

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6688 OF 2014

DASHRATH BABU GADAKH
VERSUS
BABAN SAKHARAM GADAKH AND OTHERS

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Advocate for Petitioner : Mr. Gawali Amol K.
Advocate for Respondents 1 to 10: Mr. N.V. Gaware

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CORAM : V. K. JADHAV, J.
DATED : 25th FEBRUARY, 2016

PER COURT:-

1. By consent of parties, heard finally at admission stage.
2. Respondent Nos. 1 to 10-original plaintiffs instituted a suit bearing R.C.S. No. 171 of 2013 for perpetual injunction and direction to the Superintendent of Land Records for measurement of sub plot Nos. 330 and 331 of agriculture land, situated at Nepti, Tq and district Ahmednagar. The respondents-plaintiffs also filed an application Exh.5 seeking appointment of Court Commissioner for measurement of sub plots of suit land and for preparation of map of sub plots and submission of report to that effect in the Court. The petitioner-original defendant has strongly contested the suit by filing written statement and resisted application Exh.5 by filing say. Learned C.J.S.D. Ahmednagar by impugned order dated 27.6.2014, allowed application Exh.5 and appointed T.I.L.R. Tq. Nagar, as a Court Commissioner to measure the

suit properties with further directions to submit measurement report alongwith map at the earliest. Hence, this writ petition.

3. Learned counsel for the petitioner has assailed the said order mainly on two grounds. Learned counsel submits that by way of interim relief thereby appointing the Court commissioner, final relief has been granted by the trial court. Learned counsel submits that though the pleadings are complete however, issues are yet to be framed, the trial court has allowed application Exh.5 for appointment of court Commissioner at such prematured stage.

The learned counsel for the petitioner, in order to substantiate his submissions, places reliance on the judgments in the following cases:-

I) The Bank of Tokya Mitsubishi Ltd. Mumbai vs. Spartex Ceramics India Ltd. and others, reported in 2007 (3) CTC 11 and

II) Judgment dated 22.10.2013 in writ petition No. 8748 of 2013 delivered by this Court.

4. Learned counsel for the respondents submits that there are in all 12 shareholders in the suit property and only the present petitioner is not giving his consent for pothissa measurement of suit property. Since the consent of shareholder is required for carrying out measurement of

pothissa even the land record office has refused to accept the application submitted by the respondents-plaintiffs. Counsel submits that therefore, the respondents-plaintiffs constrained to institute the suit. Learned counsel further submits that during pendency of suit, original defendant No.5 Bhairavnath Raosaheb Khandagale, though initially refused to give consent, finally has given consent for carrying out said measurement. Learned counsel further submits that, in fact, there is no question of granting substantial relief by way of passing interim order below Exh.5. Learned counsel submits that the trial court has rightly allowed application Exh.5. There is no substance in the writ petition and the writ petition is liable to be dismissed.

Learned counsel for the respondents, in order to substantiate his submissions, places reliance on judgments in following cases:-

- I) Haryana Waqf Board vs. Shanti Sarup and others, reported in (2008) 8 SCC 671,
- II) Habibkhan Inauttalakhan and Ors. Vs. Waman Govind Rathod and Ors. reported in 2012 (6) Bom.C.R. 379
- III) Atmaram Ananda Jagrut vs. Rajaram and others, reported in 2014 (3) Mh.L.J. 463.

5. It appears that there are 12 shareholders in the suit property and obviously their consent is required for carrying out pothissa

measurement. The other shareholders are ready for carrying out measurement by the Land Record Officer and the petitioner is the only person, who is opposing the said process. In view of this, the respondents-plaintiffs constrained to institute a suit with specific prayer in this regard and has also left with no other alternative but to file application Exh.5 for appointment of Court Commissioner. The Land Record Officer would not carry out measurement unless consent is given by all shareholders or the Court directs the concerned authority to carry out measurement of pothissa. In such a situation, though such interim relief directing appointment of Court Commissioner almost amounts to final relief to some extent, that falls under exceptional circumstances so far as the peculiar facts of this case is concerned. In view of above, I do not find any fault in the impugned order passed by learned Judge of the trial court. The pleadings of the parties are complete. In the light of pleadings, the pothissas of suit property are required to be measured. I do not think that it is premature stage to issue such directions of appointment of Court Commissioner for carrying out measurement of pothissa of suit property. There is no substance in the writ petition. The writ petition is therefore, dismissed. No costs.

(V. K. JADHAV, J.)

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