



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8331 OF 2023

SUBHASH BAPURAO WAGHMARE

VERSUS

SITARAM TUKARAM DATE

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Advocate for the Petitioner : Mr. Revan P. Bhumkar
Advocate for Respondent : Mr. B. K. Patil and Mr. V. M. Kagne

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CORAM : ARUN R. PEDNEKER, J.
Reserved on : 12.03.2024
Pronounced on : 07.05.2024

JUDGMENT:

1. Heard the learned counsel for the parties.
2. By the present writ petition, the petitioner is challenging the order passed at Exhibit 30, whereby the application filed by the plaintiff for appointment of the court commissioner under Order 26 Rule 9 of CPC is allowed and the Deputy Superintendent of Land Records is appointed as Court Commissioner and directed to carry out measurement of suit property bearing gut no.338 and 277, situated at Mauje Grampanchayat Ghogargaon, Taluka Shrigonda, District Ahmednagar, so also, the Deputy Superintendent of Land Records is directed to carry out the measurement and submit the report with map showing possession of respective occupants and boundaries within 2 months of payment of necessary

charges by the plaintiff. Against the order passed by the 2nd Joint Civil Judge Junior Division, Shrigonda, the present petition is filed by the defendant.

3. Mr. Revan P. Bhumkar, learned counsel for the petitioner / defendant submits that, it is the contention of the defendant that the suit is filed claiming perpetual injunction and that in a suit simplicitor for injunction no direction ought to have been issued for appointment of the court commissioner as it amounts to collection of the evidence on behalf of the plaintiff. The learned counsel further submits that, in the application, the contention of the respondent / plaintiff is that the defendant is trying to encroach the suit property and that there is no specific allegation against the defendant that they have encroached on the property. The learned counsel further submits that the court below without verifying the record appointed the court commissioner and erroneously observed that the grievance of the plaintiff is that the defendant have encroached on the suit property, whereas, the application filed by the applicant itself indicates that there is an attempt by the defendant to encroach the property, however, no encroachment is pleaded by the plaintiff. On the above two grounds, the learned counsel submits that the court commissioner ought not to have been appointed, as it amounted to collection of the evidence at the instance of the plaintiff

and the evidence of encroachment if at all has to be prima facie led by the plaintiff himself and no assistance of the court in that regard can be taken by appointing the court commissioner.

4. Per contra, Mr. B. K. Patil and Mr. V. M. Kagne, learned counsel for the respondent / plaintiff submits that the property mentioned in the plaint in the Gut no.338 and the boundary of gut no.227 and the road of Gut no.227 is in occupation of the present petitioner and it is further stated in the plaint at para 6, as under:-

“६) वादीने व गावातील इतर लोकांनी प्रतिवादीकडे दावा मिळकत व गट नं. २७७ ची मिळकत या दोन्ही मिळकतीचे एकत्रीत मोजणीचा पर्याय देखील ठेवला. परंतु प्रतिवादी मिळकतीचे रीतसर मोजणीसही तयार होत नाही. वास्तविक पाहता प्रतिवादीने सदरचे बांधकाम करण्यापूर्वी त्यांचे मिळकतीचे कोणत्याही प्रकारची मोजणी केलेली नाही. अगर कोणत्याही सक्षम अधिकाऱ्यांकडून बांधकाम बाबत परवानगी घेतलेली नाही. याउलट प्रतिवादी दावा मिळकतीपैकी दक्षिण बाजूने सुमारे ७ फूट भागामध्ये बेकायदेशीर अतिक्रमण करून कॉमन उभे करून बांधकाम करण्याच्या खटपटीत व तयारीत आहेत. प्रतिवादीने केलेल्या बेकायदा बांधकामामुळे वादीचे जाणे येणेचा रास्ता देखील बंद झाला येणेचा म्हणून वादीला प्रतिवादीचे विरुद्ध सदरचा दावा दाखल करणे भाग पडलेले आहे.”

5. Respondent / Plaintiff contended therein that there is an encroachment on the road on the basis of which his access to the land of the respondent is obstructed. As such, an injunction is sought against the petitioner / defendant in the said suit.

6. The learned counsel for the respondent / plaintiff further contends that there is a status quo order passed in the suit and notwithstanding the status quo order there is violation of the status quo order by the petitioner / defendant, as such, the appointment of court commissioner is necessary.

CONSIDERATION:-

7. Having considered the rival submissions on perusal of the impugned order it is to be noted that the trial court has observed that after the institution of the suit and despite status quo order being granted by the predecessor judge the defendant has allegedly continued with the act of encroachment by the making construction in the suit property and, therefore, in the considered view of the trial court it has proceeded to pass the following order dated 17.03.2023:-

“ ORDER

- 1. Application is allowed.**
- 2. Deputy Superintendent of Land Records, Shrigonda is hereby appointed as Court Commissioner and directed to carry out measurement of suit property bearing Gat No.338 and 277 located at Mauje Grampanchyat Ghogargaon, Taluka Shrigonda, District Ahmednagar.**
- 3. The Plaintiffs are directed to deposit necessary charges in the office of Deputy Superintendent of Land Records Office, Shrigonda.**
- 4. The Deputy Superintendent of land Records, Shrigonda is hereby directed to carry out measurement and submit the report with map showing possession of respective occupants and boundaries within 2 months from the payment of necessary charges by the plaintiffs.**
- 5. Issue Commission Writ accordingly.”**

8. From the perusal of the order of the trial court, it is apparent that there is a status quo order passed by the trial court, which is allegedly violated and in order to ascertain the violation the court commissioner is appointed.

