

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

26 WRIT PETITION NO. 10150 OF 2015

DHARMA RAMDHAN CHAVAN

VERSUS

PRAKASH RAMBHAU PAWAR AND OTHERS

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Advocate for Petitioner : Mr. Bora Satyajit S.
Advocate for Respondents 1 to 3: Mr. R. M. Deshmukh

CORAM : V. K. JADHAV, J.

DATE : 2nd February, 2016

PER COURT :

1. Heard finally with the consent of the parties at admission stage.

2. The petitioner/original plaintiff filed application at Exh. 61 under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Cadastral Surveyor as Court Commissioner for carrying out measurement of the suit property. The application is strongly opposed by respondents/defendants. The learned Judge of the trial court, by order dated 15.07.2015, has rejected the same with the observation that the witness Cadastral Surveyor of the earlier measurement report has given certain admissions during the course of his cross examination and therefore, to fill up lacuna, the petitioner/plaintiff has filed application Exh. 61.

3. The learned counsel for the petitioner submits that in the cross examination, the witness Cadastral Surveyor of the earlier measurement report, has admitted that he has not measured adjacent Gat Nos. 123, 124 and 125 and also not measured Land Gat No. 109 owned and possessed by the respondent/defendants. In the light of the said admission, the learned counsel for the petitioner submits that the petitioner/ plaintiff constrained to file application Exh. 61 for measurement of the land owned by the plaintiff as well as the land owned and possessed by the defendants. The learned counsel submits that measurement of the property owned by the plaintiff as well as defendants, in case of dispute of encroachment of site, would be necessary for the just decision of the case. The learned counsel submits that otherwise the said controversy cannot be resolved only on the basis of earlier report submitted by the Cadastral Surveyor in which he has only measured the land owned and possessed by the petitioner plaintiff. The learned counsel submits that in fact, there is no admission as such in the cross examination. However, in the light of the explanation given by the Cadastral Surveyor in his cross examination, the measurement of land owned and possessed by both the parties to the suit is required to

be carried out and the same is necessary for just decision of the suit.

4. Learned counsel for the petitioner, in order to substantiate his submissions, placed reliance on the decision of this Court in the case of **Kolhapuri Bandu Lakde Vs. Yallappa Chinappa Lakade (Deceased)**, reported in **2011 (3) Mh.LJ 348**. The learned counsel also relied on the judgment in the case of **Ramzan Sheikh Chand Sheikh Vs Punjab Nathuji Gawande**, reported in **2014(6) Mh. LJ 97** decided by this Court relying upon the case of **Kolhapuri Bandu Lakde** (supra).

5. Learned counsel for the respondents/defendants submits that Cadastral Surveyor was appointed way back in the year 2006 on the application submitted by the petitioner/plaintiff. Since the said Cadastral Surveyor, when called for examination before the the court as witness, has given certain admissions during the course of his cross examination, in order to fill up lacuna, the plaintiff has applied for the measurement of the land. The learned counsel submits that the learned judge of the trial court has rightly rejected the application Exh. 61.

6. The learned counsel for the respondents/defendants, in order to substantiate his contention, placed reliance on the decision in the case of **Chandrarao s/o Hanumantrao Wable**, reported in **2012 (2) Mh.L.J. 847**, wherein, this Court has taken view that since the plaintiff did not make any grievance on the earlier measurement, the trial court was not justified in allowing the application for re-measurement, that too when the recording of the evidence was almost complete.

7. In the case of **Kolhapuri Bandu Lakade** (supra), para 14 as below:

"14. It can thus clearly be seen that the Apex Court in the case of Haryana Waqf Board cited supra in unequivocal terms has held that in the case of demarcation of disputed lands, it is appropriate for the Court to direct the investigation by appointing a Local Commissioner as provided under Order XXVI, Rule 9 of the Code of Civil Procedure. The other learned Judges of this Court, namely M.S. Vaidya, J., S.T. Kharche, J., A.P. Bhangale, J., f.m.Reis J., have also held that in case of dispute of encroachment of a site, an appointment of Court Commissioner who could be City Survey Officer or Cadastral Surveyor for taking joint measurement of the property owned by the plaintiff and defendant for the purpose of local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure would be necessary for the just

decision of the case. It has also been held by this Court that merely because of a Court Commissioner is appointed, it will not prejudice the interest of either of the parties. It has been held that if any of the parties is aggrieved by the report of the court commissioner, an opportunity would be available to that party to cross examine the Court Commissioner and to point out as to how his conclusions were not correct. It has further been observed that the party who was not aggrieved would also prove how his conclusions are correct."

8. In the case in hand, in terms of the measurement carried out and the report submitted before the court in the capacity as Court Commissioner, the Cadastral Surveyor has stated in his cross examination that only the land owned and possessed by the petitioner plaintiff came to be measured and the other adjacent lands including the land owned and possessed by the respondents defendants are not measured. In the light of that, the petitioner plaintiff has filed application Exh.61 for taking joint measurement of the site. It is clear that only on the basis of measurement carried out earlier of the plaintiff's land, there cannot be just decision in the suit about the alleged encroachment. As such, I do not think that the learned Judge considered the application Exh.61 in its proper perspective. Moreover,

after perusal of the impugned order, it appears that the learned Judge of the trial Court even has not applied his mind. Even though the learned Judge of the trial Court has recorded finding in the affirmative, rejected the application for appointment of court commissioner. The impugned order, thus calls for interference. Hence following order:

O R D E R

- i. Writ Petition is allowed.
- ii. The impugned order dated 15.07.2015 passed below Exh.61 in RCS No.158/2009 by the Civil Judge, (J.D.), Ghansawangi is hereby quashed and set aside.
- iii. The application Exh.61 in RCS No.158/2009 is hereby allowed.
- iv. In the circumstances there shall be no order as to costs.

(V. K. JADHAV, J.)

JPC