

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4653 OF 2025

Mahipati Aannu Hande ... Petitioner

V/s.

Vishnu Babu Kumbhar and Anr. ... Respondents

Mr. C.G. Gavanekar with Mr. Ashutosh Gavanekar and Mr. Rohit Parab,
for the Petitioner.

CORAM : N.J. JAMADAR, J.

DATE : 7TH APRIL 2025.

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1. Heard the learned counsel for the petitioner.
2. The challenge in this petition is to an order dated 1st February 2025 passed by the learned Civil Judge, Ichalkaranji, whereby the learned Civil Judge was persuaded to appoint Deputy Superintendent of Land Record, Hatkanangale as a Court Commissioner to have a joint measurement of the land bearing Gat No. 678, purportedly owned by the plaintiffs, and land bearing Gat No. 671, purportedly owned by the defendant, and submit a report to the Court, clearly demarcating the boundaries of the said lands and indicating encroachment, if any.
3. The respondents instituted a suit with the assertions that

the defendant who is the holder of the land bearing Gat No. 671, committed encroachment over the land of the plaintiffss bearing Gat No. 678 to the extent of 4 R. The defendant be ordered and directed to remove the encroachment and, in the event of the failure of the defendant to remove the encroachment, an order for removal of the encroachment by the Court.

4. In the said suit, the petitioner-defendant filed a written statement contending, *inter-alia*, that the defendant had acquired the 4 R land under a registered sale deed dated 11th November 1991, and since then the defendant has been in occupation of the said land and has even carried out construction over the said land. In the month of June 2016, the plaintiffss had made an effort to forcibly dispossess the defendant and, therefore, the latter had instituted a suit bearing RCS No. 256 of 2016 seeking injunctive reliefs against the plaintiffs.

To give a counter-blast, the respondent-plaintiffss instituted the instant suit raising false contentions.

5. The Trial Court framed issues on 9th April 2021. An additional issue as to whether the plaintiffss succeed in establishing that they are the owners and in possession of the suit property has also been framed, on 14th September 2023.

6. In the meanwhile, the plaintiffss preferred an application to have joint measurement of the Gat Nos. 678 and 671.

7. By the impugned order, the Trial Court was persuaded to allow the application. It was, *inter alia*, observed that since the suit was for removal of encroachment and there was a dispute about the

demarcation of the boundaries of land bearing Gat No. 678 and 671, it was necessary to have a joint measurement of both the lands.

8. Mr. Gavanekar, learned counsel for the petitioner, submitted that the petitioner has acquired the disputed land under the registered sale deed in the year 1991. On the contrary, the plaintiffs claimed to have acquired the land bearing Gat No. 678 under a registered sale deed on 27th August 1997. The defendants sale deed is prior in point of time. The plaintiffs will have to, thus, first establish title to the suit land. The endeavour of the plaintiffss was to collect the evidence under the garb of appointment of the Court Commissioner. Therefore, the learned Civil Judge could not have allowed the application.

9. I have carefully perused the averments in the plaint and contentions in the written statement. The suit is plainly for removal of encroachment of 4 R land which the defendant has allegedly committed over Gat No. 678. Evidently, the Gat No. 678 and 671 are located adjacent to each other. In a case of this nature, where there is a dispute about the boundaries of the respective lands and an allegation of encroachment is made, the joint measurement of both the lands to demarcate the boundaries of the lands and determine the encroachment, if any, is indispensable.

11. The learned Civil Judge was just justified in observing that the joint measurement of both the lands will elucidate the matter in controversy. A useful reference, in the context, it can be made to the decision in the case of *Haryana Waqf Board vs. Shanti Sarup*¹ wherein the

¹ (2008) 8 SCC 671.

Supreme Court has emphasized that in the case of demarcation of the disputed land it is appropriate for the Court to direct the investigation by appointing a local commissioner as provided under Order XXVI Rule 9 of the Code of Civil Procedure.

11. In the case of *Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade (dead) through Pooja @ Poojari Y. Lakade*², a learned Single Judge of this Court after placing reliance on the judgment of the Supreme Court in the case of *Haryana Waqf Board* (supra) culled out the legal position in paragraph 14 as under:

“14. It can thus clearly be seen that the Apex Court in the case of Haryana Waqf Board cited supra in unequivocal terms has held that in the case of demarcation of disputed lands, it is appropriate for the Court to direct the investigation by appointing a Local Commissioner as provided under Order XXVI, Rule 9 of the Code of Civil Procedure. The other learned Judges of this Court, namely, M. S. Vaidya, J., S. T. Kharche, J., A. P. Bhangale, J., F. M. Reis, J., have also held that in case of dispute of encroachment of a site, an appointment of Court Commissioner who could be City Survey Officer or Cadestral Surveyor for taking joint measurement of the property owned by the plaintiffs and defendant for the purpose of local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure would be necessary for the just decision of the case. It has also been held by this Court that merely because a Court Commissioner is appointed, it will not prejudice the interest of either of the parties. It has been held that if any of the parties aggrieved by the report of the Court Commissioner, an opportunity would be available to that party to cross-examine the Court Commissioner and to point out as to how his conclusions were not correct. It has further been observed that the party who was not aggrieved would also prove how his conclusions are correct.”

(emphasis in origin)

12. In view of the aforesaid position in law, challenge to the impugned order does not merit countenance.

13. Mr. Gavanekar expressed an apprehension that the impugned order indicates the report of the Court Commissioner would

² (2011) 3 Mah LJ 348.

be directly read in evidence.

14. I am afraid, the operative order does not sustain such an apprehension. Yet, by way of abundant caution, it is clarified that the petitioner-defendant as well as plaintiffs would be entitled to raise objections to the report of the Court Commissioner. If raised, those objections be considered in accordance with law by the Civil Judge.

15. Subject to the aforesaid clarification, the petition stands dismissed.

(N.J. JAMADAR, J)