



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

35 WRIT PETITION NO. 11132 OF 2021

Shakil Ahmed Shabbir Ahmed

VERSUS

Adil Yarkhan Ahmed Yarkhan

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Advocate for Petitioner : Mr. A.P. Bhandari

Advocate for Respondent : Mr. P. F. Patni

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CORAM : S. G. CHAPALGAONKAR, J.

Reserved on : July 07, 2025

Pronounced on : August 21, 2025

FINAL ORDER :-

1. The petitioner takes exception to the order dated 7.9.2021 passed by the 4th Jt. Civil Judge S.D., Aurangabad below Exhibit-69 in Special Civil Suit No.188 of 2016, by which application of the petitioner seeking appointment of the Court Commissioner, has been rejected.

2. In brief, it is contention of petitioner/plaintiff that property bearing CTS No.16867 i.e. Municipal House No.5-4-1/4 situated at Chhota Ashrukhana is owned by him as per sale-deed dated 18.12.2012 and correction-deed dated 16.4.2016. As such, plaintiff seeks possession of property from defendant on the basis of title. Respondent/defendant filed his

written statement and claimed his ownership over the property. It is contention of the defendant that description of the property, particularly, four boundaries mentioned in plaint pertains to CTS no.16868 and not 16867 as claimed by the petitioner.

3. Learned Trial Court framed issues based on pleadings of the parties. Plaintiff and defendant recorded respective evidence and when matter was fixed for final arguments of defendant, petitioner/plaintiff filed an application under Order XXVI Rule 9 of the Civil Procedure Code seeking appointment of the Court Commissioner. Learned Judge of the Trial Court rejected said application by elaborate order dated 7.9.2021. Hence, this writ petition.

4. Mr. Bhandari, learned advocate appearing for petitioner submits that, dispute as to identity of property has been raised by defendant. There are voluminous documents to show that petitioner is owner of CTS no.16867 bearing municipal house no.5-4-1/4. Defendant is in illegal possession and claims that property in his possession is part and parcel of CTS no.16868. In this background, assistance of Court Commissioner is required for identification of the property.

Eventually, application below Exhibit-69 was filed for appointment of Court Commissioner, which has been erroneously rejected.

5. Per contra, Mr. Patni, learned advocate appearing for respondent submits that plaintiff is claiming his ownership over CTS No.16867. There is sufficient material on record in the form of documents and map to show location and identify of the property. Evidence of the plaintiff as well as defendant is already over and at the stage of arguments, present application was moved only with intention to protract the proceeding. According to Mr. Patni, plaintiff is attempting to collect the evidence through appointment of the Court Commissioner. Learned Trial Court has rightly rejected the application by recording elaborate reasons.

6. The provisions of Order 26 Rule 9 of the C.P.C. are necessarily to be utilized in case there is dispute as to identity of the property or boundaries of the suit property. Such powers are available to the Court at any point of time. Similarly, it is well settled that, if application for appointment of the Court Commissioner is made at inappropriate stage or

for the purpose of collection of evidence, it cannot be countenanced.

7. In the present case, application for appointment of Court Commissioner is made when evidence of both the parties was already closed and case was pending for final arguments. Learned Trial Court elaborately made observations on the basis of documents pressed into service that one Sattar Yar Khan executed sale-deed in favour of Suvalal in respect of municipal house no.5-4-1/4, wherein correct boundaries are shown, however, lateron, Suvalal executed sale-deed in favour of Shaikh Gaffar, in which towards the west side when there was property CTS No.16867, name of Zakiya Sultana was mentioned. In the sale-deed of Suvalal executed in favour of Shaikh Gaffar, property bearing CTS No.16868 and 16867 were mixed by showing wrong boundaries. Learned Trial Court also observed that from contents of sale-deed of Sattar Yar Khan, executed in favour of Suvalal, correct boundaries of suit property can be ascertained. Trial Court has further observed that Shaikh Gafar sold the said property to plaintiff by changing the boundaries from original sale-deed of 1974.

As such, it is clear that Municipal House No.5-4-1/4 is originally CTS No.16868 and not CTS No.16867.

8. On the basis of the aforesaid observations, Trial Court formed opinion that dispute in the suit can be more appropriately resolved on the basis of documentary evidence regarding flow of title in favour of the plaintiff. Appointment of the Court Commissioner would not be necessary or fruitless. Confusion as to the boundaries can be very well cleared on careful reading of the documents on record. In such case, the issue cannot be resolved by appointing the Court Commissioner or causing physical inspection at the spot.

9. Although, Mr. Bhandari learned advocate appearing for petitioner relying upon observations of this Court in case of **Shri Bhupendra s/o. Bhagwat Turkar Vs. Shri Homraj s/o. Zituji Meshram** reported in **2014(3) ALL MR 635**, contends that, where parties are litigating on boundary dispute, appointment of the Court Commissioner is imperative and it cannot be said that party seeking appointment of Court Commissioner is attempting to collect the evidence. There cannot be dispute over proposition of law espoused by this Court. However, in facts of the present case, it is difficult to

hold that there is a boundary dispute. In the present case, dispute appears to be identity of corrected CTS number in respect of suit house property. If from record of city survey or from boundaries described in the sale-deeds, identity of the property can be established, the issue of measurement would not arise. Parties are not disputing existence and availability of such documents on record.

10. In that view of the matter, this Court do not find any jurisdictional error in the impugned order. In the result, Writ Petition stands **dismissed**.

(S. G. CHAPALGAONKAR)
JUDGE

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