

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5333 OF 2019

Ganpat Govind Kadam.

...Petitioner.

Versus

Bhiva Haniwaghe Kadam

Since deceased through legal heirs

& representatives

..Respondents.

Mr. S. S. Kanetkar for the petitioner.

Mr. Sumit Kothari for respondent Nos. 1a and 1b.

Coram : Sharmila U. Deshmukh, J.

Date : July 12, 2023.

P. C. :

1. Challenging the judgment and order dated 31st October 2018 passed in Civil Appeal No.35 of 2006, rejecting the petitioner's application for appointment of Court commissioner under Order 26 Rule-9 of CPC, the original plaintiff is before this Court.

2. The petitioner is original plaintiff and the respondents are original defendants. For the sake of convenience, the parties are referred to by their status before the trial Court.

3. Regular Civil Suit No.60 of 1990 was instituted by the plaintiff

for a declaration as to ownership of the suit property and for an order of perpetual injunction. The suit property has been described in paragraph 1 of the plaint as Survey No.3, Hissa No.13 and the boundaries thereof are mentioned as under :

On the east : property of Sakharam Pandu Kadam,

On the south : plaintiff's land,

On the west : plaintiff's land Survey No. 3 Hissa No.2,

On the north : land of the plaintiff and Babaji Rama Jadhav.

4. The case of plaintiff is that the suit property is owned and possessed by the plaintiff as a manager of joint family and is their ancestral property. It is stated in the plaint that village Chatav was previously a *khoti* village and the suit property was recorded in the account of plaintiff's forefather in boat-khata. The plaint then proceeds to state the details of forefathers and sets out the genealogy. It is the case of plaintiff that the suit property is in possession of the plaintiff as a manager of joint family. It is the case of plaintiff that in boatkhata of suit property, the suit property is recorded in the name of forefathers and details are set out in paragraph no.4. The plaintiff claims that as their ancestors Ganu Bhikaji and Laxman, who were the sons of original ancestor Suryaji, died issueless, the plaintiff being the only legal heir, was entitled to

the suit property. It is his case that in the record of rights, the suit property was recorded as Hissa nos.12 and 13 and as such Survey No.3, Hissa No. 12 and 13 admeasuring 2-acre and 26-guntha is under the ownership of plaintiff. The plaintiff claims that the defendants do not have any right in the suit property, however, they claim the suit property as their own property. The defendant is not aware of the boundaries of his land and claims the suit property as his own land. It is further the case that Survey No.3, Hissa No.13 is merged in Hissa No.2 and 10 and as such the suit property is now Survey No.3, Hissa No. 2+10+13, however, there is no entry in the record of rights about Hissa No.10 and Hissa No.13. It is stated that the plaintiff's house and cow-shed are in Hissa No.13 and in fact Hissa No.13 is 18-R, Hissa No.10 is 9-R and Hissa No. 2 is 14-R. It is claimed that as there is no entry in the record of rights, the defendant is taking advantage of this and obstructing the plaintiff.

5. The defendant appeared in the suit and filed written statement in which the defence taken was that the description of suit property is not correct and as per the records although the description is Survey No.3, Hissa No.12+13, the same is Survey No.3A, A1, Hissa No.2. The defendant has raised a defence that the plaintiff has not described the property in the plaint as Survey No.3, Hissa

No.12+13 and the said property is also not reflected in 7/12 extract. It is the contention of the defendant that Survey No.3 Hissa No.12+13 is not in existence. The defence is that the plaintiff had always considered Survey Nos.3A, A1, Hissa No.2 an Survey No.3, 3A, A1, Hissa No.3/2 as their property. It is further contended that the defendant had instituted Regular Civil Suit No. 66 of 1976 against the plaintiff and his 3 brothers for mandatory injunction which was decreed and as against which there is no appeal. In these proceedings, the plaintiff had filed his reply and has admitted that the plaintiff's property is situated to the east of suit property stated in RCS No. 66 of 1976. It was further contended that the plaintiff's brother had made an application for measurement before the DILR in the year 1977 and pursuant thereto, measurement was carried out. It is contended that the said map is with the plaintiff however, the plaintiff has not produced the same during these proceedings or even during the hearing of RCS No. 66 of 1976.

