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

WRIT PETITION NO.1039 OF 2024

1. Prabhakar s/o Baburao @ Babanrao Naik,
Age: 51 years, Occu. Agril,
R/o. Daithna, Tq. & Dist. Parbhani
 2. Kishor s/o Baburao @ Babanrao Naik,
Age: 55 years, Occu. Agril,
R/o. Daithna, Tq. & Dist. Parbhani
 3. Govind s/o Baburao @ Babanrao Naik,
Age: 40 years, Occu. Agril,
R/o. Daithna, Tq. & Dist. Parbhani
-PETITIONERS

VERSUS

1. Vitthal s/o Namdeo Naik,
Age: 53 years, Occu. Agril,
R/o. Naikwadi, Tq. & Dist. Parbhani
2. Govind s/o Munjaji Naik,
Age: 48 years, Occu. Agril,
R/o. As above
3. Radhabai w/o Tukaram Kachave,
Age: 55 years, Occu. Agril,
R/o. As above
4. Ganpat s/o Nivrutti Naik,
Age: 62 years, Occu. Agril,
R/o. Daithna, Tq. & Dist. Parbhani
5. Laxman s/o Maroti Naik,
Age: 63 years, Occu. Agril,
R/o. As above
6. Rameshwar s/o Dnyanoba Naik,
Age: 43 years, Occu. Agril and Doctor,
R/o Mathura Nagar, Parbhani,
Tq. & Dist. Parbhani

(2)

7. Jagdish s/o Dnyanoba Naik,
Age: 40 years, Occu. Agril & Doctor,
R/o Mathura Nagar, Parbhani,
Tq. & Dist. Parbhani
8. Shrihari s/o Rangnath Kachave,
Age: 65 years, Occu. Agril & Pensioner,
R/o Panchavati Nagar, Manvat,
Tq. & Dist. Parbhani
9. Amol s/o Vitthal Naik,
Age: 25 years, Occu. Agril.,
R/o Daithana,
Tq. & Dist. Parbhani
10. Rahibai w/o Ganpatrao Naik,
Age: 60 years, Occu. Agril,
R/o Naikwadi,
Tq. & Dist. Parbhani

....RESPONDENTS

....

Mr S. B. Ghatol Patil, Advocate for petitioners

Mr S. K. Chavan, Advocate for respondent Nos.1 to 10

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CORAM : PRAFULLA S. KHUBALKAR, J.**Reserved on : 29th November, 2024****Pronounced on : 20th December, 2024****JUDGMENT :**

1. Rule. Rule made returnable forthwith and heard finally by consent of the parties.

(3)

2. The petitioners have assailed the order of rejection of application under Order XXVI Rule 9 of Code of Civil Procedure for appointment of a court commissioner.

3. The petitioners are the original plaintiffs, who have filed Regular Civil Suit No.178/2023 for declaration of ownership with recovery of possession of the land to the extent of 4 acres and 20 gunthas out of Gut No.134, situated at village Indewadi, Taluka and District Parbhani alongwith prayer for mesne profit. The respondents are the original defendants. The parties are referred to according to their status before the trial court for the sake of convenience.

4. The plaintiffs' case as culled out from the plaint is that, they are owners of land bearing Survey Nos.41/2, 46/2, 45/4, 44/4 and 44/2, which was clubbed and the Gut numbers are formed, which bears Gut No.134 having total area of 10 Hectors and 52 Are and that their agricultural land is adjacent to the land of the defendants and the defendants have encroached on the suit land from all the sides. The plaintiffs have pleaded about the encroachment from eastern side to the extent of 2 acres 20 gunthas and from western side to the extent of 2 acres. They have based their pleadings on a measurement map prepared by the Deputy Superintendent of Land Records and 'K' copy.

(4)

5. The defendants filed the written statement denying the averments in the plaint with respect to the alleged encroachment by raising specific pleas that without there being measurement of entire survey numbers of all the lands, nothing can be concluded about any encroachment.

