



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

25 WRIT PETITION NO. 2389 OF 2023

Vijay Vasant Rao Ekbote

VERSUS

Prakash Vasant Rao Ekbote And Another

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Advocate for Petitioner : Mr. S.G. Dodya

Advocate for Respondent nos.1,2 : Mr. N.K. Tungar

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CORAM : S. G. CHAPALGAONKAR, J.

Dated : August 04, 2025

FINAL ORDER :-

1. The petitioner/original plaintiff, instituted Regular Civil Suit No.738 of 2018 seeking a decree of perpetual injunction against defendants in respect of the land gat no.55 admeasuring 1H-49R as per boundaries specified in paragraph no.1 of the plaint.

2. Plaintiff contends that, on 29.5.1994 partition of ancestral properties took place amongst the brothers. Accordingly, plaintiff was put into possession of 1H 49R land out of gat no.65. His land is called as "Kathshevariche Lavan" and remaining land is called as the land of "Wadache." According to plaintiff, defendant nos.1 and 2 in collusion with each other are interfering in his possession. On 3.7.2018 when

plaintiff visited the suit property, he tried to convince the defendants, however, they are not in a position to listen.

3. Defendants appeared in the suit and in paragraph no.2 of written statement disputed four boundaries prescribed in the plaint. Apparently, defendants have not disputed ownership of plaintiff over suit property, however, they are disputing possession of plaintiff over the suit land as specified in plaint, particularly, within the boundaries specified therein. In this background, plaintiff filed an application for appointment of Court Commissioner under Order XXVI Rule 9 read with section 151 of the Civil Procedure Code and sought appointment of T.I.L.R. to measure land gat no.55 and tender report of such measurement to the Court. Respondents/defendants opposed the application saying that parties are in possession of the respective lands as per partition of the year 1994. However, in last four lines of paragraph no.4, they contend that, they do not want to say anything on plaintiff's prayer for appointment of Court Commissioner. The learned Trial Judge refused to entertain the application observing that this is not the case of boundary dispute and probably petitioner wants to collect the evidence through the

Court Commissioner. It is further observed that, plaintiff has to prove his case on his own evidence and not on the basis of report of the Court Commissioner.

4. Mr. Dodya, learned advocate appearing for petitioner submits that, although, plaintiff has filed a suit simplicitor for perpetual injunction, defendants while admitting ownership and possession of plaintiff on the basis of partition of the year 1994, disputes boundaries as specified in the plaint. In that view of the matter, it was absolutely essential to have measurement through the expert and bring on record clear position of land in possession of each of the parties.

5. In support of his contentions, he relies upon observations of this Court in case of **Lalitprabha Krishnaji Ajgaonkar and others Vs. Yunus Khan and others** reported in 2017 (1) BCR 179 and **Malhar Ganpat Bokephod and others Vs. Shivajij Vishwanath Pawal** reported in 2014 (4) Mh.L.J. 237.

6. Per contra, Mr. Tungar, learned counsel appearing for respondents submits that petitioner ought to have filed a

suit for fixation of the boundaries, however, he has raised a claim of perpetual injunction. Description of the boundaries given in the plaint is incorrect. However, on instructions, he submits that, if the measurement is carried out through the **T.I.L.R.**, respondents have no objection for such measurement.

7. Considering the submissions advanced, although, it is a suit simplicitor for perpetual injunction, pleadings would show that parties are disputing boundaries of the land in possession of each other. Admittedly, there was partition in the year 1994; and since then, plaintiff and defendants are enjoying ownership and possession of their shares. Now, it appears that there is dispute of the boundaries. In that view of the matter, particularly when parties are ad-idem that measurement of the land through T.I.L.R. would help in resolving the controversy between the parties, it is imperative that discretion under Order 26 Rule 9 can be exercised. It is true that in a suit simplicitor for perpetual injunction, such discretion need not be exercised in every case, but in peculiar facts of this case, and on consent of the parties this Court deems it appropriate to exercise the discretionary powers under Order 26 Rule 9 of the Civil Procedure Code.

Accordingly, writ petition is allowed in terms of prayer clause 'B'. The petitioner shall deposit fees/charges for urgent measurement within a period of four (4) weeks from today. The Court Commissioner shall measure the entire Gat number 55 and submit report indicating possession of respective parties or disputed portion in his map. Report of the measurement shall be filed within a period of (eight) 8 weeks from the date of deposit of the charges.

(S. G. CHAPALGAONKAR)
Judge

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