

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 912 OF 2022

Nivrutti Shahaji More.

...Petitioner.

Versus

Vijay Gopal Panse and Another.

..Respondents.

*Mr. Machchhindra Patil i/b Mr. Vijay R. Garad for the Petitioner.
Mr. Prashant P. Kulkarni for Respondent no.1.*

Coram : SHARMILA U. DESHMUKH, J.

Date : March 23, 2023.

P. C. :

1. By this petition, the challenge is to the order dated 23rd March 2021 passed by the trial Court below Exhibit-54 permitting the appointment of Court Commissioner under the provisions of Order XXVI Rule 9 of the Code of Civil Procedure, 1908 [for short "**CPC**"].

2. Respondent no.1 is the original plaintiff who had filed Regular Civil Suit No.67 of 2011 seeking the relief of declaration and order of permanent injunction. It is the case of plaintiff that he is the owner of suit property House No.452 situated on CTS No.1052 and the petitioner, who is defendant No.1, had purchased the house property bearing No.451

situated on CTS No. 1053. Respondent No.1 has come with the case in the aforesaid suit that as regards the subject property, the petitioner who is defendant No.1 in the said suit, has encroached upon the same and has carried out construction.

3. Heard learned counsel appearing for the parties. Learned counsel for the petitioner submits that the appointment of Court Commissioner is unwarranted inasmuch as the evidence of respondent no.1 has already been recorded and there is no necessity for the appointment of Court Commissioner.

4. *Per contra*, learned counsel appearing for respondent No.1 submits that it is the specific case of respondent No.1 in the plaint that there has been an encroachment upon the suit property and also there is a boundary dispute, and, as such the appointment of Court Commissioner would assist to effectively adjudicate the dispute.

5. In rejoinder, learned counsel for the petitioner submits that during the amalgamation, properties bearing CTS Nos.1052 and 1053 have been amalgamated and there is no boundary dispute.

6. The application has been moved by respondent No.1 seeking appointment of Court Commissioner. By the impugned order, learned trial Court has allowed the said application and directed the Court Commissioner to jointly measure CTS No.1052 and CTS No.1053 as per the original city survey record and as per the Grampanchayat Property No.195 and prepare the maps setting out the boundaries.

7. It is settled position that in cases of encroachment and boundary dispute, the appointment of Court Commissioner is necessary. There are catena of judicial pronouncements as regards the stage at which the appointment of Court Commissioner can be sought. However, the common thread that runs through all the judgments is that the appointment of Court Commissioner cannot be sought for the purpose of collection of evidence. In the present case, considering the averments made in the plaint, it appears that there is a boundary dispute as regards the properties of petitioner and respondent No.1 and the same is in fact substantiated by the submission made by learned counsel for the petitioner that subsequently there is amalgamation of these properties. As such, it appears that there is a boundary dispute as regards CTS No. 1052 and CTS No.1053, which will necessitate a joint survey of the said properties for fixing the boundary marks.

8. In the present case, admittedly, respondent No.1 has tendered his affidavit of evidence and as such it cannot be said that the present application has been filed for the purpose of collection of evidence.

9. In the light of above, there is no infirmity in the impugned order dated 23rd March 2021. The petition being devoid of merit, is hereby dismissed.

[Sharmila U. Deshmukh, J.]