



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.2345/2019

Gendlal Beniram Watekar .Vs. Tanaji Balkrishna Kumbhalkar and anr.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. D. C. Chahande, Advocate for petitioner.
Mr. K. N. Shukul, Advocate for respondent Nos. 1 to 4.

CORAM : **ANIL L. PANSARE, J.**

DATE : **MARCH 26, 2025**

Heard.

2. Challenge is to order dated 21.02.2019 passed by Civil Judge Junior Division, Parseoni, district Nagpur, by which the Court was pleased to appoint Commission in terms of Order XXVI Rule 9 of the Civil Procedure Code, 1908 (hereinafter referred to as the, "Code").

3. It appears that the respondents have filed a suit against the petitioner for declaration and permanent injunction. Declaration is to the effect that the petitioner – original defendant has encroached upon the agricultural land belonging to the respondents.

4. Learned counsel for the petitioner submits that a commission cannot be appointed for collection of the evidence.

5. This argument is something which can be said to be a well settled principle of law. Befitting answer on this point would, however, find place in the judgment of the Coordinate Bench of this Court in **Kashinath s/o Ramkrishna Chopade Vs. Purushottam Tulshiram Tekade and Ors.; [2005 (4) Mh. L. J. 471]**, wherein it is observed as under:

“11. ..The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary dispute and disputes about the identity of lands are instances, when a Court should order a local investigation under Order 26, Rule 9 of the Code of Civil Procedure.. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon. Oral evidence cannot conclusively prove such an issue.”

6. As could be seen, the Court observed that object of local investigation is not to collect evidence which can only be taken in the Court but to obtain evidence, which from its peculiar nature, can only be had on the spot. Thus, the expression, “Collection of Evidence”, is relatable to the evidence, which can only be taken in the Court and not the evidence which, in the form of local investigation, is obtained from the spot. The evidence as regards status of the property is solicited by the Court through Commission to ascertain true and correct status of the property, which cannot be, usually, tendered by the party through testimony of witnesses, for example, measurement of land to demarcate boundaries or to ascertain area encroached upon, etc. Accordingly, the Coordinate Bench further observed that the cases of boundary disputes and the disputes about identity of lands are the instances when the Court should order a local investigation under Order XXVI Rule 9 of the Code. The Court then held that in order to determine whether there has been an encroachment, it is always desirable to get fields measured by expert and find out the area encroached upon because the oral evidence cannot conclusively prove the issue.

7. In addition, counsel for the respondents has relied upon judgment in *Haryana Waqf Board Vs. Shanti Sarup and Ors.; [(2008)*

8 SCC 671 to justify appointment of Commission. The Supreme Court in paragraphs 4, 5 and 6, observed thus.

“4. Admittedly, in this case, an application was filed under [Order 26 Rule 9 of the Code of Civil Procedure](#) which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under [Order 26 Rule 9 of the CPC](#).

5. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per paragraph 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial court was wrongly rejected.

6. It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.”

8. Thus, the Supreme Court held that appointing Local Commissioner under Order XXVI Rule 9 of the Code should have been considered in the light of controversy, which was regarding demarcation in respect of the suit land.

9. Similar are the facts in the present case. The suit is filed for removal of encroachment. It appears that the agricultural lands involved in the matter are adjoining lands being survey Nos. 234 and 235. It will thus be desirable to have lands measured at the hands of an expert in order to ascertain the area encroached upon as alleged by the respondents. Such an act cannot be said to be an act of

collection of evidence as clarified in *Kashinath's* case. In the circumstance, it cannot be said that the Trial Court has either failed to exercise the jurisdiction or has committed serious error of law in passing the impugned order. No interference is, therefore, called for in supervisory jurisdiction.

10. The writ petition is accordingly dismissed. No order as to costs.

(Anil L. Pansare, J.)

Kahale