

IN THE HIGH COURT OF BOMBAY AT GOA

**WRIT PETITION NO.354 of 2016
WITH
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WRIT PETITION NO.361 OF 2016
WITH
WRIT PETITION NO. 362 OF 2016**

WRIT PETITION NO.354 OF 2016

- 1 Smt. Lalitprabha Krishnaji
Ajgaokar, since deceased through
her legal representatives,
- 2 Shri Sanjiv Krishnaji Ajgaokar,
son of late Krishnaji Ajgaokar,
major, married, occupation
service.
- 3 Smt. Swapna Sanjiv Ajgaokar,
Wife of Petitioner no.2, major,
occupation housewife.
All above residing at Miraj,
Maharashtra
- 4 Smt. Smita Suresh Naik,
daughter of late Krishnaji
Ajgaokar, major, married,
occupation housewife.
- 5 Shri Suresh Shankar Naik, major,

married, occupation service.

Both residing at Savoi Verem,
Ponda, Goa.

The Petitioners no.2 to 5 are
represented through their power
of attorney, the petitioner no.6,
herein.

- 6 Shri Tushar Laxmikant Sinai
Usgaokar, major married,
occupation business, residing at
Super market, Ponda, Goa.

.... Petitioners

V/s

Shri Yunus Khan,
major, married,
R/o. Khadpabandh, Ponda, Goa.

.... Respondent

With
WRIT PETITION NO.355 OF 2016

- 1 Smt. Lalitprabha Krishnaji
Ajgaokar, since deceased through
her legal representatives,
- 2 Shri Sanjiv Krishnaji Ajgaokar,
son of late Krishnaji Ajgaokar,
major, married, occupation
service.
- 3 Smt. Swapna Sanjiv Ajgaokar,
Wife of Petitioner no.2, major,
occupation housewife.

All above residing at Miraj,
Maharashtra

- 4 Smt. Smita Suresh Naik,
daughter of late Krishnaji
Ajgaokar, major, married,
occupation housewife.
- 5 Shri Suresh Shankar Naik, major,
married, occupation service.

Both residing at Savoi Verem,
Ponda, Goa.

The Petitioners no.2 to 5 are
represented through their power
of attorney, the petitioner no.6,
herein.

- 6 Shri Tushar Laxmikant Sinai
Usgaokar, major married,
occupation business, residing at
Super market, Ponda, Goa. Petitioners

V/s

Shri Babajan Husainsab Angadi,
major, married,
R/o. Khadpabandh, Ponda, Goa. Respondent

With
WRIT PETITION NO.359 OF 2016

- 1 Smt. Lalitprabha Krishnaji
Ajgaokar, since deceased
through her legal
representatives,

2 Shri Sanjiv Krishnaji Ajgaokar,
son of late Krishnaji Ajgaokar,
major, married, occupation
service.

3 Smt. Swapna Sanjiv Ajgaokar,
Wife of Petitioner no.2, major,
occupation housewife.
All above residing at Miraj,
Maharashtra

4 Smt. Smita Suresh Naik,
daughter of late Krishnaji
Ajgaokar, major, married,
occupation housewife.

5 Shri Suresh Shankar Naik,
major, married, occupation
service.

Both residing at Savoi Verem,
Ponda, Goa.

The Petitioners no.2 to 5 are
represented through their
power of attorney, the
petitioner no.6, herein.

6 Shri Tushar Laxmikant Sinai
Usgaokar, major married,
occupation business, residing at
Super market, Ponda, Goa.

.... Petitioners

V/s

Shri Ayub Khan,
major, married,
R/o. Khadpabandh, Ponda,
Goa.

.... Respondent

**WITH
WRIT PETITION NO.360 OF 2016**

- 1 Smt. Lalitprabha Krishnaji
Ajgaokar, since deceased through
her legal representatives,
- 2 Shri Sanjiv Krishnaji Ajgaokar,
son of late Krishnaji Ajgaokar,
major, married, occupation
service.
- 3 Smt. Swapna Sanjiv Ajgaokar,
Wife of Petitioner no.2, major,
occupation housewife.
All above residing at Miraj,
Maharashtra.
- 4 Smt. Smita Suresh Naik,
daughter of late Krishnaji
Ajgaokar, major, married,
occupation housewife.
- 5 Shri Suresh Shankar Naik, major,
married, occupation service.
Both residing at Savoi Verem,
Ponda, Goa.

