



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

**WRIT PETITION (ST) NO. 24127 OF 2024**

Surel Milk & Food Processor Pvt Ltd & Ors .. Petitioners

**Versus**

Bhagwan Krishna Pawar & Ors. .. Respondents

- .....
- Mr. Ashutosh M. Kulkarni i/by Mr. Shailesh Chavan for Petitioners
  - Mr. Ganesh T. Jadhav for Respondent Nos. 1 to 3
- .....

**CORAM : MILIND N. JADHAV, J.**

**DATE : AUGUST 26, 2024**

**ORAL JUDGMENT:**

1. Not on board. Mentioned. Taken on board.
2. Perused the praecipe dated 26.08.2024.
3. Heard Mr. Kulkarni, learned Advocate for Petitioners and Mr. Jadhav, learned Advocate for Respondent Nos. 1 to 3.
4. Present Writ Petition takes exception to the order dated 20.07.2024 passed by the learned Trial Court below Exh. 75 whereby Application filed by Plaintiffs (Respondent Nos. 1 to 4 herein) for appointment of Court Commissioner i.e. T.I.L.R. to undertake the exercise of survey, measurement and mapping of the Suit property is allowed. Suit is filed in the year 2021 seeking mandatory injunction as also it seeks an additional relief of removal of encroachment by Defendants on the Suit property. There is also a precursor Suit which

was filed by Plaintiffs in the year 2015 for the same reliefs which remained pending for some time pursuant to which it was withdrawn by Plaintiff/s with liberty to file a fresh Suit. In that Suit, Plaintiffs had made an Application for appointment of T.I.L.R. as Court Commissioner which was rejected. Be that as it may, in so far as the present Suit is concerned, Plaintiffs approached the Court seeking mandatory injunction in respect of the Suit property necessarily on the basis of their title which would be evident from either a registered sale deed or if the Suit property is ancestral property then it would be based on partition and relevant revenue records as also revenue entries. Where Plaintiffs in such a case applies to the Court for mandatory injunction, the Application is on the basis of title which is contained in either a registered document or public documents. Plaintiffs would have to first prove entitlement on the basis of documentary evidence rather than immediately alongwith filing of the Suit proceeding seek appointment of Court Commissioner to identify the Suit property as also the extent of encroachment. If such an Application is permitted by the Trial Court at the outset itself, then it would amount to collection and gathering of evidence in the first instance even before Plaintiffs prove the case of encroachment. However, this does not mean that either the Plaintiff or the Defendant would be bereft of the right to apply for a Court Commissioner to

identify the Suit property altogether. In a given case, after Plaintiffs' witness action is over and evidence in rebuttal of Defendants is over, if a dichotomy still exists regarding identification of the Suit property as also the extent of encroachment on the basis of the evidence that is led by parties, the learned Trial Court can even *suo moto* on its own motion appoint a Court Commissioner to prepare a status report to assist the Court. Despite the above, it would also be open to either of the parties to make an Application on the strength of the evidence that is led by them and urge the Court to appoint a Court Commissioner if Suit property and encroachment is not identified. The question would be at what stage such an Application be permitted to be filed and allowed.

5. Mr. Jadhav has filed affidavit in reply dated 26.08.2024 and would contend that on the basis of certain decisions of this Court, it cannot be held that mere appointment of the Court Commissioner in the first instance will be for collection of evidence. He would submit that in the present case even at the interim stage despite the Exh. 5 Application having been dismissed, learned Trial Court can still appoint a Court Commissioner. I agree with the proposition which is contained in the decisions which are appended to the affidavit in reply, but it depends upon the facts of each case. Once again the question would be at what stage and whether the facts in the present case at

the interim stage can allow appointment of Court Commissioner. If such Application is permitted and allowed in the first instance itself alongwith filing of the Suit, there is no reason for the Plaintiff to approach the Civil Court by way of Suit proceedings. He can very well exercise his rights under R. 9 of the Boundary Dispute Rules under the Maharashtra Land Revenue Code 1966 as also the extant provisions of the Maharashtra Land Revenue Code, 1966 which permit the holder of property to seek boundary related dispute redressed before the Competent Authority.

6. Mr. Jadhav has drawn my attention to the decision of this Court in the case of **Kashinath Vs. Purushottam Tulshiram Tekade & Ors**<sup>1</sup> and would urge that provisions of O. XXVI, R. 9 are wide enough to allow Court to order a local investigation in order to determine the extent of encroachment and it is always desirable to get the Suit property measured by the expert to find out the area encroached upon as oral evidence cannot conclusively prove such an issue. He has drawn my attention to paragraph No. 11 in the said decision and would submit that in the facts of the present case, this Court sustain the impugned order. I do not agree with the submissions made by Mr. Jadhav since it is clear that in the present case oral evidence has still not been adduced by Plaintiffs as also evidence in rebuttal. The said decision

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<sup>1</sup> 2005(4) All MR 519

proceeds on the premise that it is only after the oral evidence is adduced which cannot be conclusively prove the said issue, local investigation can be directed under O. XXVI, R. 9 of the CPC. Hence the facts therein are clearly distinguishable.

**6.1.** Next Mr. Jadhav would draw my attention to the decision of this Court in the case of **Mayuresh S. Sonawane Vs. Yashwant Babu & Ors**<sup>2</sup>. The said decision in fact reiterates the fact that the learned Trial Court will have to ascertain the facts of the case even at the interim stage so as to enable the learned Trial Court to pass any interim order pending the trial and in that context whether appointment of the Court Commissioner is justified or otherwise is decided.

**6.2.** Next he would draw my attention to the decision of this Court in the case of **Bhupendra Bhagwat Turkar Vs. Homraj Z. Meshram**<sup>3</sup> which once again relates to a boundary dispute and appointment of the local Commissioner for determining the extent of encroachment. The said decision proceeds on the principle of availability of authentic evidence before the Trial Court. The question is once the Plaintiff approaches the Court for a relief of mandatory injunction, the onus and burden would lie on the Plaintiff to prove the same and it is only after he discharges the same, the onus shifts on the Defendant to lead evidence in rebuttal. The question would be at what stage the Court

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<sup>2</sup> 2022(2) All MR 348

<sup>3</sup> 2014(3) All MR 635

Commissioner can be appointed and whether the Plaintiff can approach the Court as a matter of right in the first instance despite his Exh. 5 Application being rejected can be permitted to seek appointment of Court Commissioner before witness action, which are the facts in the present case. The grievance to the above question is a "no".

7. In view of the above observations and findings, the impugned order is not sustainable and the same is quashed and set aside. Resultantly dismissing the Application filed by Plaintiffs under Order XXVI R. 9 of the CPC.

8. It is directed that Suit shall strictly proceed on the basis of its own merits without being influenced by any of the observations made in the impugned order as also this order. It is directed that after witness action i.e. the evidence of Plaintiffs and evidence in rebuttal of Defendants is over, only if the Trial Court feels at its discretion that appointment of Court Commissioner is necessary, it shall *suo moto* on its own motion or on the Application of any party and after assessing the evidence led by parties may appoint Court Commissioner for measurement, survey, identification etc. of the suit property if so required to decide the *lis* between parties. It is clarified that it shall be solely at the discretion of the Trial Court in its entirety to pass order

for appointment of Court Commissioner after witness action of both parties is over.

9. All contentions of both parties are expressly kept open.

10. Writ Petition stands allowed and disposed.

Amberkar

[ MILIND N. JADHAV, J. ]

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by RAVINDRA  
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