

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 355 OF 2020

Pawanputra Janjivan Samasya Gruha Nirman
Co-Operative Society, through its President
Shri Suresh Gulabrao Choudhary,
Aged about 59 years, Occ.: Business,
R/o. Ayodhya Nagar, Nagpur.

.... **PETITIONER.**

// VERSUS //

1. Shri Ramsingh @ Dhansingh S/o.
Balvirsingh Belpariya, R/o. New Amar
Nagar, Manewada Ring Road, Kh. No.
28, Mouza : Chikhli (Khurd), Nagpur.
2. Shri Sanjay Pancharam Kokate,
R/o. New Amar Nagar, Manewada
Ring Road, Kh. No.28, Mouza :
Chikhli (Khurd), Nagpur.

.... **RESPONDENTS.**

Shri S.S.Sitani, Advocate for Petitioner.
Shri Aditya Gabhane, Advocate for Respondent No.1.
None for Respondent No.2.

CORAM : ANIL S. KILOR, J.
DATED : JANUARY 31, 2023

ORAL JUDGMENT :

1. Heard learned counsel for the petitioner and respondent No.1. None for the respondent No.2, though served.

2. **RULE.** Rule made returnable forthwith. Heard finally by consent for the parties.

3. The order, refusing to modify the order appointing the Court Commissioner, is under challenge.

The brief facts of the case are as under :

4. The petitioner filed suit for declaration, permanent and mandatory injunction with the following prayers :

“(i) declare that the defendants have no right and authority to enter upon the suit Plot No.24 area 1740 Sq.fit of the plaintiffs for making any construction.

(ii) declare that the defendants have no right title and interest over the suit plot of the plaintiffs which is described in the schedule of property and also declare that the defendants have no right to make any construction on the suit plot of the plaintiffs.

(iii) restrain the defendants, their agents, servants, contractors or any other persons on behalf of them from making any construction on the suit plot No.24 of the plaintiffs.

(iv) pass a decree of mandatory injunction and thereby to direct the defendants to remove the constructions if any made on the suit plot of the plaintiffs and to clear the pits digs on the suit plot.

(v) costs of the suit be saddled upon the defendants.

(vi) grant any other reliefs deems fit under the circumstances of the case in favour of the plaintiffs and against the defendants.”

5. To ascertain the actual location of Plot No.24 and Plot No.93 an application for appointment of the Court Commissioner was made vide Exh.28 which came to be allowed by the trial Court vide order dated 16/12/2017. However, since both the plots are situated in two different khasras i.e. Khasra No.28/1 and Khasra No.28/3, the learned trial Court appointed Commissioner to measure both the Khasras.

6. Thereafter the application for modification of the said order was filed vide application Exh.31 on the ground that after the order was passed by the learned trial Court, dated 16/12/2017 it was revealed that for measurement of both the Khasras the charges which will require are Rs.3,00,000/- and further as the plaintiff is alleging encroachment over his plot by the defendant/ respondent No.1, he is interested in getting the land of the plaintiff and defendant No.1 measured and not the complete khasra.

7. The learned trial Court rejected the application Exh.31 on the ground that there is no need to modify the earlier order dated 16/12/2017.

8. The learned counsel for the petitioner submits that when the dispute is about two plots only, the directions issued to appoint the Court Commissioner for measurement of both the khasras, will not serve the purpose as the Court Commissioner will only fix the boundaries of both the khasras and in that case there will be no finding as regards the area in possession of the defendant No.1 and the petitioner or to what extent the defendant No.1 has encroached the land. He, therefore, submits that no purpose will be served and the whole exercise will be futile, even after payment of huge charges i.e. Rs.3,00,000/-.

9. It is pointed out that when the Court has arrived at a conclusion that in this case, the Court Commissioner is required to be appointed, the trial Court ought to have appointed it for the measurement of the plots in dispute and not for the measurement of both the khasras.

10. On the other hand, the learned counsel for the respondent supports the impugned order and prays for dismissal of the present petition.

11. It is evident from the prayer clause and the pleadings in the plaint that the whole controversy relates to two adjoining plots in two different khasras i.e. Plot No.24 in Khasra No.28/3 and Plot No.93 in Khasra No.28/1. Thus, to ascertain whether the defendant No.1 has encroached over the plot of the petitioner/ plaintiff, it is necessary to measure both the plots and not both the khasras.

12. Thus, I find substance in the submission of the learned counsel for the petitioner that no purpose would be served if both the khasras are measured, because in that eventuality the Commissioner will fix the boundaries of both the khasras, but there will be no finding whether the defendant No.1 has encroached upon the plot of the plaintiff.

13. There is no dispute that the Court has found it necessary to appoint the Court Commissioner. Thus, the only question remains

whether it is proper in the facts and circumstances of the present case, to ask the Commissioner to measure both the Khasras or to ask the Commissioner to measure both the plots in dispute.

14. As I have observed that I find substance in the submission of the learned counsel for the petitioner that no purpose will be served in appointing the Commissioner to measure both the khasras, I am of the opinion that the learned trial Court has committed error in not modifying the order as requested for, vide application Exh.31. In that view of the matter, I pass the following order:

- i) The writ petition is allowed.
- ii) The impugned order dated 05/04/2019 passed below Exh.31 by 21st Joint Civil Judge Senior Division, Nagpur in Special Civil Suit No.1172 of 2010 is hereby quashed and set aside and thereby application Exh.31 is allowed.

Rule made absolute accordingly. No order as to costs.

(ANIL S. KILOR, J)

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