



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

WRIT PETITION NO. 13290 OF 2022

1. Rawanbapu s/o Bhimrao Deshmukh
2. Gangadhar s/o Uttamrao Deshmukh
Died through his L.Rs.
 - 2/1. Nirmala w/o Gangadhar Deshmukh
 - 2/2. Dhiraj s/o Gangadhar Deshmukh
3. Kishanrao s/o Uttamrao Deshmukh
4. Bhimrao s/o Uttamrao Deshmukh
5. Prakash s/o Uttamrao Deshmukh
6. Nilabai w/o Govindrao Deshmukh
7. Vandanabai w/o Sureshrao Deshmukh
8. Vitthalrao s/o Uttamrao Deshmukh

...Petitioners

Versus

1. Bapurao s/o Rangrao Deshmukh
2. Rajabhau s/o Bapuna Shinde
Died through his L.Rs.
 - 2/1 Sushila w/o Rajabhau Shinde
 - 2/2 Pralhad s/o Rajabhau Shinde
 - 2/3 Narayan so Rajabhau Shinde
 - 2/4 Dnyaneshwar s/o Rajabhau Shinde
3. Sakharam s/o Mahadappa Dolas
4. Mohan s/o Kishan Sonawane
Died through his L.Rs.
 - 4/1. Prabhakar s/o Mohan Sonawane
 - 4/2. Shivaji s/o Mohan Sonawane
5. Dr. Balaji s/o Govindrao Hingmire
6. Kishan s/o Narayan Shinde
7. Bhima s/o Munjaji Chatte
8. Grampanchayat Office,
Hatta, through its Gramsevak,
G.P. Office, Hatta, Tq. Basmath, Dist. Hingoli.

...Respondents

Mr. Milind M. Patil (Beedkar), Advocate for Petitioners .

Mr. P. N. Sonpethkar, Advocate for Respondent Nos.1, 2-1 to 2-4, 3, 4-1, 4-2 & 5 to 7

CORAM : SHAILESH P. BRAHME, J.

DATE : 8th DECEMBER 2023

JUDGMENT :

. Rule.

2. Rule is made returnable forthwith with the consent of the parties. Heard learned Counsel for both the sides finally.

3. The petitioners are assailing order dated 03.08.2022 passed below Exhibit-89 by the learned Adhoc District Judge 1, Basmathnagar in RCA No.47/2015, rejecting the prayer for appointment of Commissioner at the appellate stage. The petitioners are the original plaintiffs and the respondents are original defendants in RCS No.25/2010. It was dismissed by the judgment and decree dated 17.07.2015. The petitioners have preferred RCA No.47/2015 which is pending.

4. The background for filing application at Exhibit-89 under Order 26 Rule 9 of the Code of Civil Procedure is that the suit was filed for declaration, possession of encroached portion and mesne profit by the petitioners. It is their case that they are the owners of Survey No.78 (gut

no.369) situated at Hatta, Taluka Basmath. Out of that 1H and 40R was sold by the petitioner no.1 to the respondent no.1. It was converted into plots through sanctioned lay out. Bhagyanagar Grah Sanstha was founded and plots were distributed to its member. The controversy is in respect of 8R of the land which was in possession of the petitioners and which was not sold. The said portion was encroached by the defendants illegally and that was a cause to file suit.

5. The respondents contested the suit and contended that there was no 8R of land in existence. The lay out plan was sanctioned. By following due procedure of law, plots were sold to different persons. The petitioners were not concerned with any so called land.

6. Both the parties led evidence before the trial Court. The petitioners examined seven witnesses, including PW-2/Assistant Director of Town Planning and PW-3/Surveyor. The maps were also placed on record. The petitioners had applied for the measurement privately. However the Court Commissioner was not appointed in the trial Court under Order 26 Rule 9 of CPC. The suit was dismissed holding that there was no encroachment.

7. The petitioners have applied for appointment of Court

Commissioner by filing application at Exhibit-89 on 29.06.2022. The learned Counsel for the petitioners submits that identification of 8R of the suit land is under consideration. Despite there being evidence of PW-2 and 3 and various maps on record, the position has not been cleared. Though the trial Court has recorded that there is no encroachment but against that substantive appeal is preferred. The maps which are produced on record do indicate the existence of portion of 8R.

