



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6815 OF 2022

Shobha Sanjay Gadekar,
Age: 40 yrs. Occ. Household,
R/o. Dronagiri Nagar, Hadgaon,
Tq. Hadgaon, Dist. Nanded

.. Petitioner
[Ori. Defendant no.3]

Versus

1. Godavari w/o Pralhad Pimpale,
Age: 45 yrs. Occ. Household,
R/o. Dronagri Nagar, Hadgaon,
Tq. Hadgaon, Dist. Nanded

2. The Chief Officer,
Municipal Council Hadgaon,
Tq. Hadgaon, Dist. Nanded.

3. The Collector,
College Office, Nanded,
Tq. and Dist. Nnaded

.. Respondents
[Rep.No.1 Ori. Plaintiff &
Resp. No.2 and 3 Ori. Deft.
No.1 and 2]

...

Advocate for the Petitioner : Mr. S. B. Ghatol Patil

Advocate for Respondents No.1:

Mr. R. G. Tupe h/f. Mr. G. K. Muneshwar

Advocate for Respondent No.2:

Mr. R. R. Bangar h/f. Mr. A. N. Patale

...

CORAM : ARUN R. PEDNEKER, J.

Reserved On : 01.04.2024

Pronounced On : 08.05.2024

JUDGMENT:

1. Heard.
2. By the present petition the petitioner challenges the impugned order dated 22.03.2022 passed in Exhibit 31 filed by the plaintiff for appointment of the court commissioner thereby allowed the application of the plaintiff and appointed the court commissioner for measurement of lands of respective parties and to ascertain encroachment, if any.
3. The facts in brief are that the plaintiff / respondent filed the suit for mandatory injunction against the defendant / petitioner, not to interfere in the house property bearing no.3 Municipal No.455 in ward No.17 situated at Drongiri Nagar, Hadgaon, Tq. Hadgaon, District. Nanded. In the said suit the plaintiff also filed an Exhibit 5 application for temporary injunction restraining the defendant from carrying out construction. The suit is resisted by the petitioner by filing the written statement and denied the entire contentions of the plaint. The plaintiff filed an application for measurement of the land. The said application filed at Exhibit 31 was resisted by the defendant on the ground that it amounts to collection of the evidence for the plaintiff, so also, the applications is vague. The trial court after considering the application for appointment of the court commissioner so also the say filed by the

defendant / petitioner held that the plaintiff and the defendant are neighbours of adjacent houses and that in the plaint it is alleged that defendant no.3 has made encroachment upon the plaintiffs property and she has prayed for demolition of the encroached portion. The court further observed that the court is not an expert to arrive at the conclusion whether there is an encroachment or not and for that purpose appointment of the court commissioner is necessary. Hence the application is allowed and the Dy.L.R. Hadgaon is appointed as court commissioner and directed to measure the property of the plaintiff and defendant no.3, draw measurement map of house of plaintiff and the commissioner is also directed to form opinion, whether there is encroachment upon property of plaintiff, if yes, denote encroached portion in his map and state which owner has made encroachment.

4. The order passed by the trial court is objected by filing the present petition on the ground that it is the primary duty of the plaintiff to lead evidence as regards the property of the plaintiff by showing encroachment by producing sketch map of suit property and demarcating encroachment. Once the primary evidence is laid by the plaintiff only if the same is not sufficient the court can further go into the issue of the appointment of the court commissioner.

5. The learned counsel for the petitioner submits that order directing appointment of the court commissioner in the instant case amounts to collection of evidence for the plaintiff. The learned counsel relies upon the following judgments:-

- A. Dinanath Supdu Joshi Vs. Shriram and another, 2022 SCC OnLine Bom 6712,
- B. Ghanshyam Dehariya Vs. Anaklal Dehariya, ILR 2014 MP 3114,
- C. Prasanta Kumar Jena Vs. Chaudhari Purna Ch. Das Adhikar, CLT 2005-720.

