

Ajay

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11514 OF 2023

M/s. Dhanlaxmi Enterprises Partnership Firm .. Petitioner

Versus

~~Vasant Ganesh Phadke~~

Deceased Through Legal Heirs

Sunil Vasant Phadke and Ors.

.. Respondents

.....

- Mr. Drupad S. Patil a/w. Mr. Namitkumar S. Pansare, Advocates for Petitioner.
- Mr. Vijay Killedar a/w. Mr. Sumedh Modak, Advocates for Respondents.

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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 13, 2024.

P.C.:

1. The present Writ Petition takes exception to the order passed on Exhibit “1” dated 13.07.2023 in the Suit before the learned Trial Court.

2. Suit for removal of encroachment is filed by Plaintiffs. Admittedly when the impugned order is passed, Application below Exhibit “5”, Application below Exhibit “7” seeking appointment of Court Commissioner and Application below Exhibit “22” seeking restraint against the Defendant from carrying out any further construction are pending. By virtue of the impugned order, learned Trial Court has appointed Court Commissioner to carry out

measurement of Survey No.34/A/1/A, 34/A/1/B and 34/A/1/C through the Deputy Director of Lands Record and prepare a report within 30 days. Though this order was passed on 13.07.2023, I am informed that the said order was stayed.

3. Writ Petition has been argued on merits before me today fully by both the parties.

4. I have heard Mr. Patil and Mr. Killedar, learned Advocates appearing for the respective parties and with their able assistance perused the record of the case.

5. Briefly stated, Special Civil Suit No.59 of 2022 is filed by 5 Plaintiffs against the sole Defendant for removal of encroachment of 131 square meters (1.303 Gunthas) area. Suit plaint is at Exhibit “G” - page No.98 of the Writ Petition. It is premised on an agreement for sale dated 03.07.2012 which is appended at Exhibit “A’ - page No.22 of the Writ Petition. This agreement for sale is executed by Plaintiff No.1 being the *Karta* and the sole Defendant. Though both learned Advocates have taken me through the details of Survey No.34/A/1 and its sub-divided portions namely; 34/A/1/A, 34/A/1/B and 34/A/1/C and their respective areas, for the purpose of the present Writ Petition, I need not detain myself with all those details save and except to the extent of the relevant area only.

6. As seen from the registered sale deed dated 28.10.2013, Plaintiff No.1 sold property ad-measuring land 557.39 square meters out of Survey No.34/A/1 (part) as stated in the recital of the said document. This is an admitted position. Equally, it is admitted that while describing the area sold to the Defendant, boundaries to the land sold have not been stated in the sale deed at any place nor is there any Schedule to the sale deed.

7. Mr. Killedar, learned Advocate appearing for Plaintiffs who are Respondents before me would submit that Survey No.34/A/1 being the larger area has been subsequently sub-divided into 3 portions namely 34/A/1/A, 34/A/1/B and 34/A/1/C. He would submit that out of the total area of 34/A/1, 3.8 Ares area stands acquired by Kalyan Dombvali Municipal Corporation (for short “**KDMC**”). That apart, out of Survey No.37/A/1/B area ad-measuring 557.39 square meters is sold to Defendant by sale deed and balance area of 3042 square meters stands acquired by KDMC. He would contend that, hence it would leave area ad-measuring 2.54 Ares for the Plaintiffs out of the original Survey No.34/A/1. Suit is filed in the year 2022 and it is contended that area ad-measuring 131 square meters out of 2.54 Ares retained by Plaintiffs stands encroached by the Defendant. Perusal of Suit plaint would reveal that the aforesaid contention if put differently would mean that this area i.e. 131 square meters is infact held by the Defendant out of his 557.39 square meters. Construction is

underway on this portion.

8. Allegation of falsehood and encroachment has been made and Plaintiffs seek an amount of Rs.10,00,000/- as appearing in the averments made in paragraph No.4 of the Suit plaint.

