

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10821 OF 2022

Babasaheb Bhavar

...Petitioner

Versus

Rajtilak Subhash Dange and ors.

...Respondents

SANTOSH
SUBHASH
KULKARNI

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Mr. Anvil Kalekar, for the Petitioner.

Mr. Hrishikesh Shinde, for Respondent No.1.

CORAM: N. J. JAMADAR, J.

DATED: 10th FEBRUARY, 2025

ORDER:-

1. Heard the learned Counsel for the petitioner.
2. The challenge in this petition is to an order dated 27th April, 2022 passed by the learned Civil Judge, Senior Division, Solapur, appointing Deputy Superintendent of Land Records, Solapur, as a Court Commissioner to measure Survey Nos.87/6, 86/1 and 86/5 alongwith Bale – Hiraj road from Bale to Barshi road and upto Solapur - Pune National Highway No.55.
3. Respondent No.1 instituted a suit seeking relief of perpetual injunction against the petitioner – defendant No.3 and respondent No.2 Nahush Vivek Govardhan, from committing encroachment over Bale – Hiraj road, which runs between Survey Nos.86 and 87, and thereby cause

obstruction to the access of the plaintiff over the said road. In the plaint, the respondent asserted that as there has been increase in the value of the land abutting the road. Defendant Nos.1 and 3 were committing encroachment over the said Bale – Hiraj road. The defendants had started clearing the land. Thus, the rights of the plaintiff to have unhindered access to the said road will be impaired.

4. An application for temporary injunction was filed by the plaintiff. The said application was rejected by the Trial Court. Thereafter, the plaintiff filed an application for appointment of the Cadestal surveyor to measure the lands and submit a report to the Court, purportedly under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. The said application was resisted by the defendants.

5. By the impugned order, the learned Civil Judge was persuaded to allow the application. The learned Civil Judge was of the view that the dispute between the parties was regarding the said Bale – Hiraj road. The plaintiff had asserted that after the institution of the suit and order on the application for temporary injunction, the defendants were committing encroachment over the said road. The defendant Nos.1 and 3 had erected huge construction abutting the said

road. It was, therefore, necessary to have the lands measured for a just decision of the case.

6. Being aggrieved, defendant No.3 – petitioner has invoked the writ jurisdiction of this Court.

7. The learned Counsel for the petitioner submitted that by an order dated 26th September, 2022, this Court, while issuing the notice, had stayed the order impugned in this petition. Yet the Court Commissioner submitted the report before the trial court in the month of November, 2022. Per contra, the learned Counsel for the respondent – plaintiff points out that the Cadestral survey had already executed the commission in the month of August, 2022 itself. Attention of the Court was invited to the documents annexed to the affidavit-in-reply filed on behalf of the respondent.

8. The learned Counsel for the petitioner strenuously submitted that the suit instituted by respondent No.1 was for injunction simpliciter. There is no positive assertion in the plaint that defendant Nos.1 and 3 had committed encroachment over a specific portion of Bale – Hiraj road. The suit was in the nature of a pre-emptive action. In the absence of a positive case that defendant Nos.1 and 3 had committed encroachment over the suit road, there was no justification

for appointment of the Court Commissioner. To buttress this submission, the learned Counsel for the petitioner placed a strong reliance on the judgment of this Court in case of ***Arun Rambhau Dhankude and anr. vs. Bhanudas Ramchandra Murkute and ors.***¹.

9. In the said case, this Court had interfered with the order of appointment of the Court Commissioner and rejected the application preferred to measure the suit lands therein. The Court had, *inter alia*, noted that the tenor of the plaint, in the said suit, indicated that the suit was instituted to pre-empt the defendants from committing encroachment over the suit land. A general assertion in the application that the appointment of the Court Commissioner to measure the suit land would assist the Court in determination of the controversy on merits was not found sufficient to justify an order of appointment of Court Commissioner, since there was no allegation of encroachment.

10. I have carefully perused the averments in the plaint, application for appointment of Court Commissioner and the order passed by the learned Civil Judge.

11. Generally, the Court Commissioner is appointed to have a joint measurement of the lands where there is a boundary

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dispute or allegation of encroachment over portions of the suit land. Conversely, where the suit is for simpliciter injunction, as distinct from a suit for removal of encroachment, the prayer for the appointment of the Court Commissioner is not favourably considered. However, the tenor of the suit as a whole is required to be construed.

12. In the instant case, the plaintiff has approached the Court with a positive case that defendant Nos.1 and 3 were encroaching upon the Hiraj – Bale road. The case of the plaintiff was that the encroachment over the said road would ultimately affect the rights of the plaintiff to have an unhindered access to the said road. Undoubtedly, the suit was instituted for perpetual injunction. However, the fact that the plaintiff is an adjacent owner of the land which abuts the road over which defendant Nos.1 and 3 were allegedly committing encroachment, cannot be lost sight of. The defendants were allegedly committing encroachment over the public road which runs between the lands of the plaintiff and defendant Nos.1 and 3. In such a situation, the plaintiff can be said to have an interest to ensure that the access to the public road remains unhindered. If, in that capacity, the plaintiff approaches the Court with a case of encroachment

over the public road, then an order of appointment of the Court Commissioner to ascertain the said fact would be to elucidate the matter in controversy. The mere fact that the plaintiff has not specifically prayed for removal of encroachment is not the sole ground on which a prayer for appointment of the Court Commissioner can be rejected.

13. Moreover, in the case at hand, the Court Commissioner had executed the commission before ad-interim order came to be passed by this Court and the report has already been submitted to the Court. Thus, no prejudice is likely to be caused to the defendants if the Court considers the said report, subject to the just objections on behalf of the defendants. Thus, the petition deserves to be dismissed.

14. The petition stands dismissed.

15. All contentions of the parties are, however, kept open.

[N. J. JAMADAR, J.]