

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7444 OF 2014

1. Najabai w/o Gana Patil,
Age-79 years, Occu-Nil,
2. Babulal s/o Gana Patil,
Age-49 years, Occu-Agriculturist,
3. Hasarbai w/o Kisan Patil,
Age-54 years, Occu-Household work,
4. Kesharbai w/o Dharma Patil,
Age-45 years, Occu-Household work,
All r/o Udane, Tq. and Dist.Dhule

-- PETITIONERS

VERSUS

Shantabai w/o Vitthal Bagul,
Age-59 years, Occu-Politics,
R/o Udane, Tq. and Dist.Dhule

-- RESPONDENT

Mr.P.R.Patil, Advocate for the petitioners.
Mr.A.S.Sawant, Advocate for the respondent.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 29/08/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. I have considered the strenuous submissions of the learned

Advocates for the respective sides who have taken me through the petition paper book. Mr.Sawant, learned Advocate vehemently submits that this petition is frivolous and deserves to be dismissed by imposing costs of Rs.50,000/-.

3. The issue is that the Trial Court has rejected application Exh.166, seeking appointment of a Court Commissioner, by the impugned order dated 06/03/2014 in RCS No.20/2005.

4. The petitioners/plaintiffs have moved Exh.166 under Order 26 Rule 9 of the CPC, seeking appointment of a Court Commissioner. The suit has been filed for seeking injunction and declaration with the averment that the respondent/defendant has encroached upon the property of the plaintiffs by erecting a construction to the extent of 8 x 60 feet. The recording of evidence of the plaintiff is over. In order to render further assistance to the Court, Exhibit 166 is filed for seeking measurement of the property at plot No.24 in C.S.No.182 so as to have the correct boundaries and measurement of the suit property before the Court.

5. Mr.Patil, learned Advocate for the petitioners submits that since

he is seeking a declaration of ownership and title over Plot No.24, the exact boundaries of plot No.24 can only be ascertained by the TILR so that the parties are not compelled to speculate as to which are the boundaries while executing the decree, in the event the petitioners succeed in the suit. To clear away all clouds of doubt as regards the exact boundaries of the suit plot, the TILR can be appointed and this would also assist the defendant as the defendant would also be aware of the exact boundaries of the plot in the event the defendant is held to be the owner of the suit.

6. Mr.Sawant has strenuously submitted that two applications earlier were rejected by the Trial Court and this is a third application.

7. I do not find that there could be any embargo on the filing of an application for appointment of a Court Commissioner unless it is noticed that a party is repeatedly filing identical applications without any change in circumstances.

8. The first application Exhibit 39 for appointment of Court Commissioner was rejected on 27/04/2005 which was prior to the framing of the issues and the commencement of the Trial. The

plaintiffs' evidence was recorded on 15/04/2006. Application Exh.156 was filed for appointment of a Court Commissioner and the same was rejected in the light of the objection of the defendant that the application cannot be entertained because a Gramsevak is sought to be appointed. The defendant has specifically submitted her say on 05/09/2012 that until the plaintiffs file an application for appointment of a D.S.L.R. or T.I.L.R., the measurement of the suit property cannot be carried out at the behest of the Gramsevak. For the said reason, Exhibit 156 has been rejected.

9. The petitioners/plaintiffs have now moved Exh.166 for measurement of the suit property so as to have the exact size of the plot and its boundaries before the Trial Court. This was also the view of the defendant when it submitted its say on 05/09/2012 below application Exh.156 while opposing the appointment of a Gramsevak as a Court Commissioner.

10. Considering the above, I find that the impugned order is unsustainable as the Trial Court has concluded that the discretionary relief of appointment of a Court Commissioner cannot be granted to the plaintiffs. The Trial Court should have kept in mind the law laid

down by the Hon'ble Apex Court in the matter of Haryana Wakf Board Vs. Shanti Sarup and others (2008)8 SCC 671 and the judgments delivered by this Court in the matter of Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade (Decd.Thru.Pooja @ Poojari Y.Lakade and others) (2011(3) Bom.C.R. 807), Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others (2014(3) All MR 790 = 2014(4) Mh.L.J.366) and Kashinath Ramkrishna Chopade Vs. Purushottam Tulshiram Tekade and others (2005(4) All MR 519 = 2005(3) Mh.L.J. 471).

11. Considering the above, this petition is allowed. The impugned order dated 06/03/2014 is quashed and set aside and application Exh.166 is allowed to the extent of the measurement of the suit plot No.124 and fixing the exact boundaries of the said plot.

12. The Trial Court shall issue necessary orders to the T.I.L.R. Dhule within 2 (two) weeks from today and the charges of the Court Commissioner shall be borne by the petitioner. It shall be paid as and when the plaintiff is so directed. After the T.I.L.R. submits its report and map, the litigating parties are at liberty to deal with it, as is permissible in law.

13. Rule is made partly absolute in the above terms.

(Ravindra V.Ghuge, J.)