The Petitioners no.2 to 5 are
represented through their power
of attorney, the petitioner no.6,
herein.

- 6 Shri Tushar Laxmikant Sinai
Usgaokar, major married,
occupation business, residing at
Super market, Ponda, Goa.

.... Petitioners

V/s

Shri Qutubuddin Kasim Shaikh,
major, married,
R/o. Shapur, Ponda, Goa.

.... Respondent

**WITH
WRIT PETITION NO.361 OF 2016**

- 1 Smt. Lalitprabha Krishnaji
Ajgaokar, since deceased through
her legal representatives,
- 2 Shri Sanjiv Krishnaji Ajgaokar,
son of late Krishnaji Ajgaokar,
major, married, occupation
service.
- 3 Smt. Swapna Sanjiv Ajgaokar,
Wife of Petitioner no.2, major,
occupation housewife.
All above residing at Miraj,
Maharashtra.
- 4 Smt. Smita Suresh Naik,
daughter of late Krishnaji
Ajgaokar, major, married,
occupation housewife.
- 5 Shri Suresh Shankar Naik, major,
married, occupation service.
Both residing at Savoi Verem,
Ponda, Goa.

The Petitioners no.2 to 5 are
represented through their power
of attorney, the petitioner no.6,
herein.

- 6 Shri Tushar Laxmikant Sinai
Usgaokar, major married,
occupation business, residing at
Super market, Ponda, Goa. Petitioners

V/s

Shri Mallappa Belgaukar,
major, married, occupation-
mason, R/o. Khadpabandh,
Ponda, Goa. Respondent

**WITH
WRIT PETITION NO.362 OF 2016**

- 1 Smt. Lalitprabha Krishnaji
Ajgaokar, since deceased through
her legal representatives,
- 2 Shri Sanjiv Krishnaji Ajgaokar,
son of late Krishnaji Ajgaokar,
major, married, occupation
service.
- 3 Smt. Swapna Sanjiv Ajgaokar,
Wife of Petitioner no.2, major,
occupation housewife.
All above residing at Miraj,
Maharashtra
- 4 Smt. Smita Suresh Naik,
daughter of late Krishnaji
Ajgaokar, major, married,
occupation housewife.
- 5 Shri Suresh Shankar Naik, major,
married, occupation service.

Both residing at Savoi Verem,
Ponda, Goa.

The Petitioners no.2 to 5 are
represented through their power
of attorney, the petitioner no.6,
herein.

- 6 Shri Tushar Laxmikant Sinai
Usgaokar, major married,
occupation business, residing at
Super market, Ponda, Goa. Petitioners

V/s

Shri Dundappa Sangappa
Hadpad,
major, married,
R/o. Khadpabandh, Ponda, Goa. Respondent

Shri Sudesh Usgaonkar with Ms. R. Pereira, Advocates for
the Petitioners.

Shri Gaurish Agni with Eashan Uspakar, Advocates for the
Respondents.

CORAM: C. V. BHADANG, J.
DATE: 15TH October, 2016.

JUDGMENT:

Rule, made returnable forthwith. The learned
counsel for the respondents waives service. Heard finally by

consent of parties.

2. All these petitions involve a common question about appointment of a commissioner and as such these petitions are disposed of by this common judgment.

3. The petitioners are the plaintiffs who have filed six different suits against the respondents in these petitions. The petitioners are claiming mandatory injunction directing the respondent/s to remove the structures constructed by the respondents in the suit land known as "Gorbatta" also known as "Corpeaband" situated at Khadpabandh locality of Ponda Taluka bearing survey no.209/0 which is renumbered as survey no.209/1. The respondents/defendants are claiming that the suit structures are falling in land survey no.14 and not survey no.209/1 as claimed by the petitioners.

