

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

WRIT PETITION NO.10786 OF 2013

- | | | |
|-----|---|---------------------------------|
| 1] | Bapusaheb alias Sakharam
Kashinath Jangam,
age 85 yrs, Occ – Agr. |]
]
]
] |
| 2] | Smt.Sindhubai Ganpat Jangam
age-65 yrs, Occ-Household |]
]
] |
| 3] | Rajendra Ganpat Jangam
Age 48 yrs, Occ-Agr.and business |]
]
]
] |
| 4] | Vijay Ganpat Jangam
age 43 yrs, Occ – agr. |]
]
]
] |
| 5] | Bansilal Kashinath Jangam
(since deceased-through his LRs) |]
]
]
] |
| (a) | Santosh Bansilal Jangam
age 46 yrs, Occ – Agr |]
]
]
] |
| | All above R/at. Lohagaon, Tal.Haveli
Dist.Pune |]
]
]
] |
| (b) | Nitin Bansilal Jangam
age 53 yrs. Occ – Agr
R/at. Lohagaon, Tal. Haveli
Dist. Pune. |]
]
]
]
]
] |
| (c) | Mrs. Minal Mahadeo Jangam
age 53 yrs, Occ-household
R/at. 3/7, Rajaram Pande Chal
Adarsha Nagar, Karar Village
Malad (E), Mumbai 97 |]
]
]
]
]
]
] |
| (d) | Nikita Nandkumar Swami
age 48 yrs. Occ-household
R/at. Date Mala, Swami Bldg.
Tal.Hatkanangale, Dist.Kolhapur |]
]
]
]
] |

6]	Kalawati Dashrath Jangam	]
	(since deceased through her LRs)	]
	for themselves and also as	]
	LRs of the Petitioner No.6	]
		]
	(a) Ashok Dashrath Jangam	]
	age 51 yrs. Occ – Riksha Driver	]
		]
	(b) Sunil Dashrath Jangam	]
	age 48 uys. Occ – Riksha Driver	]
		]
	(c) Jintendra Dashrath Jangam	]
	age about 44 yrs, Occ – Service	]
		]
7]	Smt. Anusuya Dattatraya Jangam	]
	Age about 65 yrs. Occ – Household	]
		]
8]	Rajendra Dattatraya Jangam	]
	(since deceased through his LRs)	]
		]
	(a) Smt.Sandhya Rajendra Jangam	]
	age 41 yrs. Occ – household	]
		]
	(b) Karishma Rajendra Jangam	]
	age 19 yrs, Occ – student	]
		]
	(c) Karina Rajendra Jangam	]
	age 18 yrs, Occ – student	]
		]
9]	Avinash Dattatraya Jangam	]
	age 41 yrs, Occ – Pujari	]
		]
	All above R/at. Lohagaon,	]... Petitioners/
	Tal. Haveli, Dist. Pune	] (Org. Plff.)
versus		
	Ranganath Bolhu Moze	]
	Age 81 yrs., Occ – Business	]
	R/at. Lohagaon, Tal. Haveli	]... Respondent/
	Dist. Pune	] (Org. Defendant)

Mr. S N Chandrachood for the Petitioners.
Mr. A R Kapadnis for the Respondent.

CORAM : R. M. SAVANT, J.
DATE : 28th January 2015

ORAL JUDGMENT :-

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order dated 19/7/2013 passed by the learned 4th Joint Civil Judge, Junior Division, Pune by which order the Application (Exhibit 68) for review of the order dated 9/11/2012 passed by the Trial Court on the Application (Exhibit 51) filed by the Plaintiffs came to be rejected.

3 The Petitioners herein are the original Plaintiffs who have filed the suit in question being Regular Civil Suit No.2537 of 2012 for declaration and removal of encroachment. In the said suit an application came to be filed for appointment of the Court Commissioner being Exhibit 29. The said application came to be allowed by the Trial Court by its order dated 9/2/2009 and the City Survey Officer-I Haveli, Pune was appointed as the Court Commissioner for measurement of the disputed site inclusive of the plots possessed by the Plaintiffs as well as the Defendant. It seems that pursuant to the said appointment, the Court Commissioner initiated the process of carrying out the

commission work. In so far as the present Petition is concerned, what is relevant to note is that the Panchas have submitted a Panchanama dated 10/5/2010 wherein they have stated that the measurement could not be carried out as the Plaintiffs have not shown their occupation. It is also required to be noted that the statement of the Panchas was also recorded on 10/11/2009 wherein they have stated that on account of rain and on account of there being bushes, the measurement could not be carried out. However, the Defendant by the statement recorded on 10/05/2010 has mentioned that he has shown his occupation and that the same has been marked with white chalk which is acceptable to him. It seems that thereafter the Court Commissioner has submitted his report in June 2010. However, pertinently the said report does not bear the date though the month and year have been mentioned.

4 It is in view of the aforesaid facts that the application for review being Exhibit 68 came to be filed by the Plaintiffs as according to the Plaintiffs the Court Commissioner has submitted his report without carrying out measurements. The said application has been rejected by the Trial Court on the ground that whether the measurement has been carried out properly or not by the Court Commissioner would be a matter of evidence at the trial of the suit and therefore the application (Exhibit 68) need not be considered at the said stage.

5 The learned counsel appearing for the parties i.e. Shri S N Chandrachood for the Petitioners/Plaintiffs and the Shri A R Kapadnis for the Respondent/Defendant would make submissions in respect of their respective assertions namely that without carrying out the measurement, the Court Commissioner has submitted the report, and that it is after the measurement, the Court Commissioner has submitted his report.

6 In my view, having regard to the facts as afore-stated wherein the Panchas have also stated that on account of rain and bushes the measurement could not be carried out as also in the light of the statement made by the Panchas and having regard to the fact that the letter forwarding the report is undated, in my view, it would be just and proper so as to avoid any further acrimony and disputes between the parties that the measurement is carried out afresh in the presence of the parties. If the course of action as propounded by the Trial Court is to be followed, then the dispute in the suit would be side-tracked and the focus would be on the Court Commissioner's report which cannot be permitted. It is well settled that the power under Order XXVI Rule 9 of the Code of Civil Procedure can be invoked to elucidate the matter in controversy. In my view, therefore the impugned order dated 19/7/2013 is required to be quashed and set aside and is accordingly quashed and set aside. The Application (Exhibit 68) is required to be allowed and is accordingly

allowed. The City Survey Officer-I, Haveli, Pune is directed to carry out the commission work in terms of the order dated 9/2/2009 by directing the parties to remain present on site on the appointed date and time. If either of the parties do not remain present, the City Survey Officer-I, Haveli, Pune may proceed with the commission work on the appointed date and submit his report by observing that one of the party or parties have not remained present on the appointed day. The commission work to be carried out within a period of six weeks from date and report to be submitted to the Trial Court. The above Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]