6. Per contra, the learned counsel appearing for the respondent no.1 submits that the regular civil suit no.364 of 2021 is filed along with application Exhibit-5 for mandatory injunction along with all the necessary documents i.e. the copy of registered gift deed dated 26.07.2019 executed by her husband in favour of respondent no.1. In terms of the gift deed, government taxes paid of the suit land. Photograph is also produced showing crystal clear that there is an encroachment upon the land of respondent no.1 and that interim relief application is ready for hearing on its own merits and it is necessary for the appointment of the court commissioner so as to ascertain the encroachment upon the property of the plaintiff. The order passed by the trial court is a well reasoned order and the same needs no interference.

7. This court in the case of **Dinanath** (supra), at para 8, has observed as under:-

“8. The issue about the stage at which Court Commissioner can be appointed for measurement of land under the provisions of Section 75 r/w Order 26 Rule 9 of the Code of Civil Procedure, 1908 has been dealt with by this Court in the case of Shantaram Dattatray Kekan and others Vs. Bhausahab Karbhari Kekan and another vide judgment dated 05.12.2022 in Writ Petition No.14046 of 2021. After analyzing divergent views taken in various judgments of this Court, it is held as under :

8. After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fast Rule that Court Commissioner can be appointed only at a particular stage. This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. However, common thread that runs through all the above decisions is as regards the principle that a Court Commissioner can never be appointed in order to enable parties to collect evidence. It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case.

(emphasis supplied)”

8. This court has held in various judgments that the plaintiff has to primarily lead the evidence about the suit property along with the sketch map showing encroachment. There is no bar for the court to appointment the commissioner at any particular stage of the trial, however, common thread amongst various judgments of this court is that the court commissioner can never be appointed in order to enable the parties to collect evidence. Thus, primarily, the plaintiff has to produce evidence along with map and show encroachment. In the event, the court is unable to reach conclusion on the basis of evidence produced or finds it necessary that evidence needs further elaboration, the court may appoint commissioner under Order 26 Rule 9 of the CPC.

9. The suit is at a preliminary stage and Exhibit 5 application is ready to be decided. The petitioner has to prima facie lead evidence to establish his case and that the evidence cannot be gathered by the court commissioner so as to decide the extent of encroachment. The order of the trial court indicates that the trial court has gone into the inquiry of the allegation made by the plaintiff and to ascertain encroachment the court has appointed the court commissioner. It has not referred to any evidence of the plaintiff as regards the sketch map, such approach of the trial court is not acceptable in view of the various judgments of this court that the court while appointing the court commissioner cannot collect

evidence on behalf of the parties. The parties have to make out their case by leading evidence and based on the evidence given by the parties the court may determine the appointment of the court commissioner under Order 26 Rule 9 of the CPC for the purpose of elucidating any matter in dispute and may issue summons to such person as it thinks fit directing to make such investigation and to report thereon to the court.

10. It is the primary duty of the parties to lead evidence to support it's case. The court, for the purpose of further elucidating any matter in dispute after considering the evidence of the parties may appoint the court commissioner directing him to make such investigation as the court deems necessary.

11. The local investigation of the court commissioner is evidence in the matter in terms of the Order 26 Rule 10 of the CPC together with his report in writing signed by him.

12. Thus, in the instant case, since the preliminary stage of leading evidence has not been crossed or no material has been produced by the plaintiff on the basis of which the trial court comes to the conclusion that there is prima facie encroachment and that it is further necessary to obtain a report of the court commissioner that the court commissioner is required to be appointed by the trial court.

13. The trial court in its impugned order observed that the court commissioner should measure the property, prepare the map and has to ascertain which owner has made encroachment and denote the encroached portion in the map. The order of the trial court amounts to collection of evidence for the parties and ascertaining encroachment is an essential judicial function. It is only after the parties lead their evidence that an application for appointment of the court commissioner could have been entertained in the instant case.

14. In view of the same, the impugned order is set aside, however, liberty is reserved that after recording the evidence of the parties in order to clarify the ambiguity if any in the evidence then either of the party is at liberty to file application for the appointment of the court commissioner for measurement of the property and the court will consider the same in accordance with law.

15. With the above observations, the writ petition is disposed of.

[ARUN R. PEDNEKER, J.]

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