

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 12308 OF 2017

SUNANDA GOVINDRAO JALGAONKAR
VERSUS
YASHWANT BHANUDAS KHOSE

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Advocate for the Petitioner : Shri Tungar Hrishikesh V.
Advocate for the Respondent : Shri V.P.Sawant.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 12th October, 2017.

Per Court:

1 The Petitioner is aggrieved by the order dated 23.08.2017, by which application Exhibit-46 filed by the Petitioner/ Plaintiff seeking reappointment of the court commissioner by entrusting the work of re-measurement of the properties to the Deputy Inspector of Land Records (DILR), has been rejected.

2 The learned Advocate for the Petitioner has strenuously criticized the impugned order. The contention is that when the Trial Court, vide order dated 14.07.1998, had directed the appointment of the court commissioner, specific instructions were issued as regards the measurement of Plot Nos.10 and 11 from Survey No.75 Taraf Giram, Beed as well as House No.1-3-729 from Survey No.75 Taraf Giram, Beed. When the measurement of both houses was directed and the court commissioner

was further instructed to point out, whether, the construction of the compound wall by the Defendant is encroaching over the road or not and whether, any encroachment has occurred, the court commissioner was under an obligation to comply with the said directions meticulously. Having not so done, the Petitioner/ Plaintiff was left with no option, but to prefer Exhibit-46 and point out to the Trial Court that the court commissioner has not performed his duties as is directed under the orders of the Trial Court.

3 He places reliance upon the observations of this Court in paragraphs 6, 7 and 8 of the order dated 27.06.2017 in Writ Petition No.20/2016 (*Kalyan Babasaheb Waghmare and another vs. Raosaheb Sitaram Kotule*).

4 The learned Advocate for the Respondent/ original Defendant submits that RCS No.359/1996 has been pending adjudication for 21 years. The court commissioner was appointed under the orders of the Trial Court on 14.07.1998. The court commissioner has performed the act of measuring both the houses as was the direction and has submitted his report and the map on record. The measurement was carried out on 29.12.2015 in the presence of the litigating sides. The report has also been placed on record.

5 He further submits that as the court commissioner did not notice any encroachment, the report does not indicate any encroachment.

This would not mean that the court commissioner has failed to perform his duties. If no encroachment is found and the report of the court commissioner indicates the said position, the map cannot be said to be lacking in indication of the encroached area. He submits that the boundary lines have been shown in the report. Application Exhibit-5 filed by the Plaintiffs seeking an injunction has also been rejected. Merely because the Plaintiff is not satisfied with the report, would not mean that a re-measurement needs to be done.

6 I have perused the order dated 27.06.2017 cited by the Petitioner in the light of the submissions of the learned Advocates. Paragraph 7 of the order would indicate that the litigating sides in Writ Petition No.20/2016 had arrived at a consensus that since the report as well as the map and Panchanama did not indicate the measurement made by the court commissioner and since the points at issue were not considered, the re-measurement by the TILR had become imperative. I find that the order dated 27.06.2017 cited by the Petitioner was in view of the consensus between the parties.

7 When it comes to the report of the court commissioner and the map that is submitted, either of the litigating sides, who is disappointed or not in agreement with the report or contradicts the report, can take recourse to Order 10 Rule 26(1), (2) and (3) of the Code of Civil Procedure. The court commissioner can be summoned and can be

examined before the Trial Court. It can be put to the court commissioner that he has not complied with the directions issued to him. If the Trial Court is convinced that the court commissioner's activity, report and map are defective or unreliable or undependable, the Trial Court would discard the report and the map. This exercise is yet to be performed by the Plaintiff.

8 When the court commissioner did not notice any encroachment at the hands of the Defendant, merely because the report is not convenient or to the liking of the Plaintiff, the same cannot be discarded. In this case, when the court commissioner did not notice any encroachment, he naturally did not mark out the encroached portion in the map. This would not render the report or map defective.

9 Considering the above, I do not find that this petition deserves to be entertained. The Writ Petition being devoid of merit is, therefore, dismissed.