



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

34 WRIT PETITION NO. 2385 OF 2024

SK JAKIR SK SUBHAN QURESHI AND OTHERS
VERSUS
SABERABI SK RAHIMODDIN HALWAI AND OTHERS

...

Mr. Pandit Sushil Pushpendra, Advocate for the Petitioners

Mr. P. P. Patni, Advocate for Respondent No.1

Mr. N. S. Tekale, AGP for Respondent No.2

Mr. Amol S. Mali h/for Mr. D. S. Bagul, Advocate for Respondent No.3

CORAM : Y. G. KHOBRAGADE, J.

DATE : 23rd September, 2024

ORDER

1. Heard Shri Pandit, the learned Advocate for the Petitioners, Shri Patni, the learned Advocate for Respondent No.1, learned AGP for Respondent No.2 and Shri Mali, the learned Advocate appearing for Respondent No.3.

2. Having regard to submissions canvassed on behalf of both the sides, I have gone through the Petition paper book. By the present Petition, the Petitioners have challenged the order dated 13.12.2023 passed below Exh.23 by the learned 2nd Jt. Civil Judge Senior Division, Nandurbar, in Regular Civil Suit No. 55 of 2019, thereby, the Application Exh.23 for appointment of Court Commissioner has been granted.

3. The present Respondent No.1 is the original Plaintiff and Petitioners are the original Defendant Nos. 1 to 4. The Respondent Nos. 2 and 3 are original Defendant Nos. 5 and 6 in Regular Civil Suit No. 55 of 2019. For the sake of brevity, the parties to the present Petition will be referred in their original capacity.

4. The Respondent No.1/Plaintiff filed a Regular Civil Suit No. 55 of 2019 for declaration that Defendant Nos. 1 to 4 have made encroachment over the land City Survey No.2686/A admeasuring 434.8 sq. mtr., adjacent Government land towards southern side. The Plaintiff pleaded that she is owner and in possession of house, admeasuring 57.9 sq. mtrs. out of City Survey No.2680/A, admeasuring 115.8 sq. meters, towards east side. The other land bearing City Survey No. 2686/A admeasuring 434.8 towards north side of City Survey No. 2680, adjacent to Government land. The plaintiff further alleged that, the Defendant Nos. 1 to 3 have raised construction of three storied building and made encroachment on the Government land upto 6 meters, due to which public road narrowed and caused inconvenience to the Plaintiff and other people for using the road. The Plaintiff further pleaded that in revenue record Survey No. 2686/A shown as open space. Therefore, to maintain the ecological balance said land required to be kept open. However, the Defendant Nos. 1 to 4 have made

encroachment over the said land, hence, prayed for declaration and mandatory injunction for removal of said encroachment.

5. The Defendant Nos. 1 to 4 have filed written statement and denied the claim of the Plaintiff. According to the Defendants they have not encroached upon the Government land and in case they have encroached upon the Government land, in that event, the competent authority may take action against them and no right is created in favour of the Plaintiff for removal of their encroachment, hence, prayed for dismissal of the suit.

6. In order to ascertain encroachment of the Defendants on the Government land, the Plaintiff filed Exh 23 an Application under order 26 Rule 9 of the Civil Procedure Code and prayed for appointment of the Court Commissioner. The Defendants did not resist the application as they fail to file reply, therefore, on 04.10.2023, the learned trial Court proceeded with the application without reply of the Defendants. On 13.12.2023, the learned trial Court passed the impugned order and appointed the Dy. S.L.R., Nandurbar as a Court Commissioner to measure the property described in the suit by fixing four corners of the boundaries of the land and to submit report.

7. Under Order XXVI Rule 9 of the Code, the Court can appoint the Commissioner for local inspection; a) If the court deems that local

investigation is necessary for elucidating any matter in dispute; b) For ascertaining the market value of any property, or any mesne profits or damages or annual net profits. However, in the case in hand, the pleadings of the Plaintiff do not appear that Defendants have made any encroachment over the plaintiff's land. Per contra, the pleadings of the Plaintiff itself suggest that the Defendant Nos. 1 to 3 allegedly raised construction of three storied cement concrete building in front of southern side of Survey No. 2696/A and encroached upto six meters Public Road, due to which said road become narrowed, due to which the plaintiff as well people from the locality are causing inconvenience while passing through the road.

8. It is not the contention of the Plaintiff that Defendant Nos. 1 to 3 have made encroachment on the land of the Plaintiff. Nonetheless, the Plaintiff raised pleadings that, the Defendant Nos. 1 to 4 have made encroachment on the Government land. Therefore, if the, Government/Collector having any grievance or cause as against the Defendants, in that event, the competent authority/Collector may take appropriate action against the Defendants. However, the Plaintiff has no locus to challenge the encroachment allegedly made by the defendants upon the Government land. Therefore, considering the scope of Order 26 Rule 9 CPC, the learned trial court ought to have refused to appoint the Court commissioner to measure the land. It is trite settled principal

of law that, no Court Commissioner can be appointed for collection of evidence for the parties, however, in case in hand, it appears that the learned trial court passed the impugned order and appointed the Court Commissioner for collection of evidence for the plaintiff, which is not permissible in eyes of law. Therefore, the impugned order does not sustain and it is liable to be quashed and set aside. Accordingly, I proceed to pass the following order:

ORDER

1. The Writ Petition No. 2385 of 2024 is allowed.
2. The impugned order dated 13.12.2023 passed below Exhibit 23 by the learned 2nd Jt. Civil Judge Senior Division, Nandurbar in Regular Civil Suit No. 55 of 2019 is quashed and set aside.
3. The Respondent/Plaintiff is granted liberty to file an application under Order 26 Rule 9, if such exigency arises, which may be decided on it's merit without influence this order.
4. No order as to cost.

(Y. G. KHOBRAGADE, J.)