



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5158 OF 2024

Pandit Vithal Landage ... Petitioner
versus
Vishnu Govind Pawar and Anr. ... Respondents

Mr. Aniesh Jadhav with Mr. Nikhil Adkine, Mr. Samarth Kale, for Petitioner.
Mr. Rahul P. Kasbekar i/by Mr. Hrishikesh S. Shinde, for Respondent No.1.

CORAM: N.J.JAMADAR, J.

DATE : 30 APRIL 2025

P.C.

1. Heard the learned Counsel for the parties.
2. The challenge in this Petition is to an order dated 5 January 2024 passed by the learned Civil Judge, Jr. Division, Mohol, on an application for appointment of the cadestral surveyor as Court Commissioner to have a joint measurement of the suit land and the adjacent lands and submit a map showing encroachment, if any.
3. Respondent No.1 – Plaintiff has instituted the suit with the assertion that the Plaintiff is the holder of agricultural land admeasuring 40 R out of the suit property described in paragraph No.1B of the plaint i.e. Gat No.1/1/K situated at Mauje Savleshar, Tal Mohol, Solapur. The Defendant No.1 is the holder of the land on the northern side. It admeasures 41R. The Defendant No.2 is the holder of the adjacent land admeasuring 1 H and 52 R. The

Plaintiff had acquired the land from different vendors. Upon acquisition of the lands, it transpired that Defendant No.1 has committed encroachment over the suit land described in paragraph No.1A of the plaint to the extent of 7 to 8 gunthas. The Plaintiff called upon the Defendants to remove the encroachment. Defendants gave evasive replies. Hence, the suit for removal of encroachment. The Plaintiff also sought the relief of appointment of the cadestral Surveyor as a Court Commissioner to measure the suit land 1B and fix the boundaries thereof, and, in the event, the measurement revealed encroachment, a decree for removal of encroachment and delivery of possession of the encroached portion of the suit land.

4. In the said suit, the Plaintiff filed an application for appointment of the Court Commissioner on the day the suit was instituted. By the impugned order, the learned Civil Judge was persuaded to allow the application opining, inter alia, that the joint measurement of the lands and the report of the cadestral surveyor would assist the Court in deciding the real question in controversy between the parties. Being aggrieved, the Defendant No.1 has invoked the writ jurisdiction.

5. Learned Counsel for the Petitioner submitted that the learned Civil Judge committed an error in law in appointing the Court Commissioner at the very inception of the suit. The issues have not yet been framed. The trial has not commenced. At a pre-mature stage, the learned Civil Judge could not

have directed the appointment of the Court Commissioner. To lend support to this submission, learned Counsel for the Petitioner placed reliance on the judgments passed by this Court in the cases of Sitaram Suklal Patil and Anr. V/s. Vasudeo Suklal Patil¹ and Shantaram Dattatray Kekan and Ors. V/s. Bhausahab Karbhari Kekan and Anr.².

6. Learned Counsel for the Petitioner would further urge that the Plaintiff had not prayed for preparation of a map and, yet, the learned Civil Judge gave directions to prepare a map and show encroachment, if any. Therefore, the impugned order deserves to be quashed and set aside.

7. In opposition to this, learned Counsel for Respondent No.1, supported the impugned order. It was submitted that the Plaintiff had approached the Court with a positive case that the Defendants have committed encroachment over the area admeasuring 7 to 8 gunthas. Since the allegations are of encroachment and boundary dispute has arisen, learned Civil Judge committed no error in appointing Court Commissioner, submitted Mr. Kasbekar.

8. I have perused the material on record, especially the averments in the plaint. The Plaintiff has averred that, after he acquired the suit land described in paragraph No.1B of the plaint, it was realized that Defendant No.1 had committed encroachment to the extent of 7 to 8 gunthas land. The

1 WP No.9626 of 2016

2 WP No.14046 of 2021 dt. 5 Dec. 2022

Defendants also threatened to commit further encroachment.

9. Incontrovertibly, the suit land and the land of the Defendants are situated adjacent to each other. The suit is for removal of encroachment and delivery of possession of the encroached portion of the suit land. It is true, in the plaint there is a prayer for appointment of the Court commissioner to measure the suit land. However, the said prayer is essentially supplementary and subsidiary to the principal prayer of removal of encroachment and delivery of possession of the suit land.

10. It is also true, this Court in the cases of Sitaram Suklal Patil (supra) and Shantaram Dattatray Kekan (supra), has recorded that in those cases, the application for appointment of the Court commissioner was filed at pre-mature stage. However, those judgments are required to be considered in the backdrop of the peculiar facts of those case.

11. From the text of Section 75 and Order XXVI Rule 9 of the CPC, restraint on the power of the Court to appoint the Court Commissioner qua a particular stage of the proceeding cannot be discerned. It cannot be laid down as an immutable rule of law that the Court commissioner cannot be appointed before the parties have started to adduce evidence. The provisions contained in Order XXVI Rule 9 of the Court indicate that the Court is empowered to appoint the court Commissioner to elucidate the matter in controversy. The term 'elucidation of the matter in controversy' cannot be

equated to “elucidation of the evidence adduced by the parties”. To lay down a cast iron rule that the Court commissioner cannot be appointed before the parties have adduced evidence would be, in effect, disabling the Court from getting assistance it requires for the determination of the controversy between the parties.

12. In the case at hand, the question of demarcation of the boundaries of the land and encroachment squarely arises for determination. Where the question is of removal of encroachment and demarcation of boundaries, it is necessary to have a joint measurement of the adjoining lands. A useful reference in this context can be made to the decision of the Supreme Court in the case of Haryana Waqf Board V/s. Shanti Sarup and Ors.³.

13. The aforesaid being the position in law, I do not find any infirmity in the impugned order. The appointment of the cadestral surveyor to have a joint measurement of the suit land and the adjacent land of the Defendants would equip the Court to decide the lis in a just manner. Thus, in exercise of supervisory jurisdiction, no interference is warranted in the impugned order.

14. The Writ Petition stands dismissed.

15. At this stage, learned Counsel for the Petitioner seeks extension of ad-interim order for a period of six weeks.

16. Having regard to the nature of the order, the prayer for continuation of

³ (2008) 8 SCC 671

the ad-interim order does not merit acceptance. The oral application for continuation of ad-interim order stands rejected.

(N.J.JAMADAR, J.)