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

WRIT PETITION NO. 6236 OF 2021

Mayuresh Subhash Sonawane

Age : 34 years, Occ: Business,

R/at Pisavli, Malang Road, Kalyan (E).

.. Petitioner

Versus

1. Yashwant Babu Bhoir

Age : Adult, Occ.: Agriculture,

R/at : Hitesh Niwas, Near Grampanchayat

Office, Pisavli Village, Tal : Kalyan,

Dist. :Thane.

2. Jojimon Philip Joseph

Age - 51 years, Occ.: Business,

R/at : Sunrise Valley, Haji Malang Road,

Kalyan (E).

.. Respondents

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- Mr. A.A. Garge a/w. Mr. Kashyap Bhalerao for the Petitioner
- Mr. Rohan Surve i/by Mr. Kunal Naik & B.N. Kazi, Advocates for the Respondent No.1.

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CORAM : MILIND N. JADHAV, J.

RESERVED ON : 15th DECEMBER, 2021.

PRONOUNCED ON : 27th JANUARY, 2022.

(Through Video Conferencing)

P.C.:

. By the present Writ Petition, the Petitioner has prayed for the following reliefs:

"a. that the records and proceedings of Order dtd. 06.09.2021 passed by the Ld. 3rd Jt. C.J.S.D. Kalyan in an application filed for appointment of Court Commissioner below Exh.61 in R.C.S. No.276 of 2016 be called for and after examining the legality, validity and propriety thereof the said impugned order dtd. 06.09.2021 passed by the Ld. 3rd Jt. C.J.S.D. Kalyan in an application filed for appointment of Court Commissioner below Exh.61 in R.C.S. No.276 of 2016 be quashed and set aside."

2. The Petitioner is the original Defendant No.2 whereas Respondent No.1 is the original Plaintiff. The impugned order dated 06.09.2021 is passed by the 3rd Jt. C.J.S.D., Kalyan on application filed by the original plaintiff for appointment of Court Commissioner in R.C.S. No.276 of 2016.

3. Respondent No.1 (original Plaintiff) has filed suit for declaration and injunction against the Petitioner (original Defendant No.2) in respect of property bearing Survey No.35, Hissa No.5 admeasuring 0.30.8 H-R and more specifically pertaining to road having length of 130 meters and width of 7 meters crossing over from the property bearing Survey No.35, Hissa No.6, Survey No.28, Hissa No.1A and Survey No.27, Hissa No.1 belonging to the original Defendant. The dispute essentially pertains to the above road which is the subject matter of the suit. The suit stands dismissed against original Defendant Nos. 1 and 3 and is proceeded *ex-parte* against original Defendant No.4.

4. Application below Exhibit '5' has been argued by the parties and is pending for orders before the trial court.

5. In the meanwhile, Respondent No.1 has taken out Interim Application for appointment of Commissioner (below Exhibit '61')

under Order XXVI Rule 9 read with Section 151 of the CPC to appoint the D.I.L.R. for measurement of the suit property and make a report of the extent of encroachment, if any on the suit property i.e. the approach road.

6. Parties have filed their replies and contested the Interim Application before the Trial Court.

7. By order dated 06.09.2021, the trial court allowed the application on the ground that since hearing on Exhibit '5' application was pending, it would be appropriate to place before the Court the actual status of the suit property to enable the Court to determine Exhibit '5'.

8. The above order is impugned by the Petitioner (original Defendant No.2) in the present Writ Petition on the ground that appointment of Court Commissioner will lead to collecting of evidence which may be detrimental to the case of the Petitioner before the trial court.

9. Shri A.A. Garge, learned counsel appearing for the Petitioner submits that the application below Exh.5 is pending for orders since 20.02.2020, on which date the parties concluded their oral arguments

and filed written notes of arguments before the trial Court. He submits that the impugned order is not a speaking order; it has not been decided on merits; pleadings filed by the parties have not been considered by the trial Court before passing the impugned order; application of the original Plaintiff does not refer to any encroachment by the original Defendant No.2 on the subject matter of the suit property; the original Defendant No.2 (Petitioner herein) has requisite permission and sanction in respect of construction which is alleged to be an encroachment by the original Plaintiff in the suit and therefore the impugned order is not sustainable. He submits that the impugned order is unreasoned and a cryptic order and has been passed after a period of almost one year and seven months after conclusion of the hearing in the Exh.5 application by the Trial Court; the original Plaintiff intends to collect further and better evidence detrimental to the case of the original Defendant No.2 (Petitioner herein) by seeking appointment of a Court Commissioner and this should not be permitted by the Court.

9.1. Shri Garge has referred to and relied upon the decision of the learned Single Judge of this Court dated 23.01.2018 in Writ Petition No.1196 of 2017 in the case of *Dhondiram Nivrutti Pawar (Since Deceased) Through LRs. Vs. Laxman Khashaba Pawar and Ors.*, wherein this Court has held that the law relating to appointment of

Court Commissioner is fairly well settled and that the Court Commissioner cannot be appointed for the purpose of collection of evidence. He submits that the machinery of the Court cannot be used for the purpose of collecting evidence, in order to enable a party to prove facts on the basis of which interim injunction is claimed.

