

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4030 OF 2022

Krushna Jaysing Shitole

.. Petitioner

Versus

Shri Bhairavnath Vidhyarthi Vastigrah Vita &
Ors.

.. Respondents

-
- Mr. Mahindra Deshmukh for Petitioner
 - Mr. S.C. Wakankar a/w Ms. Aishwarya for Respondents
-

CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 31, 2023

P.C.:

1. Heard Mr. Deshmukh, learned Advocate for Petitioner and Mr. Wakankar, learned Advocate for Respondents at length.

2. Perused the record of the present case. The present Petition has been filed impugning the order dated 03.02.2022 passed below Exh. 54 by the learned Trial Court allowing the request of Respondent No. 1 (original Plaintiff) for appointment of the Court Commissioner. Being aggrieved thereby, Petitioner (original Defendant No. 3) has challenged the said order.

3. Mr. Deshmukh, learned Advocate for the Petitioner has drawn my attention to the suit plaint and has pointed out that the suit has been filed by the Plaintiff for a declaration in respect of the subject property described in clause (1a) of the plaint namely Survey No.

1065. Admittedly, this is the old Survey number which Mr. Wakankar for Respondents would submit that has been subsequently bifurcated into three new Survey Nos. 203, 202 and 263.

4. Mr. Deshmukh would submit that the Application filed by the Plaintiff is premature in as much as by virtue of the said Application, the Plaintiff has sought determination of the boundaries of new Survey No. 203 specifically which forms part of the substantive old Survey No. 1065. He would submit that by virtue of the said Application, the Plaintiff has sought determination of his rights in Survey No. 203 without facing a trial.

5. Perusal of the impugned order reveals that the learned Trial Court has considered the aforementioned facts in detail, however it is seen that while allowing the Application, the learned Trial Court has merely referred to the aspect that the aforementioned three survey numbers form part of old survey No. 1065 and in that view of the matter, the determination of the boundaries would be required to be done at this stage. The said findings are returned in paragraph Nos. 8 and 10 of the impugned order.

6. Mr. Wakankar, learned Advocate for Respondents has vehemently relied upon the said finding and submitted that in the event if the Court Commissioner is appointed at this stage, it would enable the learned Trial Court to determine the *lis* between the

parties.

7. As alluded to herein above, the principal relief in the suit is a declaratory relief in respect of old Survey No. 1065. That old Survey Number 1065 has been subsequently bifurcated into three survey numbers mentioned above. There is no interim relief prayed for by the Plaintiff in the suit seeking determination of the boundaries of these three survey numbers much less Survey no. 203. In that view of the matter, the Application filed by Plaintiff specifically for determination of the boundaries of new Survey No. 203 is overreaching the averments as well as the reliefs claimed for in the suit plaint without getting the declaration decided in his favour. Without considering this aspect, the learned Trial Court has passed the impugned order which is not correct, as it it would enure to the benefit of the Plaintiff without adjudication of the suit claim / declaration.

8. Mr. Wakankar has referred to and relied upon the decision of this Court in the case of **Mayuresh Subhash Sonawane Vs. Yashwant Babu Bhoir**¹ and stated that appointment of the Court Commissioner would be a necessity in the facts and circumstances of the present case in order to determine the dispute between the parties.

¹ 2022 0 Supreme (Bom) 117

8.1. I have perused the said decision and the said decision is distinguishable and the ratio therein cannot be applied in the facts of the present case. It is seen that in that case, the dispute was in respect of land and landed property. In so far as the present case is concerned, the suit land consists of three new Survey Numbers and Application is for measurement and boundaries of only one new Survey Number. Suit is for declaration for all three Survey Numbers which form part of old Survey No. 1065. It is the specific case of the Petitioner i.e. Defendant No. 3 that in so far as the new Survey No. 203 is concerned, the same is developed as a commercial building having galas and offices. Further claim in the suit is specifically for claiming entire old Survey No. 1065 and merely New Survey No. 203. Mr. Wakankar refutes the submissions of Mr. Deshmukh and hence, this becomes the subject matter of trial since it is a disputed question of fact. In that view of the matter, the ratio of the decision in the case of **Mayuresh** (*supra*) would not apply to the facts and circumstances of the present case since they are entirely different.

9. In view of the above, the impugned order dated 03.02.2022 cannot be sustained and deserves interference. Hence, it is quashed and set aside. Needless to state that the learned Trial Court shall not be influenced by any observations made in the impugned order as well as this order while determining the substantive suit proceedings.

10. At the request of both the learned Advocates, learned Trial Court is requested to dispose of the pending suit as expeditiously as possible.

11. Writ Petition is disposed.

[MILIND N. JADHAV, J.]

Digitally
signed by
RAVINDRA
MOHAN
AMBERKAR
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