

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

WRIT PETITION NO. 8619 OF 2015

Sunita Sakharam Sinare,
Age: 53 years, Occ: Household,
R/o. Davangaon, Tq. Rahuri,
Dist. Ahmednagar & ors.

...Petitioners

versus

Arjun Bhausaheb Mahadik,
Age: 45 years, Occ: Agri.,
R/o. Davangaon, Tq. Rahuri,
Dist. Ahmednagar & ors.

...Respondents

.....
Mr. R.A. Tambe, Advocate h/f Mr. R.R. Karpe, Advocate for
petitioner
Mr. V.S. Bedre, Advocate for respondents
.....

CORAM : N.W. SAMBRE, J.

DATE : 16th NOVEMBER, 2015

ORAL ORDER :

Present petition is by the plaintiffs in Regular Civil Suit No. 372 of 2010 initiated for removal of encroachment and possession of suit portion. Exhibit-47 - an application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Court Commissioner came to be rejected by an order dated 23/02/2015 at the behest of the petitioners-plaintiffs, wherein appointment of T.I.L.R. as a Court Commissioner was sought. As such, present writ petition.

2. Learned Counsel for the petitioners, while relying upon the judgment of this Court in the matter of ***Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, Deceased through & ors.***, reported in ***2011(3) Bom. C.R. 807***, would urge that appointment of Court Commissioner for measurement of encroached portion is very much required and should have been granted by the Court below, particularly in the background of the fact that defendants-respondents have objected and denied the measurement report of the T.I.L.R., who measured the land in question three years before filing of the suit. According to him, in view of above law, laid down in the case of ***Kolhapuri Bandu Lakade*** (supra), particularly in paragraph Nos. 8 and 14, it will be appropriate to grant the application preferred by the petitioners for appointment of Court Commissioner.

3. Mr. Bedre, learned Counsel for the respondents-defendants, while objecting the grant of prayer and in support of the order impugned, would urge that the application moved is by way of afterthought, as according to him, the witness who was examined by the plaintiffs has given certain admissions in favour of the defendants which petitioner intend to cover through this application. According to him, the appointment of Court Commissioner is sought with intention to collect the evidence and as such, prayed for dismissal of the petition.

4. Having bestowed my anxious consideration to the issue raised in the petition, it is required to be noted herein that the issue herein is squarely covered by the judgment in the matter of ***Kolhapuri Bandu Lakade*** (supra). It is required to be noted that the respondents in the written statement in express terms have objected the earlier measurement report and as such, in the light of relief claimed in the plaint, it was appropriate for the plaintiffs to seek such relief for appointment of Court Commissioner, that too at appropriate stage at which the application in question came to be moved.

5. In view of above, in my opinion, it will be appropriate to allow the present writ petition in terms of prayer clause (B). Accordingly, the writ petition is allowed in terms of prayer clause (B).

[N.W. SAMBRE, J.]