4. The trial Court has framed issues and the trial has commenced in which PW.1 has entered into the witness box. At this stage the petitioners filed application/s in the aforesaid suits for appointment of Commissioner. It is

contended that the dispute is of a technical nature in as much as, the identification/location of land where the suit structures fall requires a 'thorough scientific investigation' to be conducted. It is submitted that the such investigation would assist the Court to decide the controversy. It is therefore, prayed that it would be just, proper and necessary that a Commissioner is appointed to investigate and report. The petitioners, thus prayed for issuance of a commission to the Directorate of Land Survey, for deputing a surveyor to demarcate the various plots and structures standing thereon as claimed by the defendant/s vis-a-vis the survey number of the land where the said structures fall and submit a report along with a plan.

5. The application was opposed on behalf of the respondents contending that the petitioners are trying to "adopt a short-cut" which is not permissible. It is contended that it is for the petitioner/plaintiffs to lead evidence to prove their case. It is submitted that the petitioners cannot seek assistance of the Court to collect evidence.

6. The learned trial Court by the impugned order dated 5/11/2015 has dismissed the application on the ground that the land survey no.209/1 and the land survey no.14 are separate and distinct properties having separate survey plans. The learned trial Court has found that it is nobody's case that any area from out of survey no.209/1 has been erroneously included in survey no.14 or the other way round. It has been found that the two survey numbers remain independent and being promulgated have separate survey numbers. It is primarily for the plaintiffs to establish their case and the plaintiffs/petitioners cannot collect evidence through independent body for identifying the structures. It is this order which is challenged in these petitions.

7. I have heard Shri Usgaonkar the learned counsel for the petitioners and Shri Agni the learned counsel for the respondents and I have perused the impugned order passed.

8. It is contended on behalf of the petitioners that the trial Court was in error in rejecting the application on the premise that it is nobody's case about erroneous inclusion of

a portion of the land survey no.209/1 in land survey no.14 and the vice versa. It is submitted that this cannot be a reason for refusing to appoint a Commissioner. It is submitted that according to the petitioners, the subject structures constructed by the defendant/s are standing in land survey no.209/1, while the respondent/s claim that the structures are standing on distinct plots which are part of survey no.14. It is submitted that such a dispute would require the assistance of a technical expert and the trial court ought to have appointed a commissioner, as prayed, under Order 26 Rule 9 of the Code of Civil Procedure (C.P.C. for short).

9. On behalf of the petitioners reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Shreepat Vs. Rajendra Prasad & Others** JT (2000 (7) SC 379, **Haryana WAGF Board Vs. Shanti Sarup and others** (2008) 8 SCC 671 and the decision of this Court in the case of **Tajmulhussain s/o Mulla Mumtaz Hussain Vs. Satish s/o Bhanudas Chavan** 1994 (3) Bom. C.R. 317, **Ramchandra s/o Bhikaji Jagtap Vs. Dudharam**

Languruji Padvekar (dead thru LRS) & others (2003) (4)

ALL MR 990, **Smt. Shamlata wd/o Manohar Raut & Ors.**

V. Vishweshwatra Tukaram Giripunj & Anr. and

Yeshwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar

(2010) (3) Bom. C.R. 373, in order to submit that in a dispute of the present nature, a Commissioner needs to be appointed.

10. On the contrary, it is submitted on behalf of the respondents that the petitioners cannot seek to collect evidence by taking recourse to Order 26 Rule 9 of C.P.C. The learned counsel was at pains to point out that under the said provisions, it is primarily for the Court to find that such appointment is necessary for purpose of 'elucidating any matter in dispute' and it is not for the plaintiff to insist for such appointment. The learned counsel submits that under the said provisions the petitioner cannot seek to collect evidence as primarily it is for the petitioner to establish their case. The learned counsel has pointed out that the petitioners are yet to complete their evidence and in the absence of the evidence of the parties, it cannot be said that

the Court would require such investigation for elucidating any matter in dispute, within the meaning of Order 26 Rule 9 of C.P.C.. In other words, it is submitted that this is not the stage where the Court is obliged to consider whether such appointment of a commissioner is necessary. On behalf of the respondents reliance is placed on the decision of this Court in the case of **Shri Bhupendra s/o. Bhagwat Turkar Vs. Shri Homraj s/o. Zituji Meshram** 2014 3 ALLMR 635 and **Kalyan Santram Kawade & Others Vs. Khanderao alias Khandu Ganpati Kawade & Others** 2015 4 MHLJ 429. He therefore, submits that the trial Court has rightly rejected the application, which order does not call for any interference.

