

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.529 OF 2023

Sadashiv Nana Padekar and Another ...Petitioners

Versus

Anand Maruti Padekar (since deceased)
through legal heirs and Others ..Respondents

*Mr. Sugandh Deshmukh a/w Mr. Irvin D'souza a/w Mr. Vaibhav Thorave
for the Petitioners.*

Mr. Anand S. Patil for Respondents.

Coram : Sharmila U. Deshmukh, J.

Date : 18th July , 2023.

P. C. :

1. Heard.
2. The challenge in the Petition is to the order dated 15th June, 2022 passed below Exhibit 66 in Regular Civil Suit No.28 of 2013 allowing the application filed under Order XXVI Rule 9 of the Code of Civil Procedure (for short "CPC") seeking appointment of Court Commissioner for local inspection of the suit property.
3. The suit bearing Regular Civil Suit No.28 of 2013 was instituted by the Respondents-Plaintiffs in respect of an area admeasuring 0 H 81 R out of Gat No.99 seeking a declaration of ownership in respect of the said portion and for an order of permanent injunction restraining the Defendants from encroaching

upon the said property and for a direction that the encroachments which have been carried out by the Defendants by way of constructing the house should be removed and the vacant possession to be given to the Plaintiffs. In the written statement which is filed by the Petitioners-Defendants the defence taken was that the Defendants claimed as project affected person and the entire property that is Gat No.99 admeasuring 6 H 59.6 R was acquired by virtue of award passed in the year 1997 and that the possession receipt had been executed in respect of the entire Gat number. The Defendants claims ownership and possession of Gat No.99 as project affected person. In these proceedings an application came to be filed under the provisions of Order XXVI Rule 9 of the CPC for appointment of Court Commissioner which came to be allowed giving rise to the present Petition.

4. Heard Mr. Sugandh Deshmukh, learned counsel for the Petitioners and Mr. Anand S. Patil, learned counsel for the Respondents.

5. Learned counsel appearing for the Petitioners points out that the possession receipt has been executed in respect of the entire Gat No.99. He has further invited the attention of this Court to the order of the Hon'ble Minister, Revenue in which there is a finding that the Gat No.99 admeasuring 6 H 59.6 R was acquired and compensation in respect thereof was paid to the Plaintiffs. He would further point out

that by the impugned order the trial Court have appointed the Court Commissioner not only for the purpose of measurement of the entire land being Gat No.99 but the directions contained therein conferred upon the Court Commissioner the power to render findings as regards the ownership of the Plaintiffs in respect of certain area in Gat No.99. He would submit that exercise of this nature would amount to collection of evidence. He draws support from the decision of this Court in the case of ***Sanjay Namdeo Khandare vs. Sahebrao Kachru Khandare***¹.

6. *Per contra*, learned counsel appearing for the Respondents has tendered a copy of the award of the year 1997 and has pointed out that the award indicates that an area of 5 H 78.6 R was acquired out of Gat No.99. He would further submit that as the proceedings seeks removal of encroachment the settled possession in law is that in case of boundary dispute as well as encroachment the appointment of the Court Commissioner is necessitated. He would further submit that by the impugned order the direction which has been given is for measurement of the land in the light of the previous acquisition proceedings which by itself will indicate whether the acquisition was in respect of the entire Gat No.99 or if there is any portion remaining out of Gat No.99.

1 2001(2) Mh.L.J. 959

7. Considered the submissions.

8. The plaint proceeds on the basis that out of the entire Gat No.99 an area 0 H 81 R is in possession of the Plaintiffs and that the rest of the area has been acquired by virtue of an award passed on 31st March, 1997. The Plaintiffs have come with the case that in 0 H 81 R area on the western side the Defendant Nos.1 to 6 have encroached and have illegally constructed their houses and as such a prayer is sought for removal of the encroachment and for handing over the possession. The application for the appointment of the Court Commissioner also seeks measurement of the Gat number and the report to be submitted showing the area which was acquired under the award of 1997 and whether any portion of the land remained to be acquired. This was in the light of the defence which was taken by the Defendants that the entire area has been acquired. Considering that the Plaintiffs have come with a specific case that the entire Gat No.99 has not been acquired and in support thereof has placed on record the copy of the award of the year 1997 which discloses that an area of 5 H 78.6 R was acquired, the dispute appears to be in respect of encroachment on the balance 0 H 81 R and not about the title of the Plaintiffs. The plaint does not seek any declaration as regards the title of the Plaintiffs as it is not disputed that the ownership in respect of the entire Gat No.99 was with the Plaintiffs out of which an area of

5 H 78.6 R was acquired. As the issue is of encroachment in the property of the Plaintiffs in my opinion the appointment of the Court Commissioner is necessitated so that the entire Gat number can be measured in light of the acquisition proceedings which had taken place and the award of 1997 was passed. This will assist the Court in elucidating the matter in dispute which is the purpose for appointment of the Court Commissioner under the provisions of Order XXVI Rule 9 of the CPC. The submission of learned counsel for the Petitioners that the directions contained in the impugned order is to render a finding as regards the ownership of the Plaintiffs is misconceived as the Assistant Superintendent of Land Records is not competent to give any finding as regards the ownership. The Court Commissioner while executing the commission is expected to measure the land bearing Gat No.99 in the light of the acquisition proceedings and to give a report as to whether the entire Gat number was acquired or only a portion thereof. It needs no clarification that the report which will be submitted by the Court Commissioner will be considered by the Court after taking into consideration the objections, if any, which will be raised by the Defendants to the report.

9. As regards the decision which has been referred to by learned counsel for the Petitioners in the facts of that case the Court Commissioner was directed to visit the spot and to submit a report

regarding actual possession of the suit field. In the present case the dispute being as regards the encroachment the appointment of the Court Commissioner is necessitated.

10. In view thereof there is no infirmity in the order dated 15th June, 2022 passed by the trial Court.

11. The Writ Petition is devoid of merits and stands dismissed.

[Sharmila U. Deshmukh, J.]