9. Be that as it may, there is one striking feature which needs to be distinguished immediately at this stage. Suit plaint proceeds on the basis that Defendant has encroached upon an area ad-measuring 131 square meters on the basis of alleged boundaries of the area ad-measuring 557.39 square meters sold by Plaintiff No.1 to the Defendant by the sale deed. Such specific averment is found in paragraph No.2 as also in the subsequent paragraphs in the Suit plaint. Juxtaposed with the agreement for sale dated 03.07.2012 which is at Exhibit "A" - page No.22 of the Suit plaint, it is ascertainable that though the Suit plaint is based upon the said sale deed, a claim for encroachment is made on the basis of boundaries which are clearly absent in the sale deed. This is the first instance where any claim by Plaintiffs is made on the basis of boundaries of the sub-plot (557.39) sold to the Defendant is claimed and any order passed by considering the same would therefore be impermissible at this stage which is the pre trial stage.

10. Next Mr. Killedar would submit that averments in the Suit plaint are duly supported by measurement carried out by the

Government Officer dated 07.06.2021 which is appended at Exhibit “C” - page No.70 of the Writ Petition. He would submit that in view of that document, he has relied upon boundary measurement notice issued by the Authority which is dated 07.06.2021. He would submit that this document supports the averments made in the Suit plaint.

11. Be that as it may, if that be the claim of the Plaintiff in support of his Suit claim, then nothing prevented the Plaintiff No.1 rather all Plaintiffs to have invoked measurement of the property immediately after sale of the said property by virtue of the registered sale deed 28.10.2013. Thereafter he has drawn my attention to page No.72 which is the map annexed to the notice and measurement survey carried out pursuant to the notice dated 07.06.2021. Alarminglly, it is seen that notice was issued on 07.06.2021 i.e. after 8 years of the sale. Thereafter he has drawn my attention to page No.129 of the Writ Petition which is the written statement and it is contended that existence of Survey No.34/A/1/C has been infact been disputed by the Defendant. Hence he would submit that if the dispute is raised by Defendant, then in that event reasoning given by the learned Trial Court while allowing the Application for measurement is cogent since in the event of any dispute, learned Trial Court would have to elucidate the status of the Suit property and once it is disputed by the Defendant in his written statement, then in order to prove existence and location of the subject encroachment, it would be

inevitable to measure, ascertain and determine the status of the encroachment namely on Survey No.34/A/1/C ad-measuring 131 square meters.

12. In support of his submissions, Mr. Killedar has relied upon following two judgments of this Court:-

- (i) *Kalyan Santram Kawade and Ors. Vs. Khanderao alias Khandu Ganpati Kawade and Ors.*¹; and
- (ii) *Mayuresh Subhash Sonawane Vs. Yashwant Babu Bhoir and Anr.*²

12.1. He has drawn my attention to the decision in the case of *Kalyan Santram Kawade and Ors. (1st Supra)* and more specifically paragraph Nos.13 to 18 thereof and would submit that the facts of the said case are akin to the facts of the present case. He would contend that the learned Trial Court in its wisdom in that case failed to consider that it was necessary to appoint the Court Commissioner who would assist the Court in placing on record the identification and map of the subject Suit property wherein there were number of divisions and sub-divisions. He would submit that such a direction by the Court cannot be construed to be infallible because what the Court is necessarily doing is utilizing its discretionary power to ascertain the status of the subject land without going into the disputed questions or contentious areas. He would submit that the Court is not attempting

1 2015 (4) Mh.L.J. 429

2 2022 SCC Online Bom. 179 :: (2022) 2 AIR Bom R. 246

to collect any evidence considering that such an interference is clearly warranted by the Trial Court when a case of grave injustice is made out by the Petitioner. He would submit that by virtue of the impugned order, 3 specific Applications which are pending on the record and file of the Trial Court would be determined as held by the learned Trial Court. Those Applications being Applications below Exhibit “5”, Exhibit “7” and Exhibit “22” which are referred to herein above.

12.2. In respect of the decision in the case of *Mayuresh Subhash Sonawane (2nd Supra)*, he has drawn my attention to paragraph No.7 of the said decision and would contend that in that case also since hearing on Exhibit “5” Application was pending, the Court was really concerned in ascertaining the actual status of the Suit property to enable the Court to determine the Application below Exhibit “5”. *Prima facie*, it is seen that the facts of each case would govern the decision of the Trial Court and that should be the manner in which the order should be passed. Facts of both these cases are distinguishable.