6. Before the stage of framing of issues, the plaintiffs filed an application under Exhibit 21 praying for appointment of a court commissioner under Order XXVI Rule 9 of Code of Civil Procedure. By this application, they averred that the defendants have committed encroachment on their land from all four sides and for the purpose of ascertaining the exact area of encroachment, it is necessary that an independent court commissioner is appointed. They specifically prayed for appointment of Deputy Superintendent of Land Records as the court commissioner for carrying out measurement of Gut No.134 from all four sides.

7. The respondents/defendants opposed the application on the ground that in the garb of appointment of the court commissioner, the plaintiffs want to collect evidence, which was not permissible and requested for rejection of the application by imposing costs.

(5)

8. The trial court rejected the application holding that the application was premature and that a court commissioner could not be appointed for collecting evidence.

9. The limited canvass of the instant petition is the issue about need for appointment of a court commissioner in the peculiar facts of the case. Amongst other grounds, the petitioners averred that the suit property is surrounded from all sides by the property of the defendants and therefore to ascertain the exact area of encroachment, there is a necessity for appointment of an independent court commissioner. Further, the petitioners have averred that appointment of Deputy Superintendent of Land Records, Parbhani, as court commissioner will render valuable assistance to the trial court in the adjudication of the actual controversy involved in the suit.

10. I have heard the respective counsels for both the sides.

11. Shri S. B. Ghatol Patil, the learned counsel for the plaintiffs strenuously argued that the trial court has committed serious error while rejecting the application. By referring to the pleadings in the suit, he pointed out that the defendants have committed encroachment from all the sides of the suit property and argued that it is necessary to ascertain the exact area of encroachment through an independent

(6)

government official. He further argued that appointment of the court commissioner is necessary for effective and complete adjudication of the controversy and stressed that the plaintiffs have sought for appointment of the Deputy Superintendent of Land Records, who would be an independent person. In support of his submissions to highlight the legal position, he relied upon the following judgments :

- (I) Shyam Janardan Chaudhary Vs. Asha Ramdas Katkar & another, [2014 (5) Mh.L.J. 770];
- (II) Sulemankhan Mumtajkhan & ors. Vs. Bhagirathibai Digamber Asalmol & anr., [2014 (6) Bom. C.R. 177];
- (III) Kalyan Santram Kawade and others Vs. Khanderao alias Khandu Ganpati Kawade and others, [2015 (4) Mh.L.J. 429];
- (IV) Bhupendra Bhagwat Turkar Vs. Homraj Zituji Meshram, [2015 (1) Bom. C.R. 456]; and
- (V) Dattatray Namdev Kalake Vs. Bapu Bhairu Bhivungade and others, [2015 (1) Bom. C.R. 267].

12. By referring to specific observations in these judgments, learned counsel Mr Ghatol Patil argued that by appointment of the Deputy Superintendent of Land Records as a court commissioner the trial court will be having the assistance for complete adjudication of the controversy.

(7)

13. In response, learned counsel S. K. Chavan, the learned counsel for defendants invited the Court's attention to the pleadings in the plaint and written statement to show that the plaintiffs have not stated the actual area of alleged encroachment. He contended that in the suit, the plaintiffs have claimed declaration of their ownership and in the garb of application for appointment of the court commissioner, they want to collect evidence. He emphatically argued that the plaintiffs have to prove their own case on the basis of their evidence and the map which they have filed. He argued that, in the facts of the case, there is no need for appointment of any court commissioner. In support of his submission he has relied upon the judgment in the matter of **Sitaram Suklal Patil Vs. Vasudeo Suklal Patil**, reported in **2017 DGLS(Bom.) 2522**. By referring to this judgment, he strenuously argued that, since the plaintiffs have not pleaded the area of encroachment with respect to boundaries, the application under Order XXVI Rule 9 of the Code of Civil Procedure is an attempt to collect evidence and to fill up the lacunae, which is not permissible.

