

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4145 OF 2024

Sanjay Maniklal Palesha & Anr.

.. Petitioners

Versus

Highspot Developers LLP & Ors.

.. Respondents

.....

- Mr. Abhijit Kulkarni a/w Mr. Krushna Jaybhay for Petitioners
- Dr. Virendra Tulzapurkar, Senior Advocate i/by Mr. Purushottam Chavan a/w Khushabu Gandhi & Sachin Padaye for Respondent No. 1
- Mr. Amog Singh a/w Mr. Ankit Pandey & Mr. Yash Mehta i/by Mr. Jeet Gandhi for Respondent No. 6

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 22, 2024

P. C.:

1. Heard Mr. Kulkarni, learned Advocate for Petitioners, Dr. Tulzapurkar, learned Senior Advocate for Respondent No. 1 and Mr. Singh, learned Advocate for Respondent No. 6.

2. Present Writ Petition takes exception to the order dated 04.03.2024 passed by the learned Trial Court in Application below Exh. 34 filed by Respondent No. 1 (Org. Plaintiff) under O. XXVI, R. 9 of the CPC for appointment of Court Commissioner to measure the suit property. Suit was instituted on 22.12.2023 by Plaintiff against 9 Defendants seeking reliefs of declaration, injunction and removal of encroachment in respect of the suit land described in the suit plaint.

3. The grievance agitated by Mr. Kulkarni is that on 08.01.2024, order for issuance of summons was passed and suit plaint was to be served on Defendants. However by order dated 04.03.2024 which is the impugned order, Application for appointment of Court Commissioner to measure the suit property was allowed by the Trial Court even before completing of 30 days from the date of order for issuance of summons.

4. After hearing learned Advocates for the parties at length, I have impressed upon them that this Court has been taking a consistent view in such matters wherein this Court is of the opinion that appointment of Court Commissioner in cases relating to removal of encroachment, declaration and injunction cannot be allowed at the inception stage immediately after filing the Suit. It would clearly amount to gathering of evidence. Be that as it may, after hearing the learned Advocates, it is gathered that this is a case for removal of encroachment rather than declaration. It is seen that Plaintiff's properties are being developed by the Plaintiff but it is their grievance that disregarding their boundaries and entitlement, the same are being transgressed upon by the Defendants.

5. Mr. Tulzapurkar would submit that Defendants have transgressed upon Plaintiff's land, encroached upon their land and have built a Patra Shed. After hearing the learned Advocates I have

suggested to both parties namely the Plaintiff and Defendants that both of them would be entitled to the areas of their respective land parcels depending upon the boundaries of their respective land parcels on the basis of their right, title and entitlement contained in their documents of title. In that view of the matter, rather than agitating the issue of declaration, injunction and removal of encroachment in Civil Court, considering that this is a case for demarcation and ascertainment of boundaries, both parties can be directed to approach to the appropriate Authority under the provisions of Section 132 and 136 read with provisions of Chapter IX and relevant Rules namely Rule 13 of Maharashtra Land Revenue (Boundaries and Boundary Marks) Rules, 1969 under the Maharashtra Land Revenue Code, 1966 for the purpose of demarcation and ascertainment of boundaries. Mr. Tulzapurkar has taken immediate instructions and would submit that in that case withdrawal of the present Suit proceedings should not be held against the Plaintiff if the demarcation of boundaries by the appropriate Authority is required to be further challenged. Undoubtedly, Plaintiff's filing of the present Suit and this Court allowing the Plaintiff to withdraw the present Suit from the Trial Court will not and cannot be held against the Plaintiff and Defendants also concede to the same before me. In that view of the matter, Plaintiff shall file an appropriate Application seeking

demarcation and ascertainment of its boundaries of the suit property before the appropriate Authority within a period of one week from today. If such Application is filed, copy of the same shall be served on all Defendants in advance.

6. Learned appropriate Authority under the Maharashtra Land Revenue Code, 1966 seized with the said Application for demarcation of boundaries shall acknowledge the said Application and take further steps for issuance of notice to all concerned parties for the purpose of effecting demarcation. Needless to state that on the Application being made before the appropriate Authority, the charges for measurement, mapping and demarcation and ascertainment of boundaries along with measurement maps shall be paid equally by both the parties equally before me.

7. Plaintiff, Defendants as also all the concerned parties shall cooperate with the appropriate Authority by submitting their respective land records as available with them so as to enable the Authority to prepare a gist for carrying out the measurement in presence of both the parties for effecting demarcation. Needless to state that the appropriate Authority shall give advance notices to all concerned parties about the date on which it will carry out the measurement so that it would enable the parties to remain present and assist the Authority. After survey and measurements being carried

out, the appropriate measurement, mapping report as required under the provisions of the Maharashtra Land Revenue Code, 1966 shall be prepared and certified copy of the same shall be issued to all concerned parties including the Plaintiff and Defendants. Needless to state that if any party desires to challenge the same, it shall be open to them to challenge the same in Appeal before the appropriate Authority under Schedule E of the Maharashtra Land Revenue Code, 1966 in accordance with law. All contentions of all parties are expressly kept open.

8. At the joint request of Mr. Kulkarni, Mr. Tulzapurkar and Mr. Singh as also considering the issue involved in the present case, the appropriate Authority is requested by this Court to carry out the above exercise of demarcation under the provisions of the Maharashtra Land Revenue Code as expeditiously as possible and in any event within a period of eight weeks from today after following the due process of law.

9. In view of this order, Special Civil Suit No. 20/2024 is allowed to be withdrawn without prejudice to the rights and contentions of the Plaintiff as also Defendants. Registry of the learned Trial Court shall on producing the server copy of this order refund the court fees as per rules to the Plaintiff on withdrawal of the Suit. It is however clarified that the Suit is allowed to be withdrawn by the Plaintiff with specific

liberty to the Plaintiff to approach the Civil Court if the need so arises in future. Impugned order dated 04.03.2024 is set aside.

10. Writ Petition is disposed of in the above terms.

[MILIND N. JADHAV, J.]

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Digitally signed
by RAVINDRA
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