

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3961 OF 2025

Gram Panchayat Uruli Kanchan

...Petitioner

Versus

Bachharam Makhija and ors.

...Respondents

SANTOSH
SUBHASH
KULKARNI

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Mr. Bharat Gadhavi, a/w aniket Shitole, Vinayak Shelar,
Pratik Sabrad, Trusha Shah, Nansi Dande and Sarvesh
Deshpande, for the Petitioner.

Mr. Chaitanya Nikte, a/w R. Kale, Sakshi Thombre, i/b
Prajeet Sahane, for Respondents.

CORAM: N. J. JAMADAR, J.

DATED: 3rd APRIL, 2025

ORDER:-

1. Heard the learned Counsel for the petitioner.
2. The challenge in this petition is to an order dated 7th January, 2025, whereby the learned Civil Judge, Pune, has directed a joint measurement of the properties bearing CTS Nos.108 and 107, with reference to the description of the suit property in the Sale Deed under which the plaintiff claimed to have purchased the property bearing CTS No.108 and with reference to the description of the property furnished in paragraph 1 of the suit.
3. Initially, the plaintiff had instituted a suit for injunction simpliciter. Subsequently, the plaint came to be

amended seeking a relief of removal of encroachment and delivery of possession of the alleged encroached portion of the suit land.

4. Indisputably, an issue as to whether the plaintiff proves that the defendant has committed encroachment over the suit property, has been framed. The learned Civil Judge was of the view that, in order to elucidate the matter in controversy, it was necessary to appoint a Cadestal Surveyor to have a joint measurement of CTS Nos.108 and 107.

5. The learned Counsel for the petitioner submitted that the plaintiff himself is not sure about the area of CTS No.108. Under the Sale Deed, the area of the land acquired by the plaintiff is shown 108.7 sq. mtrs. only, whereas in the plaint the plaintiff has asserted ownership over an area admeasuring 146.90 sq. mtrs. Despite advertng to the said fact and the onus which lay on the plaintiff to establish his case, the learned Civil Judge went on to appoint a Court Commissioner to have a joint measurement of CTS Nos.107 and 108. The said exercise, after framing of issues, according to the learned counsel for the petitioner, amounts to collection of evidence, which is not the purpose for which a

Court Commissioner can be appointed under Order XXVI Rule 9 of the Code.

6. I have perused the averments in the plaint and application for appointment of the Court Commissioner. Incontrovertibly, the core dispute between the parties revolves around the demarcation of the boundaries of CTS Nos.107 and 108. The plaintiff has alleged that the defendant has committed encroachment over a portion of CTS No.108. Where the dispute is about the location of the land, situs, area, demarcation of boundaries and encroachment, if any, it is trite the joint measurement of the lands is indispensable to determine the issue.

7. It is true, *prima facie*, there is dichotomy in the claim of the plaintiff as regards the area over which the plaintiff asserts ownership, in the context of the area mentioned in the Sale Deed under which the plaintiff claimed to have acquired title over CTS No.108. However, having regard to the said dichotomy, the learned Civil Judge has directed the Cadestral Surveyor to submit a report with reference to the area mentioned in the Sale Deed and the description mentioned in paragraph 1 of the plaint, separately. The learned Civil Judge found that such reports would assist the

Court in arriving at a just decision of the case. In a situation of this nature, where the real dispute is about demarcation of the lands and alleged encroachment, the appointment of Cadestal Surveyor to have a joint measurement of the lands is indispensable.

8. In the case of *Haryana Waqf Board vs. Shanti Sarup*¹ the 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.

9. 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,

1 (2008) 8 SCC 671.

2 (2011) 3 Mah LJ 348.

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 Cadestal Surveyor for taking joint measurement of the property owned by the plaintiff 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)

10. In this view of the matter, this Court does not find any justifiable reason to interfere with the order passed by the trial court, which promotes the cause of determination of the real dispute between the parties and assists the Court in arriving at a just decision of the case.

11. Petition stands dismissed.

[N. J. JAMADAR, J.]