10. *PER CONTRA*, Shri Rohan Surve, learned counsel appearing for the Respondent No.1 (original Plaintiff) submits that it is settled legal position in any suit that if the Court deems fit to have a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute then issuance of a commission to such person as the Court thinks fit to make such investigation and file the status report can be allowed by the Court. He submits that in the suit plaint and the application for injunction under Exh.5 the original Plaintiff has made specific averments regarding illegal encroachment over the suit property i.e. the approach road connecting to the property belonging to the answering Respondent i.e. Survey No. 35, Hissa No.5 which is the only approach road and mode of access / communication / transit since several years. He submits that this access road is in fact situated on the land bearing OH-03R-10P which belongs to the Zilla Parishad, Thane. He further submits that pursuant to oral arguments in the application under Exh.5 parties submitted written notes of arguments. He submits that the original Plaintiff along with the application under

Exh.5 also filed Exh.61 under the provisions of Order 26 Rule 9 of the Code of Civil Procedure, *inter alia*, seeking appointment of the Deputy Superintendent of Land Record, Kalyan as Court Commissioner in order to ascertain as to whether there is any encroachment on the suit property which belongs to the Zilla Parishad and passes through the property of the original Defendant No.2 to reach the property of the original Plaintiff. He submits that the actual status of the road and any existing construction thereupon will enable the trial Court to pass a reasoned and cogent order on the Exh.5 application for injunction pending before the trial Court. He submits that the impugned order is passed for assisting the trial Court to ascertain the status of the suit property so that the trial court can pass a proper interim order to protect the suit property pending the trial. He submits that if the Petitioner pleads that it has permissions and sanctions from the planning authority in respect of any construction on the suit property the same can be placed before the trial court in evidence. He submits that it is utmost important for the trial Court to ascertain the correct status of the suit property so that an incorrect order is not passed and for determining the *lis* in the present case. He urged the Court that when the Court Commissioner would visit the suit property both parties may be directed to remain present either by themselves or through their representatives and assist the Court Commissioner in preparing the exact status report for placing before the trial court. He

has urged that all contentions of the parties can be kept open before the trial court.

11. Submissions made by learned counsel appearing for the parties have been considered. Also duly examined and considered the materials on record.

12. The order dated 06.09.2021 that is impugned in the present Writ Petition reads thus:

“Heard. Since matter is pending for Exh. 5, it is necessary to bring prima facie proof before the court regarding alleged encroachment. Hence application allowed as prayed at the cost of Plaintiff. Issue commission writ accordingly to file report within one month from the date of the order.”

12.1. The Court is seized with the case between the parties with respect to grant of temporary injunction. In the original suit the Plaintiff has principally prayed for a declaration. That apart there is a prayer for perpetual injunction that has been made by the Plaintiff (Respondent herein) against the Petitioner. In the said prayer, the Respondent has prayed for an injunction from carrying out any construction and thereby causing an encroachment and/or obstruction with respect to the ingress and egress to the Respondent’s property.

12.2. It is asserted by the Respondent that he is the owner and is in use and occupation of property bearing Survey No. 35, Hissa No. 5,

in Pisavali Village. He states that on the eastern side of his property, the property of the Petitioner bearing Survey No. 35, Hissa No. 6, Survey No. 281A and new Survey No. 27/1 is situated. Through the Petitioner's property, there is an approach road – 137 meters in length and 7 meters in width – which is the subject matter of the suit. The Respondent has asserted that the said road, admeasuring OH-03R-10P, is owned by the Zilla Parishad, Thane, and its use has been shown as 'Road.' It is the case of the Respondent that the Petitioner has illegally made a pit and laid the foundation for construction of buildings which has led to the closure of the entire access road.

12.3. It is this aforementioned transgression that is sought to be ascertained by the appointment of a court commissioner. It is pertinent to note that the Court Commissioner appointed by the Trial Court is the District Inspector of Land Records, a statutory officer. It is also pertinent to note that the Petitioner has vehemently argued before me that he possesses the necessary approvals and sanctions from the planning authority for the construction carried out by him on the suit property.

12.4. The application under Exhibit 61, in respect of which the impugned order has been passed, is filed under the provisions of Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure,

1908. In the affidavit-in-reply dated 18.11.2021 filed by the Respondent No. 1, the following averments are made in paragraphs 7, 8, 12 and 13:

"7. I say that I am the owner and in use and occupation of the property bearing Survey No. 35, Hissa No.5, admeasuring 0H-36R-4P including Pot Kharaba admeasuring 0H-6R-6P lying and being situated at Village Pisavali, Taluka Kalyan, District Thane within the limits of Kalyan Dombivli Municipal Corporation and bounded as under :

On or towards East :- Survey No. 36, Hissa No.6 and Survey No. 28/1.

