

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

WRIT PETITION NO. 5017 OF 2015

1. Smt.Tarabai Vishnu Jadhav
2. Shri Baliram vishnu Jadhav,
Both residing at Hajgoli Khurd,
Tal. Ajara, Dist.Kolhapur.

... Petitioners
(Ori.Defendants)

v/s

Shri Dinkar Ganpati Gilbile,
R/at Hajgoli, Tal. Ajara, Dist.Kolhapur.

... Respondent
(Ori. Plaintiff)

Mr.G.N.Salunke for the petitioners.

Mr.Prashant Bhavake for Resp. No.1.

Coram: N.M. Jamdar, J.

Dated: 1 SEPTEMBER 2016

ORAL ORDER:

Rule. Rule made returnable forthwith.

2 Respondent waives service. Taken up for final disposal by consent of the parties.

3 Heard learned counsel for the parties.

4 Learned counsel for the Petitioner and Respondent No.1 state that other respondents are not necessary for adjudication of the present writ petition. Liberty to the Petitioner to delete Respondent Nos.2 to 23 from the array of Respondents. Amendment to be carried out forthwith.

5 By the impugned order, the learned Civil Judge, Junior Division, Ajara, has appointed the Commissioner to survey, measure and draw the map in respect of the dispute between the parties. The learned Civil Judge has also framed an issue as regard the *res judicata* by an order dated 2 March 2015. Learned counsel for the Petitioner submitted that an order was passed by the learned Judge on 18 August 2014 below Exh.107, wherein similar prayer was rejected considering that the suit is hit by provisions of *res judicata*, as in the earlier suit also, an identical issue arose and no efforts were taken by the Respondents/Plaintiffs for proving the measurement map. He submitted that when the issue of *res judicata* is framed on the very ground as to whether the measurement can be carried out now again in the suit, the learned Judge could not have directed the appointment of the Commissioner by the impugned order. The learned counsel for the Respondent supported the impugned order.

6 Normally, this Court would not interfere with the orders of the appointment of the Commissioner in suits involving the boundary disputes. However, in the present case, the issue has been raised by

the Petitioner that the measurement itself cannot be carried out in view of the principles of *res judicata*. Therefore, the learned Civil Judge could not have proceeded to take the evidence of the Commissioner into consideration without deciding the issue of *res judicata*, that has been framed.

7 I am of the opinion that, so as to ensure that prejudice to both parties would be minimized and hearing of the suit is unduly delayed, the petition can be disposed by adopting the following methodology. The report of the Commissioner/Taluka Inspector of Land Record, Ajara, will be submitted by the Commissioner in a sealed cover to the learned Civil Judge as per the directions in the impugned order. The learned Civil Judge will take into consideration the report of the Commissioner after the issue of *res judicata* is answered in favour of the Respondents/Plaintiffs. If the issue of *res judicata* is answered in favour of the Petitioners, the question of reliance on the report of the Commissioner will not arise. Order accordingly. This methodology, as indicated above, will ensure early disposal of the suit.

8 Keeping all contentions of the parties on merits of the suit open, the petition is disposed of in above terms.

(N. M. Jamdar, J.)

