



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

WRIT PETITION NO. 8269 OF 2023

**PRAKASH LAXMAN PATIL AND OTHERS
VERSUS
RAJENDRA LAXMANRAO PATIL AND OTHERS**

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Advocate for the Petitioners : Mr. Muthiyan Namit Sunil
Advocate for Respondent : Mr. Vaidya Ameet Raveendra

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CORAM : SHAILESH P. BRAHME, J.

DATE : 18th FEBRUARY 2025

PER COURT :

. Heard both the sides finally at the admission stage.

2. The petitioners are assailing order dated 22.06.2023 below Exhibit-92 passed by the learned 15th Joint Civil Judge Junior Division, Aurangabad in RCS No.2172/2012, thereby rejecting application of the petitioners-defendants for appointment of Commissioner vide under Rule 26 Rule 9 of the Code of Civil Procedure. Respondents are original plaintiffs who have filed RCS No.2172/2012 for injunction. They claim to be owner of land Gut No.23. According to them land of petitioners, Gut No.22 is on the northern side. The suit is contested by the petitioners by filing written statement. They have also filed the counter claim for injunction. They claim to be owner of land Gut No.22. The said counter claim has also been contested. Parties have led evidence.

3. Petitioner submitted application at Exhibit-92 under Order 26 Rule 9 of CPC for appointment of Taluka Inspector of land record for demarcation of lands and the boundaries, to conduct joint measurement and also demarcation of Naala. It was contested by the respondents by impugned order, application was rejected.

4. Learned Counsel for the petitioners submits that from the pleadings of the parties and the cross-examination of the witnesses, it reveals that the controversy between them is regarding boundaries of the respective lands, position of Naala qua gut no.22 or 23. He would submit that the demarcation of the boundaries and Naala is necessary. After adducing oral evidence, application at Exhibit-92 was moved. Therefore it cannot be inferred to be an attempt to collect the evidence. To decide the real controversy between the parties, it is imperative to resort to Order 26 Rule 9. He would further submit that observations in paragraph no.6 are perverse. It is error of jurisdiction in rejecting the application. He is relying on the judgment of Telangana High Court in the matter of G.L. Purusotham and Others Vs. Y. Nagaraju and Another.

5. Per contra, Mr. Amit Vaidya, learned Counsel for the respondents would submit that there is no necessity to appoint Commissioner. He would advert my attention to ground of objection no.4 of memo of the petition. He would submit that the appointment of Commissioner and his report would not assist the trial Court in determining the facts in issue. He would vehemently submit that for

the adjudication old revenue record or the village map would be sufficient and for that purpose there is no need to resort to Order 26 Rule 9. He would submit that this is not a typical dispute of boundaries of the land between the parties pertains to existence of Brooke/Nala which can be ascertained from the revenue record. He would submit that application is rightly rejected by the Court because this is an attempt of collection of evidence.

6. Having considered rival submissions of the parties, what emerges is that both the parties have filed suit for injunction. Petitioners' claim to be owner and in possession of Gut No.22 whereas Respondents claim to be owner and in possession of Gut No.23 which are adjoining. There exists Brooke/Nala either in Gut No.22 or 23. I have examined pleadings of plaint of the Respondents in paragraph Nos. 3, 4 and 6 as well as pleadings of the written statement of the petitioners in paragraph no.6 and 15. My attention is also adverted to cross-examination of PW-1. The pleadings and the oral evidence brought on record disclose that the topography of Nala qua Gut No.22 and 23 needs to be ascertained by the trial Court for deciding the controversy between the parties. The demarcation of the lands to the extent of their boundaries and the Nala cannot be said to be extraneous.

7. Application at Exhibit-92 was moved after the oral evidence of the parties have been led. Considering peculiar nature of the properties involved in both the suit and Nala, I am of the considered

view that report of the Commissioner would facilitate the trial Judge to arrive at just and proper conclusion. The findings recorded in paragraph no.6 that there was no controversy in respect of the boundaries and the appointment of the Commissioner would not help the Court, are perverse. This is a fit case to invoke powers under Order 26 Rule 9 of CPC. Learned Judge has committed error of jurisdiction in rejecting application at Exhibit-92.

8. The submission of learned Counsel Mr. Amit Vaidya that the documentary evidence would be sufficient to decide the controversy between the parties and there is no need to resort to Order 26 Rule 9 cannot be accepted. The need for resorting to Order 26 Rule 9 is demonstrated by learned Counsel for the petitioners from pleadings of the parties and the oral evidence.

9. Learned Counsel for the petitioners is relying on the judgment of Talangana High Court in the matter of G.L. Purusotham and Others (supra). It has persuasive value. In that matter, reliance is placed on the judgment of the Supreme Court. However fact remains that need for appointment of the Commissioner depends upon facts of each case. Therefore independently, I am of the view that the Commissioner needs to be appointed in the present case. Hence I pass following order :

ORDER

(i) The impugned order below Exhibit-9 is quashed and set aside.

(ii) Application at Exhibit-92 is allowed and additionally Commissioner shall examine the existence and topography of Nala. Taluka Inspector of land record shall execute the Commissioner within four weeks and submit the report.

(iii) Writ Petition is allowed in the above terms.

SHAILESH P. BRAHME
JUDGE

NATEEB..