6. The trial Court on consideration of the evidence on record, decreed the suit declaring the plaintiff as owner of the suit land and restraining the defendant from interfering with the peaceful possession and occupation of plaintiff over the suit land. Being aggrieved by the judgment and order, the defendant preferred an

appeal being Regular Civil Appeal No.35 of 2006. On 17th December 2014, an application came to be filed by the plaintiff under Order 26 Rule 9 of CPC seeking the appointment of DILR as a Court commissioner with direction to the Court commissioner, on the basis of map of the year 1919, to measure Survey No.3, Hissa No.2, 3, 10 and 13 – the subdivided plots and to determine the boundaries of Hissa No. 13 and submit a report. The said application came to be rejected by the appellate Court, giving rise to the present petition.

7. Heard Mr. S. S. Kanetkar, learned counsel appearing for the petitioner and Mr. Kothari, learned counsel appearing for respondent nos.1a and 1b.

8. Learned counsel appearing for the plaintiff invited the attention of this Court to the averments made in plaint as well as the findings of appellate Court. He has pointed out the submissions of defendant which are recorded in the order of trial Court disputing the description of suit property which was claimed to be not tallying with the parts of Survey number shown at Exhibit-79 which was city survey map drawn of Survey No.3. He pointed out that there is another map which is at Exhibit-80 and in view of the discrepancy in the maps, the appellate Court has held that Exhibits-79 and 80 appear to be the root

cause of dispute. He has invited the attention of this Court to the maps at Exhibits-79 and 80 and would contend that a comparison of maps shows that Survey No.3 Hissa No 2+10+13 is at one place in one of the maps and Survey No.3 Hissa No 2+3+10 at different location in the other map. As such, he would contend that for the purpose of determining the boundaries of suit property, the Court commissioner ought to be appointed so that the suit property is identifiable. He would further contend that as observed by the trial Court, the defendant is disputing the description of suit property and as such for the purpose of elucidating the matter in dispute, the appointment of Court commissioner is necessary. In support of his decision, Mr. Kanetkar, learned counsel for the petitioner relied upon decision of this Court in ***Bento v. Rosario [2014(4) Mh.L.J. 366]***.

9. *Per contra*, Mr. Kothari, learned counsel for the defendant points out that the maps were within the knowledge of plaintiff during the hearing and as such it was for the plaintiff to prove his case as regards the ownership of property. He would further submit that the plaintiff has come with the specific case that he is owner of the property bearing Survey No.3, Hissa No.13 and, as such, it is for the plaintiff to establish that such a property is in existence and is under the ownership of plaintiff. He would further contend that the

appointment of Court commissioner will amount to collection of evidence in the present case. He draws support from the provisions of Order-7 Rule-3 of the CPC and would contend that the plaint is required to contain description of the property to sufficiently identify it and as in the present case the plaintiff has identified the suit property, which according to the plaintiff is correct description, there is no necessity of appointment of Court commissioner for fixing the boundaries. In support of his submissions, Mr. Kothari, learned counsel for defendant relies upon following decisions :

(a) *Dhondiram v. Laxman* [2018(2) Mh.L.J. 255];

(b) *Gundappa Tukaram Gote v. Dhondiram Tukaram Gote* [2015 SCC OnLine Bom 3646]; and

(c) *B. S. Nair Hassan Khan v. Aswathanarayana Rao* [2003 SCC OnLine Kar 601].

10. Considered the submissions of parties.

11. The plaintiff seeks appointment of Court commissioner under the provisions of Order-26 Rule-9 of the CPC with direction to the Court commissioner that Survey No.3, Hissa No. 2, 3, 5, 10 and 13, i.e., subdivided plots be measured on the basis of "A"-sheet map of the year 1919 and, as such, the boundaries of Hissa No.13 be fixed. Before proceeding further it would be appropriate to reproduce the provisions of Order-7 Rule-3 of CPC, which read thus :

“3. Where the subject-matter of the suit is immovable property.— Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.”

12. It is clear from the above that where the subject matter is immovable property, the plaint is required to identify the suit property specifying the boundaries or numbers which are sufficient to identify it. In the present case, the plaintiff has come with the case that Survey No.3, Hissa No.13 is the suit property thus identifying the suit property with four boundaries which according to the plaintiff was owned by him. The trial Court has framed a specific issue as regards the description of suit property in view of the dispute which was raised by the defendant and has answered the same in the affirmative. The trial Court as regards the maps which are at Exhibits- 79 and 80, has considered the evidence of witnesses produced on behalf of the plaintiff, namely, the TILR, Khed, who has deposed that there is a map of Hissa No.13, Survey No.3 which is of the year 1960 and on which the house is shown. The trial Court on the basis of evidence of the witnesses of plaintiff has come to a finding that the description of property is correct. The trial Court considered the evidence of witnesses that the plaintiff's house is coming in Survey

No.3 Hissa No.2+10+13 and as regards map, the appeal of plaintiff is pending before the SDO. Pertinently, the defendant has not led any evidence in the matter and from the judgment of trial Court it is not discernible as to who has produced the maps at Exhibit-79 and Exhibit-80.

