

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5615 OF 2021

Archana Sandip Sherkar

Petitioner

Versus

Baban Sahadu Raut And Others

Respondents

Mr. Amol Gandhi, Advocate for the petitioner.

Mr. G.R. Syed h/f. Mr. Mahesh Deshmukh, Advocate for
respondent Nos. 2 and 3.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 30th AUGUST, 2023

ORDER :

1. Petitioner is aggrieved by the order passed by learned 8th Joint Civil Judge, Senior Division, Ahmednagar, below Exhibit-101 in Regular Civil Suit No. 75/2018, thereby dismissing the application filed by the petitioner/plaintiff for appointment of Court Commissioner to measure the suit property and sub shares and to ascertain as to how much encroachment is there on the part of respondents/defendants.

2. Suit is filed for possession of encroached portion, measurement of sub shares, fixation of boundaries of Gat No. 553 and perpetual injunction. Suit is opposed by the defendants by filing written statement. Parties led their respective evidence.

At the time of final arguments, application Exhibit-101 was filed by the plaintiff for appointment of Deputy Superintendent of Land Record as Court Commissioner, contending that the suit is filed for measurement of sub shares and fixation of boundaries of Gat No. 553. Earlier application filed by the plaintiff for appointment of Court Commissioner was rejected on the ground that it was filed at a preliminary stage. Gat No. 553 is shown as undivided in the record of land records department. Unless and until entire Gat No. 553 is measured including sub shares in it, it would not be possible to ascertain as to how much encroachment defendants have made in the suit property and till then the dispute between the parties cannot be resolved. Plaintiff has already led evidence and proved his ownership and possession on 67 Are land in Gat No. 553. When the plaintiff tried to get suit property measured, defendants have obstructed to the same. Therefore, plaintiff prayed for appointment of DSLR as Court Commissioner.

3. Defendants opposed the said application contending that the plaintiff has already closed the evidence by filing purshis and no permission is sought from the Court to reopen the evidence. If the application of the plaintiff is allowed it will

amount to allow the suit itself. Trial Court has rejected the application. Hence, the present petition.

4. Heard the learned advocate for the petitioner and learned advocate for the respondents. Perused the memo of writ petition, annexures thereto, impugned order and the citations relied upon by the respondents.

5. It is settled legal position that in the cases of removal of encroachment and fixation of boundaries, it is desirable to appoint Court Commissioner, and if there is dispute in respect of identification of the suit property or for bringing the extent of encroachment before the Court, appointment of Court Commissioner is necessary, as is held in Sulemankhan Mumtajkhan and Others Vs. Bhagirathibai Digamber Asalmol and Another, 2014 (4) Mh.L.J. 250, Habibkhan s/o Inauttalakhan and others vs. Waman s/o Govind Rathod ant others, 2012(2) Mh.L.J. 541 and Ramzan Shekh Chand Sheikh through his L.Rs and others vs. Panjab Nathuji Gawande, 2014(6) Mh.L.J., 97.

6. In the case in hand, Trial Court has observed that there is dispute between the parties in respect of entry of potkharab land. Trial Court, therefore held that unless and until that dispute is resolved Court Commissioner cannot be

appointed.

7. Learned advocate for the respondents by relying on Arjun Rambhau Dhankude and another vs. Bhanudas Ramchandra Murkute and others, 2020(2) Mh.LJ 145 and Shantaram Dattatray Kekan and ors. vs. Bhausaheb Karbhari Kekan and ors., 2023(2) Mh.LJ 77 opposed the petition. According to him, if the Court Commissioner is appointed it would amount to grant of prayer of the plaintiff in the suit for measurement of the suit property and fixation of boundaries.

There is no merit in the said submission inasmuch as that is one of the prayer in the suit and another prayer is for removal of encroachment and possession of the encroached portion.

8. In Arjun Dhankude (supra), the suit was filed for perpetual injunction from committing encroachment over the suit property. Taking into consideration the admissions given in the cross examination, this Court held, "*appointment of court commissioner was nothing but an endeavor to indirectly collect evidence to wriggle out admissions elicited during cross examination*".

Such are not the facts of the present case.

9. In Shantaram Kekan (supra), this Court was considering the fact of filing of application for appointment of Court Commissioner at a preliminary stage and it was held that, it would definitely amount to collection of evidence.

In the present case, since recording of evidence of the parties is concluded, this decision also is of no help to the case of the respondent.

10. Trial Court has failed to consider the settled legal position and has erred in rejecting the application filed by the plaintiff. The impugned order is therefore unsustainable and same is liable to be quashed and set aside. In the result, following order:

ORDER

- (i) Writ petition is allowed.
- (ii) Impugned order dated 23.02.2021, passed by learned 8th Joint Civil Judge, Senior Division, Ahmednagar, below Exhibit-101 in Regular Civil Suit No. 75/2018, is hereby quashed and set aside.
- (iii) Application Exhibit-101 is allowed.

[NITIN B. SURYAWANSHI, J.]