On or towards West :- Survey No. 36.

On or towards South :- Survey No. 35/7.

On or towards North :- Survey No. 35/4.

8. I say that on the eastern side of my property, the property of the Petitioner bearing Survey No. 36/6, Survey No. 231A [New No. 28/1/2] and Survey No. 27/1 is situated. I further say that I alongwith other resident in the said vicinity have no other way except an approach road having 7 mtrs. width in south west and 130 mtrs. in length passing through the properties of the Defendants, to reach my property from the Malang Road. I say that the said road is referred as suit property. I say that the said road is under area admeasuring 0H-03R-10P and is owned by Zilla Parishad, Thane and its use for the year 2019-20 is also shown as for road.

9.

10.

11.

12. I say that the Petitioner is denying the existence of road on area admeasuring 0H-03R-10P, Survey No.28/1/2 of Village Pisavli, Taluka Kalyan, District Thane, but the Petitioner has constructed new road and has put a gate on one side and have constructed said road till the end of their property and have closed it on the other side i.e. towards my property.

13. I say that in the suit Application is being filed seeking temporary injunction from the Hon'ble Court against the Petitioner to keep the said road open, shown in the rough map attached and marked as 'A', 'B', 'C', 'D' and it is necessary to confirm that as claimed by the Petitioner the total area mentioned on 7/12 extract of Survey No. 28/1/2 of Village Pisavali, Taluka Kalyan, District Thane is

of his ownership and/or the Petitioner owns only area admeasuring 0H-19R-20P and area admeasuring 0H-03R-0P is owned by Zilla Parishad, Thane which use is shown as for road on the said 7/12 extract and road 7 mtrs. width and in sought west 130 mtrs. in length passing through the properties of the Petitioner to reach my property."

12.5. On perusal of the above averments, it cannot be said that the appointment of the Court Commissioner will, in the facts and circumstances of the present case, be for collection of evidence. In the decision relied upon by the Petitioner i.e., Writ Petition 1196 of 2017, the suit that was filed was *only* for an injunction against the defendants therein, and not for declaration as is the present case. In that suit, it was averred that in the year 1986-1987, the suit land was levelled, and thirteen plots were made out of the suit land and each such plot had a separate water chamber. It was averred by the respondents in the that case that the petitioners therein had obstructed the respondents' property. It is for this reason that the respondents approached the civil court and sought an interim injunction and the appointment of a court commissioner to prove the existence of the plots and the water chambers. However, this Court declined the appointment of a court commissioner as the Court felt that existence of the plots and separate water chambers could be adequately proved by documentary evidence such as NA permissions, water bills, etc. and appointment of Court Commissioner was not warranted.

12.6. In the present case, the suit has been filed by the Respondent, who is the owner of the land adjoining the Petitioner's. A specific case has been made out that due to construction carried out by the Petitioner and the consequent encroachment, the approach road to the Respondent's property is closed. This fact itself is required to be ascertained by the Court at this interim stage so as to enable the Trial Court to pass any interim order pending the trial.

12.7. In view of the above discussion and findings, the impugned order dated 06.09.2021 does not call for any interference. However, in order to maintain equity between the parties, the Court Commissioner (i.e., District Inspector of Land Records) is directed to give notice to the Petitioner and the Respondents, as well as any other landowner adjacent to the suit property (the approach road), of the day, date and time of inspection of the suit property. The Court Commissioner shall visit the suit property, take photographs make an independent survey, take measurements of the suit property and any intervening structures standing on the suit property (if necessary), prepare a survey map of the suit property, and place a Report before the Trial Court within a period of two weeks from the date of inspection of the suit property. A copy of the said survey map and report prepared by the Court Commissioner shall be given to the Petitioner and the concerned Respondents, who shall be entitled to file

their affidavit-in-reply, if any, within a period of one week from the date of receipt of the survey map/report of the Court Commissioner. The Trial Court shall accord a hearing to both parties within a period of one week after the respective say is filed by the parties, and it shall proceed to determine the pending application under Exhibit 5 only after hearing the parties on the Court Commissioner's report. All contentions of the parties are kept open on the above issue.

12.8. Both parties have jointly prayed for the suit proceedings before the Trial Court to be expedited as the original suit was filed in 2016 and a substantial amount of time has passed since. In view of the oral request made by the learned counsel appearing for the respective parties, the Trial Court is directed to expedite the hearing of the suit proceedings, and, in any event, complete the trial within a period of twelve months from the date of this order. Both parties have stated before me that they shall ensure the completion of the trial within a time-bound programme, as directed by this Court.

13. With the above directions, the Writ Petition stands disposed of. However, there shall be no order as to costs.

[MILIND N. JADHAV, J.]

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by AJAY
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