

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

Writ Petition No.7511 of 2014

Kondiba s/o Raoji Garje & Others. .. **Petitioners.**

Versus

Shamrao s/o Ramrao Garje & Others. .. **Respondents.**

Shri. R.R. Karpe, Advocate, for petitioners.
Shri. Amol Chalak, Advocate, holding for Shri. Bade-
Patil, Advocate, for respondent No.1 to 4.

CORAM: T.V. NALAWADE, J.

DATE : 20 AUGUST 2016

ORDER:

1) The petition is filed by defendants of Regular Civil Suit No.374/2006 which is pending in the Court of the Civil Judge, Junior Division, Ashti, District Beed. The petitioners have challenged the order made on application at Exhibit 82 filed by the petitioners for appointment of Cadestral Surveyor as Court Commissioner. The application is rejected by the trial Court. Both sides are heard.

2) Respondents have filed aforesaid suit for relief of injunction to protect their possession over Survey

No.64/U (1 hectare 3 R) and Survey No.72/A (49 R). Boundaries of these two properties are given in the plaint. It is the case of the plaintiffs that defendants, present petitioners, have no concern whatsoever with the suit property but they are creating obstruction to the possession of the plaintiffs.

3) Present petitioners filed written statement and they have contended that they are the owners of Survey No.165/2 and the plaintiffs have shown the boundaries of Survey No.165/2 for describing Survey No.64/U. It is the case of the defendants that old Survey No.166/A is now Survey No.72/A and the defendants have got Survey Nos.163, 164, 165 and 166 under the provisions of the Tenancy law. They contended that the plaintiffs are not in possession of the suit property and they contended that by mentioning previous numbers the plaintiffs are trying to grab the suit property.

4) In the application filed for appointment of Cadestral Surveyor as Court Commissioner, defendants, present petitioners have made following contentions : -

(i) It needs to be ascertained from the Court Commissioner as to whether the plaintiffs are in possession of Survey No.72/A and also it needs to be ascertained as to on which side of previous Survey No.166 Survey No.72/A is located; and,

(ii) Defendants own entire area of Survey No.165 and in Survey No.64/U was part of Survey No.165, the exact location of Survey No.64/U or Survey No.165 needs to be ascertained.

5) The aforesaid contentions made in the application show that the defendants want to collect evidence through Cadestral Surveyor in respect of the possession. The contentions also show that the defendants want to use Cadestral Surveyor to prove their contention that the suit properties are part and parcel of Survey Nos.166 and 165.

6) Firstly, Court Commissioner cannot be appointed to collect evidence of possession. Secondly the contentions made by the defendants can be proved on the basis of the revenue record. If in the past, the suit properties were having separate numbers and they are converted into new number and any other area is also included, that can be proved on the basis of revenue record created for creation of new numbers.

7) The order made by the trial Court shows that the defendants are trying to protract the decision. The evidence of the defendants was closed on 7-3-2014. In view of these circumstances also interference is not possible.

8) Learned counsel for the petitioners placed reliance on two reported cases like (1) **(2008) 8 SCC 671 (Haryana Waqf Board v. Shanti Sarup)**; and, (2) **2014 (5) Mh.L.J. 60 (Hemraj vs. Suryabhan)**. In these cases necessity of local inspection and appointment of Court Commissioner is discussed in view of provision of Order 26 Rule 9 of the Civil Procedure Code. The facts of each and every case are always different. In view of nature of contentions made by the defendants in the present matter this Court holds that it is not advisable to appoint Court Commissioner. This Court holds that the trial Court has not committed any error in rejecting the application. In the result, the petition stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

rs1