14. I have carefully perused the documents. The suit is for declaration of ownership over an encroached area and for possession thereof. The plaintiffs have pleaded that their land is surrounded by the

lands of the defendants. In the specific pleas set up by the defendants in paragraphs number 15 and 16 of the written statement, by mentioning various survey numbers including the suit property, it is pleaded that, for showing encroachment it was necessary to measure the entire survey number. By the application for appointment of court commissioner the plaintiffs have prayed that, for the purpose of ascertaining exact area of encroachment, there is a need for measurement of the encroached area. The controversy involved in the suit makes it imperative to ascertain the exact area which is in possession of the plaintiffs and defendants. In view of the peculiar facts of the case that the land of the plaintiffs is surrounded by the lands of the defendants, it cannot be expected that the defendants will co-operate the plaintiffs in carrying out the measurement of the lands by entering in their property.

15. It is pertinent to note that the plaintiffs have specifically prayed for appointment of Deputy Superintendent of Land Records as a court commissioner. Although in the plaint the plaintiffs have pleaded about the alleged area of encroachment and have relied on a 'K' copy of map prepared by the Deputy Superintendent of Land Records, however, the exact area of alleged encroachment is not specifically mentioned. By

way of the application for appointment of the court commissioner, the plaintiffs have demonstrated the need to ascertain the exact encroached area so that the actual controversy involved in the suit gets decided finally.

16. In view of the entire conspectus of the matter, I am of the view that there is a need for measurement of the lands by an independent government official so that an authentic measurement map is brought before the Court.

17. In view of the position of law discernible from the judgments cited, it is fairly settled that it is always desirable that in cases involving the boundary disputes, for purpose of identifying the land, measurement thereof has to be carried out by an authentic evidence and preferably by the competent public official.

18. In view of the controversy involved in the instant matter, the judgment reported in **Shyam Janardan Choudhary** (supra) needs to be referred. The learned Single Judge of this Court, while deciding the case, reproduced the observations in the matter of **Yeshwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar, [2010 (3) Mh.L.J. 956]**, as stated in paragraph No.4, which are reproduced below:-

“4. In the case of *Yeshwant Bhaduji Ghuse vs. Vithobaji Laxman Ladekar*, reported in 2010(3) *Mh.L.J.* 956, this Court has considered the provisions of Order XXVI, Rule 9 of the Code of Civil Procedure and has held that as under :

“the Court has discretion to order local investigation. The object of local investigation is not so much to collect evidence which can be taken in the Court, but to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes and disputes about identity of lands are instances when a Court should order local investigation under Order 26, Rule 9 of the Code. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out exact area encroached upon, oral evidence cannot conclusively prove such an issue.”

19. As regards the issue of appointment of Commissioner, it is also necessary to keep in mind the other line of cases, holding that Commissioner cannot be appointed for the purpose of collecting evidence. Reliance placed by the learned counsel for the respondents Mr Chavan, on the judgment reported in the matter of **Sitaram Suklal Patil** (supra) is to highlight this position of law.

20. In the instant matter, the plaintiffs have prayed for appointment of the Deputy Superintendent of Land Records as the court commissioner. The main ground put forth to oppose the application is

(11)

the attempt to collect evidence. In view of the controversy involved in the suit, I am of the considered view that appointment of Deputy Superintendent of land Records as a court commissioner will be of a valuable assistance to the trial court rather than helping the plaintiffs to collect evidence.

21. As regards the present stage of the suit, it is informed by the counsel for the petitioner which is not controverted by the counsel for respondents that the issues are framed and evidence is yet to start. As such, appointment of court commissioner at this stage will not cause any prejudice to the defendants. The plaintiffs have clearly expressed their readiness to bear the expenses and hence the appointment of the court commissioner has to be at the costs of the plaintiffs.

22. In view of this, I am of the view that the impugned order is not sustainable. The reasoning of the trial court that the appointment of court commissioner is at a premature stage and that it will amount to collection of evidence, is erroneous in view of the peculiar facts of this case. The impugned order, therefore, is liable to be set aside.

23. In view of the above, the writ petition is allowed. The order dated 03/11/2023 passed by the Joint Civil Judge Senior Division,

(12)

Parbhani on application at Exhibit 21 in Regular Civil Suit No.178/2023 is hereby quashed and set aside. The application filed by the plaintiffs at Exhibit 21 in Regular Civil Suit No.178/2023 is allowed.

24. Rule is made absolute in above terms.

25. No order as to costs.

(PRAFULLA S. KHUBALKAR, J.)

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