11. I have given my anxious consideration to the submissions made. Under Order 26 Rule 9 of C.P.C. a Commission to make local investigation can be issued, where the Court deems such a local investigation to be requisite or proper for the purpose of “elucidating any matter in dispute” or for ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits. Presently we are not concerned with the later two

aspects. The dispute involved in the suit is short and simple as to whether the subject structures are situated in a land survey no.209/1 (as claimed by the petitioner) or are situated in land survey no.14 (as claimed by the respondents). It is not in dispute that the land survey no.209/1 and the land survey no.14 are adjacent lands and as such, prima facie the dispute in effect would be where the boundaries of the aforesaid two lands lie. The learned counsel for the respondents did not dispute that evidence of an expert as is claimed herein would assist the court in deciding such a controversy. The objection is primarily on account of the stage at which the application is filed.

12. In the case of **Haryana WAQF Board (supra)** the dispute was about demarcation of the land. The Second Appeal filed by the WAQF Board was dismissed summarily, in view of the concurrent finding of the lower Courts that the Appellant Board had failed to prove encroachment. The Hon'ble Supreme Court noticed that the appellant had filed applications before the trial Court as well as the Appellate Court for appointment of a local commission for demarcation

of the suit land. It was held that the local commission ought to have been appointed for demarcation of the land.

13. In the case of **Shreepat (supra)** the respondents had filed a suit for restoration and possession over a piece of land bearing Khasra no.257/3 in which it was claimed that the appellant had forceably taken possession of the same and was trying to construct his house. The suit was resisted by the appellant on the ground that the land in dispute was not part of Khasra no.257/3 but part of Khasra no.257/1 which was a Government land which was leased out to the appellant. The suit was decreed which was confirmed by the learned Appellate Court and by the High Court in Second Appeal. Before the Hon'ble Supreme Court it was urged that though there was a serious dispute with regard to the identity of the land in dispute, namely whether it was part of Khasra no.257/1, the Court did not get the identity established and decreed the suit only on the basis of oral evidence which was not sufficient. The Hon'ble Supreme Court while accepting the contention has held that since there was a serious dispute with regard to the area and

boundaries of the land in question, especially with regard to its identity, the Court ought to have got the identity established by issuing a survey commission to locate the plot in dispute and the matter was remanded.

14. In the case of **Tajmulhussain (supra)**, there was a dispute about the location of the boundary line between various sub divisions of a plot. This Court had directed appointment of a commissioner. It is true that in that case both parties had tendered on record maps drawn by an expert, for their respective lands. I would revert back to this aspect a little later.

This Court in the case of **Tajmulhussain** had observed in para 10 that the appointment of a commissioner would not prejudice the interest of either of the parties, in as much as, if at all any party is aggrieved by the report of the commissioner so appointed by the Court an opportunity would be available to that party to cross examine the commissioner and to point out how the conclusions were not correct.

15. In the case of **Ramchandra Jagtap (supra)**, this Court referred to its earlier decision in the case of **Krishnarao Vs. Mahadeorao** (1953 N.L.J. Note 230 at page 72) which observations may be reproduced thus:

"The trial Court rejected the application stating that the question of encroachment by the defendant on a particular date is to be proved by positive evidence by the plaintiff and, therefore, it did not think it desirable to appoint a commissioner. It is against this order that the plaintiff has come up in revision.

4. Order 26, Rule 9, of the Civil Procedure Code is as follows :

"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

5. Under the above rule, the Court has a

discretion to order local investigation or not. The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes and disputes about the identity of lands are instances when a Court should order a local investigation under this rule. [Po Gyi v. Maung Paw and Anr. (121C. 347)]."

6. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the exact area encroached upon. Oral evidence cannot conclusively prove such an issue. The order of the lower Court refusing to appoint a commissioner amounted to a refusal to exercise jurisdiction. It is set aside. The plaintiffs application under Order 26, Rule 9, of the Civil Procedure Code, for appointment of Commissioner is allowed."

