

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1418 OF 2023

Chudaman Atmaram Patil
Age : 41 yrs, Occu : Agril & Business,
R/o. Wani, Tal. & Dist. Dhule .. Petitioner

Versus

Dattu Kautik Patil
Age : 40 years, Occu : Agril,
R/o. Wani Bk, Tal. & Dist. Dhule .. Respondent

...

AND

WRIT PETITION NO.1420 OF 2023

Chudaman Atmaram Patil
Age : 41 yrs, Occu : Agril & Business,
R/o. Wani, Tal. & Dist. Dhule .. Petitioner

Versus

Kishor Shivdas Patil
Age : 50 yrs, Occu : Agril,
R/o. Wani, Tal. & Dist. Dhule .. Respondent

...

In both the matters:

Advocate for Petitioners : Mr. Shailesh P. Brahme

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 08-02-2023

PER COURT :

. In both the writ petitions, identical issues are raised and hence the same are disposed of by this common judgment.

2. The challenge in these petitions is to the order of the

trial Court rejecting the petitioners' application for appointment of the Court Commissioner at the stage at which the proceedings are pending before the Trial Court. Special Civil Suit No. 33 of 2019 and R.C.S. No.41 of 2022 came to be instituted by the petitioners seeking relief of declaration of ownership and injunction as against the defendants. It is the case of the petitioners, who are the original plaintiffs that they are the owners of the suit property and State Government had constructed a road through the suit property as a result of which the suit property has been divided into two parts. It is the case of the petitioners that the defendants have encroached upon part of the property which is divided by the road on the western side and prayed for removal of encroachment. In the said proceedings, an application for appointment of Court Commissioner came to be filed which was rejected by the trial Court by observing that it is necessary for the petitioners to first prove that the land on which the encroachment is claimed, is owned by the petitioners and they were in possession thereof and for the same it is necessary first to prove that the road has been constructed illegally through the property of the petitioners thereby dividing the land into two parts.

3. Heard the learned counsel for the petitioners.
4. The learned counsel appearing for the petitioners

submits that an application for injunction was filed which was later on withdrawn. It is further his submission that the petitioner had instituted proceedings against the authorities in Special Civil Suit No.33 of 2019 seeking a direction as regards acquisition of the land, which according to the petitioner came to be divided by reason of the illegal road which has been constructed on the suit property. The learned counsel for the petitioners has invited attention of this Court to the reply which has been filed by the State Government and contends that in the reply the State Government has admitted the existence of the road.

5. Considered the submissions of the learned counsel for the petitioners.

6. In the present case, the petitioner has come with the case that he is the owner of the property on which the alleged encroachment has been carried out by the defendants. The case for declaration and possession is on the ground that the property which was owned by the petitioner has been divided into two parts by reason of the road which has been illegally constructed by the State Authorities. The reliance of the petitioner on the reply of the State Authorities in Special Civil Suit No.33 of 2019 is misconceived

inasmuch as what has been stated by the State Authority is that it was a highway which has been constructed previously and hence there is no question of acquisition of the said property. In such a situation, it is for the petitioner to first lead evidence to show his ownership and possession of the suit property and the application, if any, for appointment of Court Commissioner will have to be agitated after the issue of ownership and possession is proved.

7. I do not find any infirmity in the order of the trial court for rejecting the application at this stage and in particular considering the observations of the trial Court that the petitioner has to lead evidence to prove the ownership and possession of the suit property and that the property stood divided by a reason of a road which was constructed by the State Authority. The trial Court has not rejected the application for the reason that there is no requirement of appointment of the Court Commissioner, but the application has been rejected for the reason that the evidence has not yet been led.

8. For the reasons above, there is no infirmity in the impugned order of the trial Court as the petitioner will be at liberty to move the application after the necessary evidence has been led to prove his ownership and possession and thereafter the request for appointment of the Court Commissioner can be reiterated.

9. Writ petitions stand dismissed.

(SHARMILA U. DESHMUKH, J.)

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