

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

WRIT PETITION NO. 366 OF 2017

PRAKASH BHIKOBA SHIVANKAR
VERSUS
HANUMAN BHAGWANTA BHADULE AND OTHERS

...

Advocate for the Petitioner : Shri Gaware Niteen V.

Advocate for Respondents 1 to 6 : Shri Palod L.B..

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 13th August, 2018

Per Court:

1 The Petitioner/ original Defendant No.1 is aggrieved by the impugned order dated 18.07.2016 by which, the Trial Court has permitted the appointment of a court commissioner by allowing the application Exhibit-42 filed by the Plaintiffs in RCS No.106/2013.

2 The grievance of the Petitioner is that after the application Exhibit-5 filed by the Plaintiffs was rejected by the Trial Court on 17.02.2014 and before the conclusion of recording of oral and documentary evidence, Exhibit-42 has been allowed practically permitting the collection of evidence.

3 Reliance is placed upon the following orders passed by this Court :-

- (a) *Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan Haidar Ali, 2012 (1) ALL MR 80 : 2011 (6) Mh.L.J. 334.*
- (b) *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314.*
- (c) *Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.*
- (d) *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.*

4 The learned Advocate appearing on behalf of the original Plaintiffs has strenuously defended the impugned order. He relies upon various judgments delivered by this Court in the matters of *Mahadev Sitaram Sinai Kakodkar and another vs. Conservator of Forests and others, 2016 (3) Mh.L.J. 335* and *Deorao Punjabrao Mohod and another vs. Janardhan Dhondbaji Mankar, 2014 (4) Bom.C.R. 865*, wherein, it is held that if there are boundary disputes, a court commissioner can be appointed so as to properly measure all lands of the

litigating sides by a joint measurement and the boundaries can be fixed. There can be no debate on this crystallized position of law.

5 However, the issue is, at what stage an application for appointment of a court commissioner be allowed under Order 26 Rule 9 of the Code of Civil Procedure. In the instant case, the Plaintiffs have prayed in Exhibit-42 that Gut No.16 and Gut No.20 be measured so as to find out the exact location of these gut numbers, to find out as to who has the precise possession of which gut number and an advocate can be appointed as a court commissioner. Though the Trial Court has appointed the Taluka Inspector of Land Records, Shrigonda, the purpose for which Exhibit-42 was filed, could not have been entertained. Firstly, prior to recording of oral evidence, the court commissioner ought not to be appointed. Secondly, even when the stage is ripe, the court commissioner could be appointed only to carry out a joint measurement and fix the boundaries.

6 At this juncture, the learned Advocate for the Plaintiffs submits that after the recording of oral evidence, the Plaintiffs may be granted liberty to seek the appointment of a court commissioner if this petition is to be entertained.

7 Considering the above and the law crystallized by this Court in the matters of *Syed Mushtaque, Dnyandeo Vithal Salke, Chandrakant Dike* and *Dhondiba Bapu Zaware (supra)*, this Writ Petition is allowed. The impugned order is quashed and set aside and the application Exhibit-

42 is rejected.

8 The litigating sides are expected to conclude the recording of their oral evidence expeditiously. After the conclusion of the recording of oral evidence, either of the litigating sides can move such an application and the Trial Court would consider such an application on its own merits.

kps

(RAVINDRA V. GHUGE, J.)