

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6047 OF 2021

Sumanbai Asaram Bhaskar

Petitioner

Versus

Devidas Gandev Bhaskar

Respondent

Mr. Sanket Kulkarni, Advocate for the petitioner.

Mr. R.L. Kute, Advocate for respondent.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 29th AUGUST, 2023

ORDER :

1. This petition filed under Article 227 of the Constitution of India, challenges the order passed by learned Civil Judge, Junior Division, Kopergaon, below Exhibit-20 in Regular Civil Suit No. 123/2020, thereby allowing the application filed by respondent/plaintiff for appointment of Taluka Inspector of Land Records, Kopergaon, as Court Commissioner for carrying out measurement of the suit properties 1A and 1B bearing Survey Nos. 94/9 and 94/10.

2. Suit is filed by respondent/plaintiff claiming relief of perpetual injunction, measurement of the suit property and fixing of boundaries. By filing written statement

petitioner/defendant opposed the suit. During the pendency of suit, application Exhibit-20 is filed by the plaintiff contending that he is owner of suit property 1A and defendant is owner of property 1B and defendant has encroached on the portion of suit property 1A to the extent of 7 to 8 Ghuntas which is owned by the plaintiff. Measurement of the suit properties 1A and 1B is necessary for determination of the suit. Hence, he prayed for appointment of Court Commissioner. Said application was opposed by the defendant by filing say at Exhibit-32 stating that application is abuse of process of court and plaintiff is trying to collect evidence. It is also prayed that if the Court is inclined to order measurement, joint measurement of sub divisions may be ordered. Trial Court, after hearing the parties, allowed the application. Petitioner is aggrieved by this order.

3. Heard the learned advocate for the petitioner and learned advocate for the respondent. Perused the writ petition memo, annexures and the impugned order.

4. It appears from the record that interim injunction order is passed in favour of plaintiff. According to the plaintiff the defendant has encroached from the eastern side of the suit property. It is claimed by the plaintiff that from the eastern side

there is encroachment to the extent of 50 Feet in the plaintiff's property. Defendant has denied encroachment. From the photographs placed on record, it prima facie appears that the defendant has constructed on the disputed portion during the pendency of the suit and so as to bring that aspect on record plaintiff has filed application for appointment of Court Commissioner. Though, it is vehemently argued by the learned advocate for the petitioner that appointment of Court Commissioner is at pre mature stage, in the facts of the present case, said argument is unacceptable.

5. In Habibkhan s/o Inauttalakhan and others vs. Waman s/o Govind Rathod and others, 2012 (2) Mh.L.J. 541, this Court considered the judgment of Sanjay Namdeo Khandare vs. Sahebrao Kacharu Khandare and held thus;

"4. The proposition that the Commissioner cannot be appointed to collect the evidence, need not be dilated. But, in each and ever case, it cannot be said that the Commissioner appointed by the Court invoking its power under section 75 read with Order XXVI, Rule 9 of the Code of Civil Procedure is for collecting evidence. In many cases, they are meant for the assistance of the Court in arriving at the just conclusion.

5. The disputes regarding the boundaries can be best adjudicated by taking the assistance of the experts such as the T.I.L.R, who on measurement can express his opinion...."

6. Trial Court has relied upon the aforesaid ratio while allowing the application and has directed measurement of the suit properties 1A and 1B. No prejudice is likely to be caused to the defendant if the measurement of the suit properties 1A and 1B is carried out. Measurement is necessary to find out extent of encroachment and whether construction is carried out subsequently on the encroached portion. Trial Court has rightly exercised discretion in favour of the plaintiff. There is no illegality or perversity in the order impugned in the present petition. No case is made out by the petitioner to warrant interference in the extra ordinary writ jurisdiction. Writ petition being devoid of merit is dismissed.

[NITIN B. SURYAWANSHI, J.]