



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7983 OF 2022**

Manohar Tukaram Munagekar	...	Petitioner
versus		
Ramchandra Sakharam Band and Ors.	...	Respondent

Ms. Prabha Badadare, for Petitioner.
Mr. Vinayak R. Kumbhar, for Respondent Nos.1 to 4A.

CORAM: N.J.JAMADAR, J.

DATE : 25 FEBRUARY 2025

P.C.

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally.
2. The Petitioner-Appellant in Regular Civil Appeal No.62 of 2016 has assailed the legality, propriety and correctness of an order dated 19 April 2022 passed by the learned District Judge, Sindhudurg at Oros on an application preferred by the Respondent No.4A-Plaintiff seeking appointment of the Court Commissioner to measure the suit property and submit a report.
3. By the impugned order, the learned District Judge was persuaded to allow the application and appoint Taluka Inspector of Land Records, Kankavali to measure the suit property bearing Sur No.42, Hissa No.14, admeasuring 15R situated at Grampanchayat Kasarde, Village Anandnagar, Tal. Kankavali.

4. Respondent Nos.1 to 4 and the predecessor in title of Respondent Nos.4A to 4E Rupavati Sakharam Band – deceased Respondent No.5 had instituted a suit being RCS No.14 of 2006 for declaration, mandatory injunction and recovery of possession of the alleged encroached portion of the suit property. By a judgment and decree dated 20 October 2012, the said suit was partly decreed and the Defendant No.1 – Petitioner herein, was ordered to remove the encroachment over the suit property as described in the map at Exhibit 70 within a period of three months, and, in default, the Plaintiffs were granted liberty to get the said encroachment removed through Court.

5. Aggrieved, the Petitioner preferred an appeal. In the said appeal, Respondent No.4A initially sought measurement of the suit property by making an application to the Deputy Superintendent of Land Records, Kankavali. The Deputy Superintendent of Land Records, Kankavali, expressed his inability to carry out measurements in view of the pendency of the appeal. Respondent No.4A preferred an application seeking appointment of the Court Commissioner to measure the suit land. It was, inter alia, asserted that abutting the suit land, there were lands bearing Survey No.42, Hissa Nos.22 and 23 belonging to the Petitioner and a portion of the said lands was acquired by the competent authority. It was, therefore, necessary to measure the suit property and bring the correct position on the record of

the Court.

6. By the impugned order, the learned District Judge was persuaded to treat the said application as an application for adducing additional evidence in appeal under the provisions of Order 41 Rule 27 of the Code of Civil Procedure, 1908 and allowed the said application observing, inter alia, that there was no dispute over the fact that some portion of Survey No.42 was acquired for road widening project, and, thus, to avoid multiplicity of the proceedings, it was necessary to appoint the Court Commissioner to have local investigation.

7. Ms. Badadare, learned Counsel for the Petitioner, would urge that the learned District Judge unjustifiably resorted to the provisions contained in Order 41 Rule 27 of the Code, 1908, though Respondent No.4A – Plaintiff never professed to lead additional evidence. At any rate, the conditions precedent for invoking the said provision to permit the Respondent No.4A to adduce additional evidence were not satisfied. Since the appeal was against the decree for removal of encroachment, there was no occasion for the learned District Judge to appoint the Court Commissioner at the instance of the Plaintiff when the suit was partly decreed.

8. Mr. Kumbhar, learned Counsel for Respondent Nos.1 to 4A – Plaintiffs, supported the impugned order. It was submitted that the learned District Judge was well within her rights in directing the measurement of the suit

property as the controversy was one of the removal of encroachment. No prejudice as such would be caused to the Petitioner if the Court Commissioner measures the land and submits report to the Court.

9. I have carefully perused the material on record, especially, the impugned order. It is imperative to note that, the record does not indicate that the Respondents-Plaintiffs have filed a cross objection, being aggrieved by the decree impugned in Regular Civil Appeal No.62 of 2016. From the tenor of the application, it appears that the Respondent No.4A asserted that the appellant-Petitioner was committing encroachment over the suit property. Since a portion of Survey No.42 was acquired for road widening, it was necessary to bring the correct position at site before the District Court.

10. From the perusal of the impugned order, it becomes abundantly clear that the exact area of Survey No.42 which was acquired, location thereof and its co-relation with the suit property was not placed on the record of the learned District Judge. In fact, the learned District Judge has observed that, though a copy of the award for acquisition of the land was not produced on record, acquisition of some portion of Survey No.42 was not denied by the Appellant.

11. I am afraid, in the face of the aforesaid situation, the learned District Judge could have resorted to the appointment of the Court Commissioner , that too by invoking the provisions contained in Order 41 Rule 27 of the Code,

1908. If at all the District Court was of the view that the local investigation was required to elucidate the matter in controversy, it ought to have satisfied itself about the extent and identity of the land acquired out of Survey No.42 and its co-relation with the suit property. In absence thereof, the impugned order partakes the character of a roving inquiry. I am, therefore, inclined to interfere with the impugned order and remand the matter back to the District Court for decision on the application for appointment of the Court Commissioner afresh, after considering the award passed and the relevant record.

12. Hence, the following order :

ORDER

- (i) The Writ Petition stands partly allowed.
- (ii) The impugned order dated 19 April 2022 stands quashed and set aside.
- (iii) The application for appointment of the Court Commissioner (Exhibit 45) stands remitted to the District Court for afresh decision after considering the award for acquisition of portion of Survey No.42, the area and location thereof, and its co-relation with the suit property, and providing an effective opportunity of hearing to the concerned parties.
- (iv) Rule is made absolute to the aforesaid extent. No costs.

(N.J.JAMADAR, J.)

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5/5