



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.12167 OF 2024

District : Nandurbar

Ismail Saifuddin Saifi,
Age : 53 Years, Occ. Business,
r/o. Bohari Colony, Sector No.1,
Plot No.1, Shahada, Tq. Shahada,
Dist. Nandurbar

..Petitioner

Vs.

1. Kishor s/o.Narottam Patil,
Age : 61 Years, Occ. Agri.,
r/o. Gujar Galli, Shahada,
Tq. Shahada, Dist. Nandurbar,
2. The Collector,
Nandurbar
3. The State of Maharashtra,
Through The Collector, Nandurbar

..Respondents

Mr.Subodh P. Shah, Advocate for petitioner
Mr.A.R.Syed, Advocate h/f. Mr.Sushil Pandit, Advocate for respondent
no.1
Mr.A.A.A.Khan, Advocate for respondent nos.2 and 3

CORAM : AJIT B. KADETHANKAR, J.
DATE : MARCH 24, 2026

JUDGMENT :-

Rule. Rule made returnable forthwith. Considering the nature of controversy between the parties, I have heard the matter for final disposal by consent of learned counsel for the respective parties.

2. Subject-Matter:-

An order passed by the learned Civil Judge, Senior Division, Shahada, Dist. Nandurbar on 18.07.2024 in Regular Civil Suit No.23 of 2023 u/s 75 r/w Order 26 Rule 9 the Code of Civil Procedure is under challenge. In a suit for mandatory injunction for removal of encroachment caused by the Defendant on Government acquired land, the Defendant sought appointment of a Court Commissioner to admeasure the land in Gut No.89/1 situated at Village Kukadel, Tq. Shahada, Dist.Nandurbar and for fixing the boundaries. Order passed by the Trial Court appointing Court Commissioner is the subject-matter of this Petition.

3. Introduction: 15 R land owned by Respondent No.1's mother at Village Kukadel, Tk. Shadada, Dist. Nandurbar was acquired by the State Government. The owner attempted to re-occupy the said land on account of failure of Govt. to use it for public purpose. Owner's suit filed against the State govt. was dismissed. Civil Court observed that the land was acquired by the State Government, and the Plaintiff therein had no right over it.

Now, Respondent No.1 – legal heir of the deceased owner again re-occupied portion of the same 15 R land acquired by the Govt.

Hence the petitioner, suffering nuisance due to the encroachment and construction on the said piece of land, lodged present suit.

While Petitioner contends that encroachment is on the land acquired by the Government, Respondent No. 1 contends that the 15 R land was never acquired. He alternatively submits that the land is unsusceptible to the acquisition due to non utilization by the Govt. for the purpose for which it was acquired.

4. Core issue: On this backdrop, the Respondent No.1/Defendant No.1 sought appointment of Court Commissioner for measurement of the land even before Plaintiff's evidence could be completed.

Hence core issue for consideration is if the dispute is whether the land in question was acquired by the Government or not, whether is the Trial Court justified in engaging Court Commissioner for measurement of the land.

5. FACTS IN BRIEF:-

5.1. Respondent No.1's mother, i.e. deceased Kantabai Narrottam Patil was the owner of land admeasuring 01 H 01 R situated at Survey No.89/1 at village Kukadel, Tq. Shahada, Dist. Nandurbar. As

per petitioner's contention, the land admeasuring 15 R out of said property was acquired by the State of Maharashtra for road and canal. That, the said land remained unutilized by the Government for the given purpose.

5.2 The owner namely, deceased Kantabai Patil reoccupied the land and filed Regular Civil Suit No.71 of 2005 in the Court of learned Civil Judge, Senior Division, Shahada, for declaration and perpetual injunction against the State authorities and some private parties.

5.3 Learned Civil Court, after assessing the evidence on record arrived at conclusion that the plaintiff could not prove that she was owner of the suit land and that the deceased proved encroachment of the plaintiff over 15 R subject-matter Government land. It was also observed that 15 R Government land was acquired by the State Government, and that the status of land was an acquired land. The judgment and decree was never taken up in challenge, the same is still intact.

5.4 Subsequently, the Respondent No. 1 who is legal representative of deceased Kantabai reoccupied the said 15 R Government land and carried out construction over there.

