



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7892 OF 2020

VIJAYKUMAR CHAGANLAL BEDMUTHA
VERSUS
THE DISTRICT COLLECTOR, BEED AND OTHERS

...
Mr. Anant R. Devakate, Advocate for the Petitioner
Ms. A.S. Mantri, AGP for Respondents/State
Mr. R.H. Wagh, Advocate for Respondent Nos. 4 To 6
...

CORAM : MANJUSHA DESHPANDE, J.

DATE : 03rd MARCH, 2025

PER COURT :

1. Petitioner challenges the order dated 01/10/2019, passed by learned Civil Judge, Senior Division, Majalgaon, Dist. Beed, below Exhibit-23 in Regular Civil Suit No.06/2019, thereby rejecting the application filed by petitioner / original plaintiff seeking appointment of Court Commissioner for measurement of the suit land. The suit i.e. R.C.S. No.06/2019 has been filed for recovery of encroached portion of land from defendant Nos.4 to 6.

2. It is the case of petitioner that land Survey No.26/1/2 admeasuring 1 H 36 R situated at village Phule Pimpalgaon, Tq. Majalgaon, Dist. Beed, was originally owned by one Babarao Lahanappa Naiknavare. Land to the extent of 5 R was acquired by the Special Land Acquisition Officer, Jayakwadi Project, Beed, by award No.LAQ.SR/22/74 passed under Section 11 of the Land Acquisition Act, 1894, on 20/11/1976. After acquisition in the year

1976 under the Maharashtra Prevention of Fragmentation and Consolidation of Holding Act, land Survey No.26/1/2 was converted into land Gut No.119. The learned advocate for petitioner relies on the extracts of consolidation scheme by which land Survey No.26/1/2 was converted into Gut No.119. However, by some mistake of the revenue authorities, entire land of admeasuring 1 H 36 R was shown to be acquired and was mutated in the name of Jayakwadi Project. Subsequently, the mistake was corrected and names of legal representatives of deceased Babarao Lahanappa Naiknavare were recorded to the extent of remaining land admeasuring 1 H 31 R and Mutation Entry No.1214 was sanctioned to that effect in the year 2008. Learned advocate for petitioner submits that land admeasuring 60 R out of 01 H 31 R was sold to Ramkrushna Ganpatrao Yadav, Dhondiram Sukhdeo Dhepe and Namdeo Shamrao Mali by registered sale deed dated 28/07/2008 by the legal representatives of deceased Babarao.

3. It is submitted that one Ramraje Shivajirao Solanke purchased land admeasuring 20 R from Dhondiram Sukhdeo Dhepe by sale deed dated 10/02/2011. Since petitioner was in need of land he purchased land to the extent of 94 R from Gut No.119 from Ramraje Solanke by sale deed dated 02/07/2012 and accordingly his name came to be entered in the revenue record and Mutation Entry No.1622 to that effect came to be recorded. Petitioner, therefore,

become owner of the suit land. It is his contention that land of respondent No.4 is situated to the western side of Gut No.119 and land of respondent Nos.5 and 6 is situated towards southern side of Gut No.119. After carrying out private measurement it was found that respondent Nos.4 to 6 have encroached in the land of petitioner. Therefore, petitioner requested respondent Nos.4 to 6 to restore his possession according to the private measurement, however, respondents refused to accede to his request and demanded measurement through respondent Nos.2 and 3. Petitioner, therefore, filed suit for recovery of possession of encroached portion.

4. During pendency of R.C.S. No.06/2019 petitioner filed application for appointment of court commissioner for measurement of land Gut No.119 from western and southern side of Gut Nos.117 and 118 respectively. Application filed by petitioner was opposed by respondent Nos.4 to 6 contending that entire Gut No.119 has been acquired by the State of Maharashtra for Jayakwadi Project and accordingly Mutation Entry No.154 is also sanctioned. Since entire land of Gut No.119 has been acquired, there is no land in existence from Gut No.119 and compensation is already disbursed to the wife of original owner. Therefore, there is no question of land being sold in favour of petitioner vide registered sale deed. In spite of land being acquired, the entry to the extent of 1 H 31 R land in Gut

No.119 has been sanctioned on 01/01/2008.

5. After hearing the respective parties, the Trial Court has rejected the application of petitioner vide order dated 01/10/2019 observing that from the documents placed on record it appears that land in Gut No.119 is admeasuring 1 H 36 R and that entire land has been acquired for Jayakwadi Project, however, due to mistake committed the the Talathi while recording entry in 7/12 extract, sale deed of the suit land has been executed.