16. In the case of **Smt. Shamlata wd/o Manohar Raut (supra)** the plaintiffs had claimed that there was

encroachment by the defendant. The measurement maps prepared by a retired Talathi was found to be not reliable as the measurement was not carried out scientifically and after issuing notice to the other side. In such circumstances, it was found that the appointment of the commissioner to measure the plots of the plaintiffs and defendant was necessary.

17. In the case of **Yeshwant Bhaduji Ghuse (supra)**, it has been held that in cases of boundary disputes it is always desirable to get fields measured by an expert and as such the matter was remanded to the lower Appellate Court with a direction to appoint the taluka Inspector of land records as commissioner under Order 26, Rule 9 of C.P.C.

18. Thus, it has consistently been held in various decisions that in a dispute about identity/location or boundaries of a land, it is appropriate that the Court has assistance of some expert evidence about the measurement.

19. Now let us come to the aspect about the stage of

filing of such an application. It is true that under the garb of an application under Order 26 Rule 9 of C.P.C a party cannot seek to collect evidence. Thus primarily it is for the Court to find that such local investigation is necessary for the purposes of elucidating any matter in dispute. The question whether such an attempt would be in the nature of collection of evidence or whether the Court needs the same for elucidating any matter in dispute, would be a question peculiar to the facts and circumstances of each case.

20. In a given case, the distinction may be thin, none the less clear. Although stage for consideration of an application under Order 26 Rule 9 C.P.C, would be relevant the nature of the dispute and the material already on record may outweigh the same, depending upon facts and circumstances of each case. In the case in hand the plaintiff has produced a survey plan along with a sanad dated 18/6/2014 which pertains to the sub division of survey no.209 as survey no 201/1/A and 209/1/B. In such circumstances, I am of the considered view that it would be appropriate for the trial court to appoint a Commissioner to

elucidate the matter. In the case of **Bhupendra Turkar (supra)**, this Court has inter alia held in para 7 of the judgment thus:

7. Normally, it is true that the court of law would not exercise its discretion for to assist the plaintiff to prove fact as to who is in possession if it is a disputed fact. However, the cases of boundary dispute are clearly distinguishable in which the identity of land, measurement thereof and area of the land is needed to be considered preferably on the basis of the authentic evidence and map of the land drawn by competent public official on behalf of the Central or State Government, the trial court is benefited by such map of the land authentically drawn and produced in order to decide the suit correctly, effectively and finally in the larger interest of justice so that no such dispute shall remain pending in courts for long time in respect of alleged encroachments over the suit property. It is, therefore, always desirable to get the suit land or field measured by an expert or competent public official to find out the area of the suit land encroached upon, more so, when oral evidence cannot help the court when it is in the form of words against words by rival parties. Considering the implication of Section 83 of the Indian Evidence Act, presumption can be drawn in respect of map or plan drawn by competent public official in such cases so as to resolve the controversy between the parties. It is, therefore, decided by this court earlier also, that it is always desirable to insist upon the parties in such cases, to have a joint measurement in respect of the

suit land or joint property, then the trial court upon evidence led before it can decide the real controversy in the suit finally, effectively and in accordance with law. In cases where parties are at dispute or not in agreement with the map or plan, Court Commissioner can certainly be appointed in order to prepare a map or plan in respect of the suit property in order to assist the court. There is no question of assisting the plaintiff to collect evidence of disputed factum of possession in such cases.

21. Even in the case of **Kalyan Santram Kawade & Others (supra)** it has been held that normally such an appointment does not precede the recording of evidence.

22. Considering the nature of dispute involved in the present case, I am of the considered view that the appointment of a Commissioner is necessary. In such circumstances, the following order is passed:

Order:

(i) The writ petitions are allowed. The impugned orders dated 5/11/2015 are hereby set aside.

(ii) A Commission shall be issued to the Directorate of Land Survey to depute a surveyor to locate plot nos. A-41, A-

42, A-40-C, 57, A-44 and A-45 and to report whether the aforesaid plots fall in survey no.209/1 or survey no.14.

(iii) Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

Ap/