5.5 The petitioner, who is the adjoining land owner suffered nuisance due to due to the activities of the respondent. Hence, he filed Regular Civil Suit No.23 of 2023 in the Court of learned Civil Judge, Senior Division, Shahada against the respondents seeking mandatory injunction that the encroachment and illegal constructions carried out on the subject-matter 15 R Government land at the behest of respondent no.1 be removed.

5.6 The respondent no.1 disputed the suit. The respondent no.1 flatly denied that the subject-matter 15 R Government land was ever acquired. He submitted that although some office record cited Government's name and possession over the said land, it was never acquired. On one hand it is also submitted that the subject-matter land was not utilized the State Govt. for any public purpose, which goes to show that it has lost the status as an acquired land. With this, the respondent no.1 prayed to dismiss the suit.

5.7 Issues were framed by the Trial court. Before the plaintiff could lead and finish his evidence, the respondent no.1 filed the impugned application u/s 75 r/w Order 26 Rule 9 of Civil Procedure Code, for appointment of an Officer from Land Record office to admeasure the land in Gut No.89/1, Kukadel and to produce map and report before the Court.

5.8 The petitioner objected the said application. He argued that the application was not maintainable at all. He submitted that the suit property in the Regular Civil Suit No.71 of 2005 and the property under acquisition is one and the same. He would submit that the issue in dispute is defendant no.1's right to re-enter into the 15 R Government land situated in Gut No.89/1 of village Kukadel, and to carry out construction thereon. He would submit that the application was merely to protract the suit proceedings and the same is liable to be dismissed.

5.9 Upon hearing the parties, learned Civil Judge, Senior Division, Shahada opined that in case of encroachment cases, it is appropriate and efficacious to appoint Land Record Officer who admeasures the land and to place material before the court. As such, vide impugned order dated 18-07-2024 the Trial Court allowed the application and appointed the District Superintendent of Land Record, Nandurbar, to admeasure land block no.89/1 of village Kukadel, Tq. Shahada, Dist. Nandurbar. Hence, this petition.

6. Submissions:

6.1 Mr. Subodh Shah, learned counsel for the petitioner, would reiterate his objections raised before the trial court, as observed supra.

Referring to the page 14 of the petition and the observations of the Trial Court at page 65, Mr. Shah submit there is no dispute as regards to the description of property. He would submit that in fact defendant has squarely accepted that the suit property is a part of the 15 R land which was acquired by the Govt.

6.2 Mr.Syed, learned counsel for respondent no.1, would support the findings recorded by the trial court. He would submit that in the written statement the defendant has disputed description of the suit property and has contended that the suit property falls within the 15 R land, Kukadel.

6.3 Learned Assistant Government Pleader Mr. Khan for respondent no.2 - State adheres to the contention that 15 R land at Survey No.89/1 in village Kukadel, Tq. Shahada, Dist. Nandurbar by the Stat authorities. Learned Assistant Government Pleader relies upon the Judgment and Decree in Regular Civil Suit No. 71 of 2005 which still hold the field.

7. Discussion and Consideration:-

7.1 Appointment of a Court Commissioner is governed by Section 75 read with Order 26 Rule 9 of C.P.C., which is reproduced as follows:-

75. Subject to such conditions and limitations as may be prescribed, the court may issue a commission-

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition;
- [(e) to hold a scientific, technical, or expert investigation;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- (g) to perform any ministerial act.]

Order XXVI Rule 9:- Commissions to make local investigations

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court: Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

7.2 So far as appointment of Court Commission as regards to encroachment on landed property and boundary disputes are concerned, there is no dispute over position of law that (I) an officer from Land Records office can be appointed as Court commission where there is boundary dispute or dispute as regards to the encroachment, (ii) Court commission can not be appointed for the purpose of creation or collection of evidence; (iii) Court commissioner can be appointed for limited purpose of preparing map and placing it before the court, and (iv) Court commission can be appointed by the Court suo motu under its discretion or an application by a party etc.

7.3 In the cases of encroachments, its for the plaintiff to adduce evidence adequately to demonstrate how the defendant has caused encroachment over the 'subject matter property'. Plaintiff is the carrier and master of the suit. Its trite law that one who pleads, has to lead evidence to prove the pleading. After the plaintiff discharges his burden to prove his area and the alleged encroachment, then its for the Defendant to adduce evidence to show that he has not caused any encroachment. This is general situation in the cases of encroachment taking to boundary disputes.

