



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL APPLICATION (CAS) NO. 1208 OF 2023
IN
SECOND APPEAL NO. 396 OF 2022

Hemlata Moreshwar Dhoble
..VS..
Dinanath Punaji Dobarkar and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R.M. Sharma, Advocate for appellant.
Mr. S.G. Malode, Advocate for respondent Nos.1 to 3.

CORAM : SANJAY A. DESHMUKH, J.

DATED : 27th JUNE, 2024

1. This is an application for appointment of Court Commissioner.
2. Learned Advocate for the appellant submitted that defendant Nos.1 is the owner of plot No.32 and appellant is the owner of plot No.33. The sale-deeds of these plots are in the name of respective parties who are in possession of it. They have constructed their houses on it. There are compound walls. Thus, the ownership and possession of the respective parties on those two plots are not disputed.
3. The appellant's learned Advocate pointed out reasons for granting the application for appointment of Court Commissioner to measure suit properties. The learned Advocate for the respondents strongly opposed the application.

4. Learned Advocate for the appellant in support his contention has relied on the case of ***Bento Antonio Gomes Alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others***, reported in ***2014(4) Mh.L.J. 366***, in which law is laid down in para No.21. Para No.21 reads as under :

“21. No doubt that in the present case, application for appointment of Court Commissioner was not made. However, it is to be noted that before the learned Trial Judge three experts’ reports were available. Two were in support of the plaintiff’s plea and one in support of defendants’ claim. The learned Trial Judge had decreed the suit relying on the experts’ evidence. However, the Appellate Court disbelieved the experts’ evidence on behalf of the plaintiff as well as the defendants. In that view of the matter, there was no expert’s evidence available before the Appellate Court. In the circumstances, it was necessary on the part of the learned Appellate Court to remit the matter to the learned trial Court appointing an expert as a Commissioner for doing the local investigation.”

He has also relied on ***Maria Alda Fernandes Vs. Gabriel Coutinho (deceased through legal heirs) & Ors.***, reported in ***2013 SCC Online Bom 230***. Para No.10 reads as under :

“10. Considering the ratio laid down by this Court in the said judgment relying upon the judgment of the Apex Court, I find that in cases in which the dispute is with regard to the identity of the property and/or encroachment, it is always open to the Court to appoint a Commissioner for local investigation in terms of Order 26 rule 9 of

the Civil Procedure Code. This appointment would be more appropriate taking note of the contention of the petitioner that there are some impediments put up by the respondents when she visits the suit property. Whether the report is to be accepted or not is a matter which would be considered by the learned Judge in case objections are raised to such Commissioner's report. As the report of the Commissioner itself is not conclusive, the learned Judge was not justified at this stage to appreciate the material on record to consider whether the appointment of the Commissioner would be justified.”

5. Nobody will dispute the ratio laid down in the above authorities, however, it is well settled that each case is to be decided on merit i.e. decisive are facts of the case.

6. The learned Advocate for the respondents argued that admitted facts are that the plaintiff and defendants are in possession of their respective plots. No case of boundary dispute therefore, the application filed with bad intention to prolong the case and deserves to be rejected. He prayed to reject the application.

7. Perused the record and proceeding. The issue is limited as to whether compound wall of plaintiff's plot can be used for raising poll for electricity connection? Therefore, when it is not dispute as to the boundary and the encroachment over the suit property, the commission for measurement of plots of both parties cannot be appointed.

8. Disputed question is very different and therefore, considering the peculiar set of facts, though learned Advocate for the appellant relied upon the above referred authorities, they are not helpful to the appellant.

9. The application was not moved before the Trial Court or the First Appellate Court. The application is filed in the year 2023 first time in this appeal. Considering the period required for hearing of the application, it would be proper to reject the application with costs of Rs.1,000/- (Rs. One Thousand only).

10. The application is **rejected** with costs of **Rs.1,000/-** (Rs. One Thousand only) to be paid to the respondent Nos.1 to 3.

11. The application is **disposed of**.

SECOND APPEAL NO. 396 OF 2022

1. Stand over to **04.07.2024**.

2. Interim relief granted earlier to continue till next date.

(SANJAY A. DESHMUKH, J.)