9. However, the perusal of the final order appointing the court commissioner would indicate that the superintendent of land records is appointed as the court commissioner and directed to carry out the measurement of the suit property bearing no.338 and 227 located at Mauje Grampanchayat Ghogargaon, Taluka – Shrigonda, District – Ahmednagar. The superintendent is directed to carry out the measurement and submit the report with map showing the possession of respective occupants and boundaries within two (02) months.

10. The order appointing the court commissioner apparently is not for ascertaining the stage of earlier construction and a new construction after the status quo order to ascertain whether there is violation of the status quo order. In order to ascertain violation of status quo order, it is necessary to ascertain the nature of constructions carried out prior to the passing of the status quo order and after the passing of the status quo order, irrespective of whether the construction of the petitioner is within the boundary of the petitioner. The perusal of the impugned order indicates that the court commissioner is appointed

for the demarcation of the boundaries and for carrying out the measurement of the suit property and showing possession of the respective occupants and their boundaries. Giving findings on possession is essential judicial function and has to be based on evidence produced before the court and cannot be left to the court commissioner so also the measurement of the suit property bearing Gut No.338 and 277 located at Mauje Grampanchayat Ghogargaon, Taluak – Shrigonda, District – Ahmednagar cannot be carried out at a preliminary stage of the suit, as it would amount to collection of the evidence at the instnace of the plaintiff and the prayer for same can be entertained at a later date after the evidence of the plaintiff and after considering the evidence of the plaintiff if it is found necessary the court commissioner can be appointed. The appointment of the court commissioner although is made for the reason of finding out violation of the status quo order but in the impugned order nowhere directs the court commissioner to find out the violation if any i.e. the construction before and post status quo order. The commissioner is not directed to report violation of the status quo order.

11. Reference can be made to the Judgment of this court in the case of Dnyandeo Vithal Salke & Ors. VS. Dagdu Kadar Inamdar, 2017 (5) ALL MR 104, wherein, in a suit for simplicitor injunction, it has held at para 2 as under:-

“2. Admittedly, the suit has been filed for injunction simplicitor and there is no prayer for removal of encroachment. Application (Exh.5) seeking temporary injunction against the petitioners original defendants filed by respondent original plaintiff was rejected on 29.09.2016 on the ground that the original plaintiff could not establish prima facie case in his favour and he could not prima facie show which property was in his possession. When the suit has been filed for injunction simplicitor, I do not understand as to how the Civil Judge, Junior Division could have passed order directing appointment of T.I.L.R., with direction to submit his factual report as regards possession and user of the land. This amounts to collection of evidence which is not the object of the provisions regarding appointment of the Court Commissioner, as contained in Order 26 Rule 9 of the Civil Procedure Code. The learned Single Judge (As the Hon’ble Judge then) in the case of Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare & Ors., 2001 (2) Mh.L.J.959 has also taken a view that appointing the Court Commissioner to submit his report regarding actual possession of the suit field would amount to making effort to collect evidence regarding possession and the same is not permissible in the law.”

12. The Judgment in the case of Dnyandeo (*supra*) is applicable to the facts of the instant case. In the instant case also the court commissioner is directed to submit his report as regards the actual possession of the suit property and the same amounts to collector of evidence.

13. This court in the case of Kalyan Santram Kawade and others Vs. Khanderao @ Khandu Ganpati Kawade and others, 2015 (4) Mh.L.J. 429, at para 16 has observed as under:-

“16. Mr.Choukidar is justified in submitting that a Court commissioner can not and ought not to be appointed with the purpose of collecting evidence and that such an appointment, normally does not precede the recording of evidence. Nevertheless, this being a discretionary power, I am of the view that it should be left to the Trial Court to assess the necessity of appointment of a Court Commissioner, but surely avoid such appointment if it is to collect evidence. Interference in the impugned order by this Court is warranted only when a case of grave injustice is made out by the petitioner.”

14. This court has held in the case Kalyan (supra) that the court commissioner ought not to have been appointed for the purpose of collecting the evidence and normally does not precede the recording of evidence.

15. Thus, both the above judgments are applicable to the instant case.

16. The law laid down by this court is that the court should not assist the parties in collecting the evidence and normally the court commissioner should be appointed after the evidence of the parties and, in the instant case, the appointment made is to ascertain the violation of the status quo order but the final directions given to the superintendent

of land records / court commissioner is to demarcate the boundaries and to find out the factual occupation of the parties qua the suit land and the same is not permissible.

17. Thus, the impugned order passed by the C.J.J.D., Shrigonda is quashed with liberty to the petitioner to move appropriate application to the trial court for appointment of the court commissioner if necessary after the evidence of the plaintiff. So also, the trial court in it's discretion if necessary may investigate into the violation of the status quo order by appointing the court commissioner or otherwise by an independent evidence to the extent of finding out if there is violation of the status quo order. With the above liberty the impugned order of appointing the court commissioner is set aside.

18. The writ petition stands disposed of accordingly.

[ARUN R. PEDNEKER, J.]

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