



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

WRIT PETITION NO.154 OF 2016

1. Balasaheb s/o Sadashiv More,
Age 63 years, Occ. Agri.
2. Gautam s/o Balasaheb More,
Age 33 years, Occ. Agri.
3. Dnyaneshwar s/o Sudhakar More,
Age 28 years, Occ. Agri.
4. Dattatraya s/o Balasaheb More,
Age 35 years, Occ. Agri.
5. Sudhakar s/o Sadashiv More,
Age 48 years, Occ. Agri.,
All R/o Hingani (Bk.),
Tal. Kille Dharur, Dist. Beed.

...Petitioners
(Orig. Defendants)

Versus

Shivraj s/o Subhashrao Solanke,
Age 24 years, Occ. Agri.,
R/o Hingani (Bk.),
Tal.Kille Dharur, Dist. Beed.

...Respondent
(Orig. Plaintiff)

.....
Mr. S.B. Solanke, Advocate for Petitioners
Mr. S.B. Choudhari, Advocate for Respondent
.....

CORAM : MANJUSHA DESHPANDE, J.

**RESERVED ON : 10th JANUARY, 2025
PRONOUNCED ON : 21st JANUARY, 2025**

ORDER :

1. Order dated 10/02/2014, passed by the Civil Judge, Junior Division, Dharur, below Exhibit-31 in R.C.S. No.04/2012, is assailed in the present petition. Petitioners are original defendants in R.C.S. No.04/2012 filed by plaintiff i.e. respondent herein for perpetual injunction.

2. It is the case of plaintiff / respondent herein that he had purchased agricultural land at Hingani Khurd, Taluka Kille Dharur, District Beed, bearing Gut No.194 to the extent of 1 H 21 R, from Sharad Bharatrao Solanke for consideration of Rs.2,50,000/-, on 12/06/2009 by way of sale deed bearing No.761/2009. From the date of sale deed he is in possession of the said land. Defendants / petitioners have started obstructing his possession, therefore, he was constrained to file the suit for perpetual injunction. Petitioners / defendants, in pursuance to the summons issued to them appeared in the suit and filed their written statement denying the contents of the plaint. They have denied that they are causing any disturbance in the possession of plaintiff and prayed for dismissal of the suit. After filing of the suit it proceeded and application below Exhibit-30 and 31 for appointment of Court Commissioner came to be filed by respondent / plaintiff. Petitioners / defendants filed their 'say' thereby opposing the application stating that said application has been filed by respondent / plaintiff only with an intention to collect the evidence. Hence, it was prayed that application be rejected.

3. The Civil Judge, Junior Division, Dharur, after hearing the application has been pleased to pass the order dated 10/02/2014, thereby allowing the application and appointing Taluka Inspector of Land Records, Dharur, as Court Commissioner, directing him to measure entire Gut No.194 along with it's *Pot Hissa* and submit self

explanatory report in respect thereof. Being aggrieved and dissatisfied with the said order, petitioners/defendants have filed present writ petition.

4. Learned advocate Mr. S. B. Solanke, appearing for petitioners submits that the application filed by respondent / plaintiff was only with an intention to collect the evidence, which is not permissible under law. Scope of Order 26 Rule 9 of the C.P.C. is limited. It is settled position of law that application for appointment of Court Commissioner cannot be filed with an intention to collect the evidence. Parties have to prove their case on the basis of evidence available with them. Hence, according to him the application was not tenable. While opposing the application, petitioners / defendants have stated before the Civil Judge Junior Division that, the suit itself has been filed for perpetual injunction and there is no whisper about any encroachment made on his agricultural land. Therefore, there is no necessity for appointment of T.I.L.R. as a Court Commissioner for conducting measurement of the land.

5. It was further submitted before the Trial Court that since the relief sought by plaintiff was for perpetual injunction, it is for the plaintiff to prove obstruction caused by defendants by producing evidence on record and he cannot collect evidence by seeking appointment of Court Commissioner. It is for the plaintiff to prove

that defendants have caused obstruction to his possession. Only in case the plaintiff has proved *prima facie* that defendants have caused obstruction to his possession, the prayer made by plaintiff for appointment of Court Commissioner would be tenable. In the suit for injunction evidence cannot be collected by appointment of Court Commissioner.

