

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

WRIT PETITION NO. 1909 OF 2024

Balu Govind Dhumal

...Petitioner

Versus

Dattatray Govind Dhumal & Ors.

...Respondents

Mr. Abhijit Kadam, Advocate for the Petitioner.

Mr. Pritam Nigade, Advocate for Respondent Nos. 1 to 3.

SUNNY
ANKUSHRAO
THOTE
Digitally signed
by SUNNY
ANKUSHRAO
THOTE
Date:
2024.09.13
18:53:48 +0530

CORAM : M. M. SATHAYE, J.

DATED : 13 SEPTEMBER 2024

P.C.:

1. Rule. Rule made returnable forthwith. Learned counsel for the Respondents waives service. Heard finally by consent.

2. By this Petition, the Petitioner - Original Plaintiff is challenging the order dated 20 October 2023, passed by by Joint Civil Judge Junior Division, Ghodnadi-Shirur, District Pune below Exhibit-28 in RCS No.156 of 2023. By impugned order, the learned Trial Judge has allowed the application filed by Respondent-Defendants for appointment of Court Commissioner for measurement of Gut No.485 in accordance with the map which is annexed

to the gift deeds in favour of the Petitioner and Respondent No.1.

3. Learned counsel for the Petitioner submitted that the impugned order amounts to collection of evidence and the same is passed on the basis that the Petitioner/Plaintiff is not disputing about the *Bandh* (dyke) as well as allocation of shares. He submits that the impugned order needs interference, specially when there is serious contest about respective possession of the shares.

4. On the other hand, learned counsel for the Respondents supported the impugned order. He submitted that the measurement is already carried out as per the impugned order and the map which is submitted, will help in adjudicating the the dispute between the parties.

5. I have perused the plaint in which Gut No.485 is subject matter property on which house property bearing Grampachayat Milkat No.950 is situated. The Prayer No.2 is about half share or such share as may be decided by the Court in the house property. Perusal of the application of the Respondents below Exhibit-28 shows that it is the Respondents' own case that the respective gift deeds in favour of parties has rough sketch annexed to it. It is the case of the Petitioner that the compound wall constructed by him was partly demolished by the Respondents and there is an apprehension

of further demolition of the compound wall. The shares of the parties are subject matter of the suit, to be decided on appreciation on evidence.

6. Nothing is on record or brought to the notice of the Court, on the basis of which the learned Trial Judge has held that the Plaintiff is not disputing about the *Bandh* and allocation of shares. The contentious issue appears to be the share in the property and its extent. A prayer for mandatory injunction about the compound wall is also sought.

7. In such circumstances, the impugned order could not have been passed on the basis that the Plaintiff is not disputing about Bandh and allocation of share. It is material to note that measurement is directed 'in accordance with map' which is already annexed to the gift deeds. The parties are expected to prove their respective cases, for preponderance of probability, on the basis of oral and documentary evidence that they choose to file, for which cross-examination can take place.

8. In the above background, in my opinion, impugned order results in collection of evidence. In light thereof, the impugned order requires interference and the same is accordingly quashed and set aside. Needless to mention that since the impugned order is set aside, the measurement carried out and the map submitted based on it, shall not be considered by

the Court.

9. The Petition is allowed and Rule is made absolute in the above terms. No order as to costs.

10. All concerned to act on duly authenticated or digitally signed copy of this order.

(M. M. SATHAYE, J.)