

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9830 OF 2014

Vitthal Rama Kumbhar
Age 70 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

..Petitioner

Versus

1. Ram Shankar Metkari
Age 60 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

2. Maruti Shankar Metkari
Age 45 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

3. Venkat Laxman Metkari
Age 30 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

4. Gajanan Ram Metkari
Age 30 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

5. Pema Dhondiba Gaikwad
Age 80 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

6. Tulshiram Pema Gaikwad
Age 59 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

7. Dhondiram Pema Gaikwad
Age 55 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

8. Govind Pema Gaikwad
Age 52 years, Occ. Agriculture,
R/o Tawashigad, Tq. Lohara,
District Osmanabad.

..Respondents

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Advocate for Petitioner : Shri Dodya S.G.
Advocate for Respondents : Shri Gunale V.D.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 08, 2017

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ORAL JUDGMENT :-

1. Heard learned Advocates for the respective parties at length.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.
4. The petitioner is aggrieved by the order dated 6.9.2014, by which, application Exhibit 39, filed by the petitioner / plaintiff in RCS No.35 of 2014 for seeking appointment of a Court Commissioner has been rejected.
5. Shri Gunale has relied upon the judgment of this Court in the matter of Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and others [2001 (1) Bom. C.R. 800] and Shri Efigenio Dias and

another Vs. Shri Malaquias D'Costa and others [2002(2) Mah.L.J. 209].

6. There is no dispute that the petitioner has preferred a suit for permanent injunction with regard to the peaceful possession over land S.No. 37 to the extent of 1 Hectare 74 Ares along with 1/3rd share in the well situated at village Tawashigad, Tq. Lohara, District Osmanabad and for fixation of the boundaries by the measurement of the plaintiff's share out of S.No.37, in all admeasuring 4 acres and 4 gunthas.

7. The issues have been cast in the matter and the trial, therefore, can be said to have been commenced.

8. The plaintiff moved an application Exhibit 39, invoking Order XVI Rule 9 of the Code of Civil Procedure, wherein, he has been specifically prayed that the TILR / Deputy Director of Land Records, be appointed as the Court Commissioner to measure the suit land as per the schedule attached to the plaint, to the extent of 1 Hectare and 74 Ares i.e. 4 acres 14 gunthas and fix the boundaries. I find that the said prayer is in tune with the claim put forth by the petitioner vide his plaint.

9. The defendants have submitted their say and have opposed the application for appointment of Court Commissioner, primarily, on

the ground that the boundaries mentioned by the plaintiff are false, imaginary and disputed and the share of land mentioned by the plaintiff in the plaint is not possessed by him. It was further stated that the Court Commissioner cannot be appointed for finding out who is in possession or to indicate which portion is possessed by which of the litigants.

10. The impugned order, which is cryptic in nature, running into four sentences, indicates that the trial Court was convinced that the petitioner has sought appointment of a Court Commissioner for proving his possession and that his suit was simpliciter for injunction.

11. After considering the extensive submissions of the learned Advocates, upon going through the record available and on considering the view taken by this Court in the reports cited, I find that the trial Court has misdirected itself while passing the impugned order. The application has been rejected for the reason that the suit is for simpliciter injunction and the plaintiff is seeking appointment of Court Commissioner for proving his possession. The suit is not for simpliciter injunction and in fact is for protecting 1/3rd share in the well situated in the field and for fixing boundaries after measuring the entire land of S. No. 37 admeasuring 4 acres 4 gunthas. It is also obvious that the petitioner had only claimed for measurement of the land of 4 acres 14 gunthas in S. No.37 and fix the boundaries in the

said application.

12. This Court, in the cases of Sanjay Namdeo (supra) and Shri Efigenio Dias (supra), has dealt with the issues of collecting evidence with regard to possession and for searching an alternate route. The facts and pleadings in both these cases are quite different than those before this Court.

13 Considering the above, this petition is partly allowed. The impugned order dated 6.9.2014 is quashed and set aside. Application Exhibit 39 is allowed to the following extent:-

(A) The trial Court shall direct the TILR / Deputy Director Land Records, Taluka Lohara, District Osmanabad to act as a Court Commissioner and to measure the suit land,admeasuring 1 Hectare and 74 Ares in S.No.37 by following the due procedure and taking into account the revenue records pertaining to the said Survey No.37.

(B) The Court Commissioner shall issue notices to the all the litigating sides and carry out the measurement and accordingly fix the boundaries and submit a map along with his report within a period of two months from the date of his appointment by the trial Court.

(C) Needless to state, the litigating sides are at liberty to deal with the report and map submitted by the TILR / Deputy Director Land Records, Taluka Lohara, District Osmanabad as is permissible under the Code of Civil Procedure.

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

(RAVINDRA V. GHUGE, J.)

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