6. After hearing the respective parties and going through the documents annexed with the writ petition it is evident that sale deed has been executed by one Sharad Bharat Solanke for consideration of Rs.2,50,000/-, on 12/06/2009 in favour of plaintiff and accordingly possession was handed over to plaintiff from the date of sale deed. Even entry in 7/12 extract and the Mutation Entry No.796 has been taken to that effect. While opposing the suit, defendants have claimed that the State Government has acquired the suit land for Saraswati Project. Though as per the sale deed plaintiff has been in possession of the land and Mutation entry as well as 7/12 extracts also show his possession, however, possession of the plaintiff has been disputed by the 'say' of defendants on two grounds; that land has been acquired by the State Government for Saraswati Project and; an incorrect map has been placed on record. Therefore, in order to ascertain correct existing position of the suit land, plaintiff had requested to appoint Court Commissioner.

7. Though defendants have opposed the prayer made in

the application at Exhibit-31, the Civil Judge, Junior Division, Dharur, after taking into consideration the nature of dispute has passed the impugned order thereby allowing application at Exhibit-31. It has recorded finding that, from the pleadings and the say of defendants it is clear that original owner Bharat Solanke has executed sale deed in favour of plaintiff, however, the area mentioned in the sale deed was not existing in the said Gut number on the date of sale deed. It is further observed that according to defendants some of the land in that Gut number has already been acquired by the State Government for Saraswati Project long back and therefore, the said part of the land which has been acquired is in possession of the State Government.

8. It is further observed that, though it is submitted that the land has been acquired by State Government from Gut No.194, however, there is no entry in the revenue record about the acquisition of said land. Similarly, there is no entry in 7/12 extract about the acquisition, therefore, it is necessary to ascertain as to what extent the land has been acquired from Gut No.194. Considering the rival conflicting stand taken by the parties to the dispute, Trial Court has observed that though as per the documents on record sale deed has been executed in favour of plaintiff and also some part of Gut No.194 is acquired by the Government. Unless it is ascertained as to which part of the gut number and to what extent

land is acquired by the State Government, dispute between the parties cannot be resolved. In order to ascertain exact position of the suit land, T.I.L.R. would be the only competent authority.

9. Though on the basis of sale deed possession of plaintiff is shown in the 7/12 extract and mutation entry to that effect is taken, however, considering the 'say' filed by the defendants it is necessary to ascertain the exact position, as it is claimed that the Government is in possession of the part of suit land in view of acquisition. In view of the reasoning given by the Trial Court, I do not find that there is any error committed while passing the impugned order thereby directing T.I.L.R., Dharur, to act as Court Commissioner and conduct the measurement of land Gut No.194 in respect of the land as per sale deed along with the sub-divisions and also ascertain whether some part of the land has been acquired by the State Government. The T.I.L.R. has also been directed to submit report along with the map.

10. The impugned order has been challenged by petitioner on 23/11/2015 by filing present writ petition. Admittedly, there is no stay granted by this Court to the impugned order. In view of the same, when present status of the suit was inquired it is informed that the issues have been framed on 15/11/2022 and even the oral evidence of plaintiff is completed. It is further informed that pursuant to the order appointing Court Commissioner, the trial

Court has not received report of the Court Commissioner. Reminder was already sent to the T.I.L.R. on 07/09/2021. In response to the same, office of T.I.L.R. has responded and sent communication to the Court on 30/11/2021, informing that plaintiff has remained absent during the measurement, therefore, measurement of the suit land could not be done. It is further informed that if plaintiff deposits measurement fee in the office of T.I.L.R., measurement will be conducted afresh and report will be submitted.

11. While assailing the impugned order, petitioners relied upon the order dated 17/01/2014, passed by this Court in Writ Petition No.8877/2013 (Chandrakant Kashinath Dike & Others Vs. Smt. Satyabhama Vishwanath Dike & Another), wherein this Court had observed that it is premature to file application for appointment of Court Commissioner before the witnesses have stepped into the witness box. At the stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that appointment of Court Commissioner is necessary, then at that stage parties can apply for appointment of T.I.L.R. as Court Commissioner. Hence the order of appointment of T.I.L.R. as Court Commissioner was found to be premature and the same has been quashed and set aside, granting liberty to the parties to file application for appointment of Court Commissioner at later stage.

12. However, the facts of the present case being different,

in my opinion, the said order cannot be made applicable to the facts of the present case. In present case, though on papers possession is found to be that of plaintiff, however the same is disputed and it is claimed that some of the portion is in possession with the Government by way of acquisition. However, the exact part of the land on which it is claimed that Government is in possession, is not mentioned and there are no revenue entries of acquisition, therefore, T.I.L.R. would be the appropriate authority to ascertain the same.

13. In the facts of the present case, I do not find that any error is committed by Civil Judge, Junior Division, Dharur, while passing the impugned order. Hence, the writ petition is dismissed.

(MANJUSHA DESHPANDE, J.)