

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

WRIT PETITION NO. 5854 OF 2015

1. Abdul Rahim Abdul Khadir,
Age: 51 years, Occu. Agril.,
R/o Baikar Mohalla, Pathari,
Tq. Pathri, Dist. Parbhani.

2. Shaikh Nasir Ahmad S/o Sk. Rasool,
Age: 53 years, Ocu. Agril.,
R/o Baikar Mohalla, Pathari,
Tq. Pathri, Dist. Parbhani.

...PETITIONERS

versus

1. Aayub Kha s/o Wali Moh. Kha,
Age: 48 years, Occu. Agril & Business,
R/o Fakirabad Mohalla, Pathri,
Tq. Pathri, Dist. Parbhani.

2. Shaikh Sugraabee W/o Sk. Rasool,
Age: 68 years, Occu. Agril. &
Household, R/o Baikar, Mohalla,
Pathri, Tq. Pathri, Dist. Parbhani.

3. Shaikh Moh. Taleb S/o Sk. Rasool,
Age: 38 years, Occu. Agril.,
R/o Baikar Mohalla, Pathari,
Tq. Pathri, Dist. Parbhani.

4. Shaikh Moh. Jaber S/o Sk. Rasool,
Age: 43 years, Occu. Agril.,
R/o Baikar Mohalla Pathari,
Tq. Pathri, Dist. Parbhani.

5. Mohammed Iqbal S/o Mohd Siddiq.
Age: 53 years, Occu. Agril.,
R/o Baikar Mohalla, Pathari,
Tq. Pahtri, Dist. Parbhani.

...RESPONDENTS

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Mr. S.J. Salunke, Advocate for Petitioners
Mr. N.R. Pawade, Advocate for respondent No. 1

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CORAM : SUNIL P. DESHMUKH, J.

DATED : 28th JULY, 2015

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard the learned counsel for appearing parties finally, with consent.

2. The petition questions propriety of the impugned order dated 10-03-2015 on Exhibit-65 in Regular Civil Suit No. 102 of 2012, passed by civil judge, junior division, Pathri, primarily for the reason that it does not reflect application of mind to the circumstances as had been referred to under order dated 05-02-2014 of this court in writ petition No. 1115 of 2014. Relevant paragraph No. 4 of the impugned order reads thus-

“4. It is admitted fact that the plaintiff previously filed the application for appointment of Court Commission and the same was rejected by this Court. Against this order the plaintiff has submitted a writ bearing No. 1115 of 2014 before the Hon'ble High Court Bench at Aurangabad. The Hon'ble High Court held in para No. 3 of the said order that after evidence of plaintiff, at that stage if the court finds that there is dispute with regard to the demarcation of the property of the plaintiff and defendants, its identity and location of the property, the parties may apply to the Court for appointment of Cadestral Surveyor as court Commissioner which application, would be considered by the Court on its own merits. After perusal of evidence it appears that Cadestral Surveyor is an expert to measure land of suit property. The matter is, therefore, required to be elucidated by appointing a Court Commissioner. Hence, I proceed to pass following order.”

3. This court under its order dated 05-02-2014 in writ petition No. 1115 of 2014 had observed thus -

“4. In the light of above, I am not inclined to consider the present writ petition. After the petitioner adduces his evidence, at that stage if the Court finds that there is dispute with regard to the demarcation of the property of the plaintiff and defendant, its identity and location of the property, the parties may apply to the Court for appointment of Cadastral Surveyor as Court Commissioner, which application would be considered by the Court on its merits. The writ petition as such dismissed. No costs.”

4. Learned counsel for respondents - plaintiffs refers to various circumstances, which according to him have weighed with the court while passing the impugned order. However, impugned order does not depict the same. Thus, I deem it appropriate that application be reconsidered and order be passed keeping in view observations of this court in paragraph No. 4 of order dated 05-02-2014.

5. In view of aforesaid, impugned order dated 10-03-2015 on Exhibit-65 in Regular Civil Suit No. 102 of 2012, passed by civil judge, junior division, Pathri stands set aside. Exhibit-65 stands restored to its position as had been subsisting immediately before the date of the impugned order. Trial court to decide Exhibit - 65 afresh keeping in view observations of this court in paragraph No. 4 of order dated 05-02-2014 in writ petition No. 1115 of 2014.

6. Writ petition is allowed. Rule is made absolute in above terms. No order as to costs.

7. Needless to refer to that this order shall not influence decision to be rendered on merits on Exhibit-65 by the trial court.

Sd/-

(SUNIL P. DESHMUKH, J.)

MTK