6. This Court vide order dated 24/04/2024 directed learned AGP to take instructions from the appropriate authority, whether entire property in Survey No.26/1/2 is acquired for Jayakwadi Project or some portion of the land is acquired. Accordingly reply affidavit has been filed on behalf of respondent No.1 on 20/08/2024 by the Sub Divisional Officer, Majalgaon, wherein it is categorically stated that the land to the extent of 0.05 R from Gut No.119 has been acquired by the State Government for construction of Majalgaon Project by following due procedure, and final award was declared on 20/11/1976. It is also stated that petitioner has purchased land admeasuring 94 R from Gut No.119 from its owner Ramraje Solanke vide registered sale deed dated 02/07/2012 and accordingly the mutation entry has been sanctioned and name of petitioner is reflected in revenue record. In view of the application filed by petitioner on 26/04/2024, the Talathi has been directed to submit

detailed report in respect of Gut No.119. Accordingly on the basis of report submitted by Talathi on 19/07/2024, the Sub Divisional Officer, Majalgaon has informed petitioner on 24/07/2024, that no land belonging to him from Gut No.119 has been acquired by the Government. On the basis of affidavit filed by respondent No.1, position is made clear that land to the extent of 0.05 R from Gut No.119 has been acquired by the Government.

7. Learned advocate for respondent Nos.4 to 6 has vehemently opposed the petition contending that entire Gut No.119 was in fact acquired and nothing was left for being sold in favour of petitioner. Even the trial Court has recorded that petitioner has previously given an application for conducting measurement and accordingly report has been submitted along with panchanama, which shows that entire land has been acquired by the Government. Therefore, the impugned order passed by the Trial Court is appropriate and does not deserve any interference.

8. After hearing the respective parties, it appears that land survey No.26/1/2 admeasuring 1 H 36 R owned by Babarao was acquired to the extent of 0.05 R by the Government of Maharashtra for Majalgaon Project. The land Survey No.26/1/2 was subsequently converted into Gut No.119. By mistake the entire land of admeasuring 1 H 36 R was shown to be acquired for the project and it was mutated in the name of Jayakwadi Project. That mistake was

corrected and names of legal representatives of deceased Babarao were recorded to the extent of remaining land admeasuring 1 H 31 R and Mutation Entry No.1214 was sanctioned to that effect in the year 2008. Learned Civil Judge Senior Division has passed the impugned order on two assumptions i.e. measurement of suit land has already taken place, therefore, there is no need to measure the suit land, and the earlier measurement report discloses that entire land of Gut No.119 has been acquired by the State Government. Acquisition of land to the extent of 0.05 R is supported by the award dated 20/11/1976. In the reply affidavit it has been categorically stated that State Government has acquired land from Gut No.119 to the extent of 0.05 R only. Therefore, contention of petitioner stands fortified by the affidavit filed on behalf of respondent No.1.

9. Learned advocate for petitioner relied on the judgment of this Court in case of ***Shantaram Dattatray Kekan and Others Vs. Bhausaheb Karbhari Kekan and Another***, reported in **2023 (2) Mh.L.J. 77**, wherein this court has observed that,

"8. After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fast Rule that Court Commissioner can be appointed only at a particular stage. This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. However, common thread that runs through all the above decisions is as regards the principle that a Court

Commissioner can never be appointed in order to enable parties to collect evidence. It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case."

Since the relief claimed by petitioner is of recovery of possession of encroached land and the same is based on the sale deed, it will be necessary to appoint a Court Commissioner to ascertain the extent of encroachment. The plaintiff has relied on the extracts of consolidation scheme of the village and the award in support of his claim that only 0.5 R land is acquired from Gut No.119, which is supported by the reply affidavit filed by the Sub-Divisional Officer, Majalgaon. Therefore, only the surveyor would be in a position to ascertain the extent of encroachment.

10. So far as present case is concerned, it is submitted by learned advocate for petitioner that after filing of the suit, written statement has been filed and issues were framed. The petitioner has filed affidavit in support of examination-in-chief, hence, the trial has already commenced. He has thereafter filed application for appointment of Court Commissioner. In view of the same, in my opinion, it is a fit case for causing interference with the order passed by the trial Court and in order to ascertain the extent of encroachment it would be necessary to carry out the measurement, through cadastral surveyor.

11. Hence, the writ petition is allowed. Order dated 01/10/2019, passed by learned Civil Judge, Senior Division, Majalgaon, Dist. Beed, below Exhibit-23 in Regular Civil Suit No.06/2019, is hereby quashed and set aside and the application Exhibit-23 is allowed.

(MANJUSHA DESHPANDE, J.)