

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 8542 OF 2015  
WITH  
WRIT PETITION NO. 8938 OF 2015

ZAFARKHAN MAJIDKHAN PATHAN AND ANOTHER  
VERSUS  
THE STATE OF MAHARASHTRA AND OTHERS

Advocate for Petitioner : Mr. R.R. Mantri  
h/f. Mr. S.S. Kazi.  
Advocate for Petitioner in WP8938/15 : Mr. N.K. Kakade.  
AGP for State : Mr. S.K. Tambe.

CORAM : RAVINDRA V. GHUGE, J.  
DATE : 27<sup>th</sup> November, 2018

PER COURT :

1. In the first petition as well as in the second petition, the learned AGP appears on behalf of all the respondents/state authorities. The first petition is in relation to RCS No. 157/2015, filed by the petitioners/plaintiffs. The second petition is in relation to RCS No. 159/2015, filed by the petitioner/plaintiffs.

2. In both these petitions, the grievance of the petitioners is that the Trial Court has rejected the appointment of a Court Commissioner by order dated 06/08/2015 below Exhibit 23 and 28/08/2015 below application Exhibit 34. It is undisputed that applications seeking temporary injunction are still pending.

3. This Court (Coram : Sunil P. Deshmukh, J.) passed an order on 25/08/2015 and 01/09/2015, granting status quo in the matters, by which, the Trial Court has adjourned the said proceedings. On 23/03/2016, this Court (Coram : S.V. Gangapurwala, J.) has passed an order in the first petition which reads as under :

*“1. A.G.P Shall specifically state on the following aspects :*

*(i) Whether the measurement notice was ever issued and served upon the petitioners in respect of the measurement as contended in their affidavit dated 7.9.2015 ?*

*(ii) Whether the writ properties at any time were part of any acquisition proceedings ?*

*2. Place the matter on 4th April 2016.*

*3. Interim orders to continue.*

*4. There is no impediment for the parties to resort to Nimtana measurement in accordance with law.”*

4. Learned advocates for the petitioners jointly submit that since the petitioners are identically situated in connection with the lands at issue in the suits, they are agreeable if a Court Commissioner is appointed in

the peculiar facts of this case. Learned AGP submits, on instructions, from Shivgan Dnyaneshwar Nivrutti, Sectional Engineer, Mula Irrigation Department, Ahmednagar, that the Court Commissioner could be appointed, who would not be below the rank of the Superintendent of Land Records, District Ahmednagar. Learned advocate for the petitioners are agreeable to bear the charges for such appointment and measurement of the suit properties.

5. This Court has consistently taken a view that a Court Commissioner under Section 75 read with Order XXVI Rule 9 of the Code of Civil Procedure, should normally not be appointed, before the recording of oral evidence is concluded. However, this Court (Coram : S.V. Gangapurwala, J.) has noticed that the measurement of the properties is intricately connected with the acquisition proceedings and it was also observed in the order dated 23/03/2016, that the parties could resort to an Nimtana measurement. However, now that the parties are agreeable for an appointment of a Superintendent of Land Records, Ahmednagar, as a Court Commissioner, these petitions need not be kept pending.

6. In view of the above, these two petitions are partly allowed. The impugned orders are set aside and application Exhibit Nos. 23 and 34 in the two respective suits stand partly allowed. The learned Trial Court

shall direct the appointment of the Superintendent of Land Records, District Ahmednagar, to carry out the measurement of the suit properties. Such an order has been passed within three weeks from today. The petitioners shall deposit the necessary charges, which shall be intimated to the Court by the defendants, within two weeks of the directions issued by the Trial Court appointing the Superintendent of Land Records, failing which these petitioners shall be deemed to have acquiesced their right to an appointment of the Court Commissioner and the Trial Court, thereafter, shall proceed to decide their application Exhibit 5.

7. While appointing such Court Commissioner, the Trial Court would direct the Court Commissioner and the parties to proceed to measure the said land at issue on a particular date at a particular time. These parties shall abide by the said directions and shall be precluded from seeking any adjournment. The Trial court would also direct the Court Commissioner to complete the exercises of measuring the lands within four weeks after the amounts are deposited and shall tender the report and the map to the Court within two weeks from the date of the inspection/measurement of the said properties.

8. After the Court Commissioner submits its report, the Trial Court shall proceed to decide application in Exhibit 5. As such, the direction

granted by this Court (Coram : S.P. Deshmukh, J.) dated 25/08/2015 and 01/09/2015 in these two matters, would continue till Exhibit 5 applications are decided.

9. Needless to state, if the Trial Court finds that the plaintiffs are delaying the hearing of Exhibit 5 application, it shall proceed to pass an order that the status quo order passed earlier, shall stand vacated.

**( RAVINDRA V. GHUGE, J. )**

S.P.C.