

Amk

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

WRIT PETITION NO. 2641 OF 2015

Shri Sanjay Jibhau Khairnar & Ors. .. Petitioners
Vs.
Shri Yadav Sakharam Wagh & Ors. .. Respondents

Mr. Sachin Padaye i/b Mr. Girish R. Agrawal for the Petitioners.
Ms. Kavita Tatkekar a/w. Mr. Sandip D. Shinde for Respondent Nos.1 to 4.

CORAM : SMT. SADHANA. S. JADHAV, J.
DATE : 15th NOVEMBER, 2017.

P. C. :

1. Heard.
2. Rule. Rule made returnable forthwith with the consent of the parties.
3. The petitioners herein happen to be original defendants in Regular Civil Suit No. 133 of 2013. The petitioners had purchased the land from the plaintiffs on 14.03.1985. The said property was initially a joint family property. It appears that in the year 1989 there was a partition in respect of the said property amongst the coparceners of the plaintiffs. However, it was the contention of the plaintiffs that since the lands were not measured prior to the sale deed executed in favour of the defendants, the defendants by taking undue advantage of the same are encroaching. Hence, they had filed as suit for injunction. The plaintiffs had then filed an application under Order 26 Rule 9 of the Code of Civil Procedure and had

requested the Court to appoint Taluka Inspector of Land Records (TILR) to measure the said land and to fix the boundaries. This request was made in the backdrop of the fact that initially when they had filed application seeking measurement, the TILR could not demarcate the boundary since the defendants had objected to the same and due to objections raised by the defendants, the lands could not be measured. It was the contention of the petitioner that the issue of injunction cannot be resolved by appointing the TILR for demarcating the boundaries. The learned Court in order to arrive at just decision had appointed the TILR by an order dated 06.01.2015 and had directed the TILR to draw map and submit the report on or before 24.02.2015. The plaintiffs were directed to deposit the fees of measurement in the office of TILR by 20.01.2015. Being aggrieved by the said order, the petitioner has filed the present petition.

4. It is the contention of the present petitioners that a Court Commissioner cannot be appointed to collect evidence. The learned counsel for the petitioner has placed reliance upon the judgment of this Court reported in **2001(1) ALL MR 653** in the case of **Sanjay s/o. Namdeo Khandare Vs. Sahebrao s/o Kachru Khandare & Ors.** Learned counsel for the petitioner has drawn attention of this Court to para 2 of the order wherein it was held that the order of appointing Court Commissioner would tantamount to appointing Court Commissioner to collect evidence regarding possession. The Court had further held that it is well settled law that the Court Commissioner cannot be appointed for

collecting evidence. In the present case it cannot be said that the TILR, who happens to be a public servant, is appointed for collecting evidence as the facts would clearly show that the petitioner had purchased the land in the year 1985 and at that time the lands were not measured. It was the specific contention of the plaintiffs that the petitioner was taking undue advantage of the said fact and encroaching upon the land and therefore in the present case it can be safely inferred that the TILR has been appointed only to demarcate the boundaries and that the said request was turned down by the present petitioners on the earlier occasion. In view of this, the order dated 06.01.2015 calls for no interference. The petition is rejected.

5. Needless to say that the interim relief granted vide order dated 30.07.2015 stands vacated.

6. The learned Court to proceed with further stages. However, it is made clear that this Court has not gone into the merits of the matter and the observations are restricted to appointment of TILR for the purpose of demarcating the boundaries in their respective shares. Rule is discharged.

[SMT. SADHANA S. JADHAV, J.]