8. The learned Counsel has drawn my attention to findings recorded by the trial Court in paragraph no.23 and 34 of the judgment. He further submits that the petitioners submitted application for production of documents under Order 41 Rule 27 of CPC. It was allowed. In wake of those developments, it became more glaring to have the local inspection. He submits that the learned Judge erred in holding that there was no point in directing the measurement because already it was done.

9. The learned Counsel for the respondents vehemently opposed the submissions. He would submit that the application at Exhibit-89 was submitted belatedly. The intention for filing application is to fill up the

lacuna as the trial Court had recorded findings about encroachment against the petitioners. The exercise which is sought to be done by the appointment of Court Commissioner was already undertaken. This is an attempt to protract the hearing of appeal which is due for the final hearing.

10. I have considered rival submissions of both the learned Counsels. I have gone through the judgment passed by the trial Court and the documents produced on record. The petitioners have relied upon following judgments :

- a. Haryana Waqf Board Vs. Shanti Sarup and Ors.
- b. Shyam Janardan Chaodary Vs. Asha Ramdas Katkar and Another
- c. Yashwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar
- d. Rambhau s/o Daulatrao Mule & Ors. Vs. Balabhau s/o Pandharinath Kachre & Ors.

11. The petitioners filed RCS No.25/2010 for declaration, possession of encroached portion and mesne profit. A rough sketch was produced alongwith plaint. Besides that a lay out plan of the concerned area at Exhibit-73 and measurement map at Exhibit-76 were produced on record. The petitioners examined seven witnesses. Out of them, PW-2 was Assistant Director of Town Planning and PW-3 was a Surveyor. The

findings are recorded against the petitioners regarding encroachment and the suit was dismissed. However, a substantive appeal is pending.

12. It is not that the petitioners did not make any attempt to bring on record the factual situation. The documentary and the oral evidence was led which do not enure to the benefits to the petitioners. It cannot be said that the petitioners are resorting to Order 26 Rule 9 for collection of evidence. The maps on record do indicate area of 8R. If paragraph no.23 of the trial Court judgment is considered, then there shows existence of 8R of land. Similarly from paragraph no.34 of the judgment, it appears that the area in question exists. However the trial Court recorded findings that it was not of the ownership of the petitioners or encroached by the respondents.

13. It is an admitted position that the documents were produced in the Lower Appellate Court under Order 41 Rule 27. There is going to be a fresh scrutiny of the facts brought on record in the Lower Appellate Court. An appeal is continuation of the suit. If Commissioner is appointed and within stipulated time, the report is directed to be filed on record that may help the Lower Appellate Court to elucidate the matter. The existence of 8R area is a crucial part of judicial enquiry in appeal.

14. In a given facts and circumstances, I am of the considered view that appointment of Commissioner is necessary for measurement, the existence of disputed portion and its accurate position. The appointment of Commissioner will facilitate to resolve the controversy involved. There is no legal impediment for appointing Commissioner under Order 26 Rule 9 of CPC in the Appellate Court. That would avoid probable remand of the matter.

15. The submissions of learned Counsel for the respondents that the petitioners have belatedly filed application at Exhibit-89 and it was filed with oblique motive has no merit. I have already recorded that the petitioners made sufficient attempts in the trial Court. Similarly, the findings recorded in the trial Courts' judgments do not remove the doubt about the claim of the petitioners. When the Court Commissioner can be appointed even in the second appellate stage, there is no hurdle for allowing application Exhibit-89 at first appellate stage. The Commissioner can be directed to submit the report within stipulated time.

16. The learned Counsel for the petitioners relied on various judgments. The ratio of the judgments can be followed. I have considered the relevant paragraphs. I proposed to allow writ petition.

17. For the reasons stated above, I find that the impugned order is unsustainable. I pass following order :

(i) The order dated 03.08.2022 passed below Exhibit-89 by the learned Adhoc District Judge-1, Basmathnagar in RCA No.47/2015 is quashed and set aside.

(ii) The application at Exhibit-89 shall stand allowed with further direction to execute the commission and submit the report within a period of eight weeks.

(iii) The petitioners shall not protract the hearing of appeal in any manner after receiving the report of the Commissioner. The hearing of RCA No.47/2015 is expedited.

(iv) Rule is made absolute in the above terms.

[SHAILESH P. BRAHME, J.]

Najeeb.