7.4 In the cases of perpetual & mandatory injunction if the defendant makes any counter claim to seek any relief to protect his possession or otherwise, the defendant is indeed justified in filing such application. However, in the given set of facts its the responsibility of the Plaintiff to prove his case by adducing such evidence that is required by the Law.

7.5 The petitioner contends here that the 'subject matter property' is a part and parcel of the 15 R land acquired by the State Government long back. Petitioner agrees that the said land is not yet utilized by the Government for the purpose for which the acquisition was conducted. Vendor of the Petitioner i.e. Smt. Kantabai, through

whom the respondent claims a right over the 'subject matter property', attempted to re-occupy the acquired land. She even filed civil suit (supra) against the State Government and ors. to protect her possession. However the suit came to be dismissed with findings that the subject matter 15 R land was acquired by the State Government, and the Plaintiff therein had no right over it. The Civil Court Decree is intact even today.

7.6 Now on the same land, the Respondent No.1 re-entered claiming his right through his deceased mother i.e. Plaintiff in Regular Civil Suit No. 71 of 2005. The Respondent No. 1 has denied that the 15 R land was ever acquired by the State Govt. He, at some point accepts that there are some office record showing that the said land was acquired, but still he reiterates that the land was never utilized for the acquisition purpose. As such, the Respondent No. 1 adheres to his contention that the subject matter 15 R land was never acquired by the State Authorities. He even denies the judgment and decree passed in the Regular Civil Suit No. 71 of 2005 passed by the Civil Court.

This Court won't enter into the merit of the respective parties' contentions. What is required at present to see whether the defendant could file an application u/o XXVI Rule 9 of the Civil Procedure Code 1908 in the peculiar facts of the case.

7.7 As observed supra, by the nature of the suit, the plaintiff is under obligation to convince the Trial Court basically on two issues:-

- (i) The subject-matter land is a part and parcel of the 15 R Government acquired land; and
- (ii) The respondent no.1 has no authority to re-enter on the said 15 R Govt. acquired land and to cause any illegal construction.

7.8 This Court while deciding the Writ Petition No.14046 of 2021 at Aurangabad, had an occasion to test whether a Court Commissioner for measurement of land u/s 75 r/w Order 26 Rule 9 of Civil Procedure Code can be appointed even before the suit commences or whether such appointment can be made only after adducing evidence by both the parties. The issue, as recorded by this court arose essentially on account of divergence of views expressed by this court in several of its decisions. After discussing the case laws pressed for consideration this court concluded thus:-

13. In such circumstances, the issue that arises is whether plaintiffs can seek appointment of Court Commissioner for the purpose of establishment of alleged encroachment over the suit property by defendants even before elucidating their case by production of evidence. The defendants contend that, their possession over the suit property is already established in RCS No.6/2008. The plaintiffs have ascertained the exact area of

encroachment as 20R and have prayed for removal of encroachment of the ascertained portion in the suit. The plaintiffs are yet to adduce evidence in support of their claim that land admeasuring 20R has been encroached by defendants. Therefore, seeking appointment of Court Commissioner at this stage would definitely amount to collection of evidence. Also there is a substantive prayer for measurement of suit property, which is virtually granted by directing appointment of court commissioner. Furthermore, in the light of previously concluded litigation between same parties over the same land would raise the issue about maintainability of the suit itself. I do not wish to record any findings on this aspect as issue involved in the present petition is limited. However, in my view considering the peculiar facts and circumstances of the present case, appointment of Court Commissioner for measurement of land and fixation of boundaries at least at this stage before plaintiffs adduced there evidence is not warranted.

14. Accordingly, the Writ Petition is allowed. The order dated 23.11.2021 passed by the Civil Judge, Junior Division, Kopargaon on application at Exhibit-23 in R.C.S. No.186/2016 is set aside. However, plaintiffs will be at liberty to file appropriate application for appointment of Court Commissioner for measurement of land and fixation of boundaries, if they so desire, after conclusion of evidence of parties. In case such an application is made and only if the Trial Court is satisfied that appointment of Court Commissioner is necessary after considering the evidence on record, the Trial Court shall decide such application on its own merits without being influenced by any of the observations made in this order.

7.9 In the case in hand, the plaintiff has not yet concluded his evidence, nor an occasion has arisen for defendant's evidence. True that the Respondent No.1 denied description the suit property in his written statement, but he asserts that it is a part of the 15 R land which the petitioner alleges to have been acquired by the Government. However, the peculiar controversy is as regards to whether the subject-

matter 15R land is Government land, and whether the defendant has right to re-enter into it claiming to have absolute right on it.