13. In the present case, the facts noted above are clear. There is a registered sale deed between the parties, which does not specify to any boundaries save and except one map which is appended at page No.54 of the Writ Petition. This map is infact in the registered sale deed itself. *Prima faice*, it is seen that the said map is to a scale and parties can easily scale the said map and place its dimensions on

record. Unfortunately none of the parties have thought to do so.

14. In view of the above observations, when the Suit plaint is seen and more specifically paragraph Nos.2 to 4 of the Suit plaint, it is clearly seen that the Suit is based on the sub-divisions of the original Survey No.34/A/1. The alleged encroached portion is contemplated to be identified by a subsequent sub-division which is circumscribed in 34/A/1/C as stated in paragraph No.4 of the Suit plaint. Though Mr. Killedar has made a valiant effort to refer to the 7/12 extract at page No.38 of the Writ Petition which is in respect of 34/A/1 (part) and referred to various mutations carried out therein, all that can be gathered from the said 7/12 extract is the fact that an area ad-measuring 557.39 square meters out of 34/A/1 (part) is sold to Defendant. Contention of Plaintiffs is that this area has to be ruled out from 34/1/A (part) and necessarily so, the further sub-division of it would then be comprised in 34/1/A/C as stated in paragraph No.4 of the Suit plaint. However this will have to be proved in evidence by the Plaintiff as boundaries are not specified in the sale deed. In a Suit for encroachment, if both parties at the outset are consenting, then the Trial Court can appoint Court Commissioner and elucidate identification of the Suit property, but if an Application is filed by one party and resisted by the other, then in that case the learned Trial Court is to examine the issues before the Court in the facts and circumstances of the case which are referred to and alluded to herein

above.

15. The learned Trial Court ought to have considered the above issues and more specifically the fact that the entire Suit is based upon the sale deed dated 28.10.2013. It is seen that on the area which is now with the Defendant pursuant to the sale deed, the Defendant is carrying out construction. Charges are traded by the Plaintiffs against the Defendant as also by the Defendant against Plaintiffs which are appearing in the Suit plaint and the written statement. I need not comment on those charges. Ultimately in such a case where removal of encroachment is sought, disputed questions of fact are involved and more specifically so with respect to the boundaries of the Suit property itself, appointment of Court Commissioner at a pre- trial stage as also before the Application below Exhibit “5” is heard is a transgression of law and this is so because in the Application below Exhibit “5”, parameters requiring consideration of balance of convenience are required to be looked into by the Court. In the present case, Defendant has carried out construction on a portion of the Suit property. In such as case whether the Defendant has encroached or not encroached is a question to be determined in the trial after both the parties lead evidence and order directing the Court Commissioner to measure the suit property without it being proven in the manner in which it has been done and allowed in the operative portion of the impugned order is in my opinion, an order which ought not to have been granted

considering the reasons reflected in the order itself.

16. On the contrary, the learned Trial Court while concluding the order has stated that there appears to be a boundary dispute between the parties. If that be the case, the learned Trial Court ought to have relegated the parties to boundary dispute proceedings under the Maharashtra Land Revenue Code, 1966, but to pass the order in the manner in which it is passed is impermissible in law in the facts of this case which are discussed herein above.

17. The said order not only deserves to be quashed but also set aside comprehensively. The order dated 13.07.2022 therefore stands quashed and set aside. Resultantly, Application below Order “1” stands dismissed.

18. Needless to state that all contentions of the Plaintiffs are expressly kept open. The present order only determines the issue with reference to the impugned order and shall not be constructed by any party or even the Trial Court that this Court has given any opinion on the merits of the matter as these observations are *prima facie* and shall not come in the way of the learned Trial Court while determining the Suit proceedings which shall be based on evidence.

19. At the joint request of both the learned Advocates, the learned Trial Court is requested by this Court to determine the Suit being Special Civil Suit No.59 of 2022 as expeditiously as possible and

strictly in accordance with law.

20. With the above observations, Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

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