



**IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD**

922 WRIT PETITION NO. 1509 OF 2024

Sakharabai Sandu Magar

VERSUS

Jagannath Hari Pawar

...

Advocate for the Petitioner : Mr. Anand Chawre

Advocate for Respondent No.1 : Mr. K. P. Rodge

...

CORAM : R. M. JOSHI, J.

Dated : July 23, 2024

PER COURT :-

1. By consent of both sides, petition is heard finally at admission stage.
2. Petitioner / original defendant in Regular civil Suit No.50/2021 takes exception to order dated 29/09/2023 passed by the learned Trial Court below Exhibit 28 whereby application filed by the plaintiff/ respondent herein for appointment of Taluka Inspector of Land Records as Court Commissioner to measure the suit land is allowed.
3. The facts as they appear from the record indicate that the respondent filed suit bearing Regular Civil Suit No.50/2021 with the claim that he is the owner of 60 R land from Survey No.53 on the basis of registered sale deed executed by the vendor in his favour. It is alleged by him that the defendant is causing obstruction to his peaceful possession of the suit property. Hence, suit is filed for seeking injunction against the defendant restraining him from obstructing possession of the plaintiff over the suit property.
4. Prior thereto the petitioner herein had filed suit being Regular Civil

Suit No.170/2018 seeking partition of the properties from his father and brothers. There is no dispute to the fact that 60 R land which is sold to the respondent is forms part of the suit properties therein.

5. In Regular Civil Suit No.50/2021 an application came to filed vide Exhibit 28 for appointment of Court Commissioner with the averments that the defendant has disputed the contention of the plaintiff about existence of a bandh between two lands. There is also claim that since the defendant is obstructing the possession of the plaintiff over the suit land and threatening to take possession thereof, it is just and necessary to appoint Taluka Inspector of Land Records as Court Commissioner to measure the land. This application was opposed by defendant. By passing impugned order, said application came to be allowed.

6. Learned Counsel for petitioner submits that it is trite that the appointment of the Court Commissioner cannot be done for the purpose of collecting evidence for and on behalf of the party. He drew attention of the court to the averments in the plaint and the relief prayed therein. According to him, the suit is filed for simplicitor injunction, with no allegation of encroachment and seeking possession of the encroached portion, question of appointment of Court Commissioner does not arise.

7. Learned Counsel for the respondent opposed the said submission

primarily on the ground that the order in question is passed on 29/09/2023 and pursuant to the said order the, respondent has paid the fees of measurement and fees for the police protection. According to him at a belated stage the said order cannot be challenged. On merit it is his submission that once the respondent / plaintiff has come out with a case that he is the owner of the suit property and his possession is being obstructed by the defendant and there is written statement filed on record by the defendant therein to the effect that there is no bandh in between two lands as claimed by the plaintiff, the issue can be sorted out only by appointment of the surveyor to measure the land. It is his submission that the learned Trial Court has rightly observed that in order to decide the dispute between the parties permanently, it would be in their interest to appoint such surveyor.

8. There cannot be a dispute about the position of law to the effect that the Court Commissioner cannot be appointed for the purpose of collecting evidence for and on behalf of the party. In order to appoint a surveyor to measure the suit property, it was absolutely necessary for the Trial Court to take into consideration the scope of the suit and in particular the pleading of the plaintiff in the plaint. Undisputedly there is no allegation in the plaint that the defendant has caused encroachment upon the suit property. Only relief prayed is to injunct

the defendant from obstructing the possession of the plaintiff over the same. Merely because defendant filed written statement disputing the contentions raised by the plaintiff, the same does not become an issue to be decided in this case, since no counterclaim is filed by defendant. On the face of it the pleading of the parties indicate that there would be only one issue for determination of the Trial Court i.e. whether the plaintiff proves that the defendant is causing obstruction to the plaintiff's possession over the suit property.

9. Learned Trial Court though has sought to take a view that appointment of a Court Commissioner would help the parties to settle their dispute, however while doing so, the scope of the suit is being ignored by the learned Trial Court. Having regard to the fact that it is not a case of encroachment or possession of the encroached portion of the suit property, question of appointment of surveyor to measure the property does not arise. In the facts and circumstances of the case, the order impugned cannot sustain for the aforesaid reasons. Hence, petition stands allowed.

10. Impugned order is set aside. Application Exhibit 28 filed in Regular Civil Suit No.50/2021 is dismissed.

(R. M. JOSHI, J.)

vj gawade/-.