7.10 Acquisition of the subject-matter 15 R land is a question of fact to be decided by the Trial Court. The judgment and decree passed by learned Civil Judge, Senior Division, Shahada in Regular Civil Suit No.71 of 2005 has already held that 15 R land in Gut no.89/1 in Village Kukadel is a Government acquired land. The said decree, as observed *supra* is intact even today.

7.11 Instead of taking exception to the judgment and decree in R.C.S. No.71 of 2005, the respondent no.1 contends that the said land was never acquired by the State Government and hence his construction cannot be termed to be an encroachment.

7.12 Considering this preponderant controversy, it appears that the suit is not as regards to any dispute over boundaries merely because the Respondent No. 1 disputed the property description. He has specifically pleaded at paragraph No. 6 and 12 of his written statement that the suit plot forms part of the 15 R land purportedly acquired by the Government. *Prima facie* it seems that the encroachment is not owing to any boundary dispute, but on the pretext

of the Respondent No.1 that the entire 15 R land was never acquired by the Government, and also it no more remains a govt. acquired land.

7.13 Mr. Sayyad, learned Counsel for the Respondent No.1 relies upon an order dated 01-04-2008 passed by this Court in Writ Petition No. 487 of 2008 at Nagpur. I have respectfully gone through the said order. Facts in the cited case and in the present case are distinctly different.

In the cited case, the Plaintiff had already obtained report from cadastral surveyor. The Defendant applied for appointment of Court commissioner for measurement of the disputed land. This court while justifying appointment of Court Commissioner observed on facts that the report/map prepared by the cadastral surveyor was deficit to place on record the full details of the properties in disputes. Hence, in order to bring total details of the properties of the parties this Court confirmed appointment of Court Commissioner in that case.

7.14 I appreciate sincere effort by Mr. Sayyad, learned Counsel for the Respondent No.1 to justify the impugned order. However, as described supra, apparently facts of case in hand are absolutely different from the case cited by Mr. Sayyad, learned Counsel. At the cost of repetition it is observed that , by a judicial pronouncement it is

held that 15 R land, Kukadel belongs to the State Government. The Defendant No.1/ Respondent No. 1 denies the said fact contending his ownership on the said land. As such, controversy is not at all concerning boundary dispute. Hence in my considered view, the citation shall not be helpful to the Respondent No.1.

7.15 Every encroachment case may not only because of boundary disputes, as is the present one. Not in every case where merely because the defendant disputes boundaries, court commissioner has to be appointed for measurement of land. The dealing court has to see the pleadings in its entirety. In the case in hand, encroachment is owing to re-entry by the respondent no.1 on the government acquired land. On this backdrop I am of the opinion that appointment of Court Commissioner in terms of the impugned order would not at all serve any purpose for adjudication of the Civil Rights of the parties in the suit. As observed above, it is for the plaintiff to lead evidence and to prove his case.

7.16 Ordinarily, in a suit for injunction a Defendant may not be required to seek appointment of Court Commission. Its for the Plaintiff to prove how he is entitled for a decree of injunction against the defendant. However, a defendant may also file an application for

appoint of a Court Commissioner in peculiar circumstances in an injunction suit, but that too, after evidence from Plaintiff side is over. May it be, in view of the real controversy as recorded above the respondent no.1's application was certainly a misconceived one, and ought not to have been allowed by the Trial Court.

7.17 Hence in my considered view, the Trial Court has unjustifiably exercised the discretion in allowing the respondent no.1's application u/s 75 r/w Order 26 Rule 9 of the Civil Procedure Code.

18. Hence, I pass the following order :-

- (i) The Writ Petition is allowed.
- (ii) The impugned order dated 18.07.2024 passed below Exh.31 in Regular Civil Suit No.23 of 2023, by learned Joint Civil Judge, Senior Division, Shahada, Dist. Nandurbar, is quashed and set aside.
- (iii) No order as to costs.
- (iv) Findings and observations in this order are to the extent of the subject-matter application only. The Trial Court shall appreciate merit of respective parties' case on its own merit without being influenced by any observation in this Order.
- (v) Rule made absolute in above terms.

[AJIT B. KADETHANKAR, J.]

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