, to reconcile the boundary discrepancies, I am not inclined to look into these documents, reason being, neither order of the trial Court, nor order in Miscellaneous Appeal, refers to these documents. Moreover, order of status-quo was sought, pending decision on application for temporary injunction. Additionally, the trial Court has also overlooked the various permissions granted by the Planning Authority and a fact that in the year 2019, plaintiff's land was measured by the Competent Authority. Above all, the trial Court overlooked the fact that, defendant's project is subject to RERA and order restraining defendant no.6, from creating third party rights, would entail serious consequences. Besides, the evidence on record, clearly indicates that, after the trial Court restrained the defendant from creating third party rights in the suit property, the plaintiff, circulated that order to various authorities,

including the State Bank of India, from whom the defendant no.6, has availed the loan facility. The letter dated 6th May, 2021 addressed by the State Bank of India to the defendant, conveys, SBI sounded defendant no.6 that, till clearance of the order from the Court, disbursement of the cash credit account, will have to be kept on hold and in case of unfavourable decision, the Bank may recall the advance and entire outstanding will have to be deposited. As such, one can vouch the conduct of the plaintiff, which clearly shows, his/her extra judicial approach.

17. In any case, for the reasons stated above, I am not inclined to interfere in the impugned order dated 26th July, 2021 passed in Civil Misc Appeal No. 79/2021. Therefore, the Writ Petition assailing the said order, is dismissed.

18. Yet, having regard to the facts of the case, it would be expedient in the interest of justice to direct the learned trial Court to decide the application, Exhibit-5, filed by the plaintiffs in the Regular civil Suit No. 2199/2019 expeditiously and preferably before 31st December, 2022.

19. It is clarified that the trial Court shall decide the Exhibit-5 application in Suit No. 2199/1999 on its own merits without being influenced by the order of this Court.

20. In that regard, all contentions of the respective parties are kept open.

21. In the result, Writ Petition No. 5786/2021 filed by the defendants is allowed. In the result, order dated 3rd February, 2021, below Exhibit-9, appointing the Court Commission is quashed and set aside, whereas Writ Petition No. 17946/2021 filed by the plaintiff, is dismissed.

22. Both the petitions are disposed of in the aforesaid terms.

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(SANDEEP K. SHINDE, J.)