13. Be that as it may. There is a specific finding in favour of the plaintiff that the description of suit property set forth in plaint is correct and there are witnesses examined by the plaintiff to prove his claim.

14. The application seeking appointment of Court Commissioner has been filed on the basis of observations of the trial Court as regards the discrepancy in maps below Exhibit-79 and Exhibit-80 and it is contended that the identity of suit property will be an important issue and as such it is necessary that the sub divided plots of Survey No.3 be measured and the boundaries of Hissa No.13 be defined. The appellate Court while rejecting the application has considered that the application seeks appointment of Court commissioner to carry out the measurement on the basis of map of 1919, i.e., survey map at Exhibit-79 and has rejected the same on the ground that there is discrepancy in the survey map below Exhibits-79 and 80. The appellate Court held that the proper remedy of plaintiff is to take

objection as regards the survey map. I do not find any reason to interfere with the order of the appellate Court. During the proceedings before trial Court, the plaintiff was aware of the discrepancy in map below Exhibit-79 and Exhibit-80 and has on that basis examined the witness and has proved the description of the suit property. In such an event, the application seeking appointment of Court commissioner on an apprehension that the identity of suit property would be an issue cannot be entertained. The appointment of Court commissioner is for the purpose of elucidating the matter in dispute and not for the purpose of collection of evidence. After evidence being led by the plaintiff identifying the suit property, it is now not open for the plaintiff at the appellate stage, to seek appointment of Court commissioner, as the plaintiff has established the description of suit property during the trial and has therefore to stand or fall by his own averments.

15. The decisions relied upon by learned counsel appearing for the defendant are squarely applicable to the facts of the present case. This Court in the case ***Dhondiram (supra)*** held that it was for the respondent–plaintiff to prove the existence of plot by producing necessary documentary evidence on record and for that purpose cannot seek appointment of Court commissioner. Pertinently, this

Court in that case held that the appointment of Court commissioner to bring the factual position of the suit land and to prove the fact that the plots are already made or there are separate water chambers for each plots cannot be permitted as the same would amount to collecting evidence to enable the respondent-plaintiff to prove the facts on the basis of which the interim relief was claimed. In **Gundappa (supra)** this Court held that the Court commissioner cannot be appointed to fix the boundaries and the same would amount to collection of evidence. In the facts of that case, the Court held that once the plaintiff had mentioned the area of suit property and the defendants are seeking to set up a defence on the basis of assessment extract, parties would have to prove their respective assertions by leading cogent evidence and cannot seek appointment of Court commissioner to fix the boundaries. The third decision is of Karnataka High Court in the case of **B S Nair Hassan Khan (supra)**, which is in support of the proposition that the application for appointment of Court commissioner cannot be filed at a belated stage.

16. As regards the decision in the case of **Bento v. Rosario (supra)** which is relied upon by learned counsel appearing for the petitioner-plaintiff is concerned, in that case, in the second appeal

filed against the judgment and decree of trial Court there was a dispute as regards the existence of ridge which was a boundary between the suit property and the defendant's land which was disputed by the defendant. In that case, as the issue was as regards the boundary dispute, the matter was remitted to the trial Court for appointment of Court commissioner for doing the local investigation to find out as to whether the ridge which existed was a boundary between the suit property and the property of defendants or not. The facts of that case are clearly distinguishable and, as such, the said decision does not assist to the case of petitioner. In the present case, the issue in the suit is not a boundary dispute between the parties and in fact the plaintiff had come with a specific case of ownership of Survey No. 3, Hissa No. 13, and as such, it is for the plaintiff to lead cogent evidence in respect of ownership rights in the suit property and cannot seek appointment of Court commissioner for identification of suit property which will amount to collection of evidence.

17. In the light of above, there is no merit in the writ petition. Writ petition stands dismissed.

[Sharmila U. Deshmukh, J.]