

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD****WRIT PETITION NO. 13521 OF 2017**

1] Gendmal S/o Bhikulal Banthiya,
Age : 60 Years, Occu. Business & Agri,
R/o Kacchi Galli, Parbhani. ..PETITIONER
(Ori. Plaintiff)

Versus

1] Khamar Ali Shah S/o Mehmood Ali Shah,
Age : 60 Years, Occu. Business,
R/o. Kadrabad Plot, Mominpura Darga,
Parbhani. ..RESPONDENT
(Ori. Defendant)

2] Nasar Ali Shah S/o Akbar Ali Shah
Age : 42 Years, Occu. Service,
R/o, Kadrabad Plot, Mominpura
Parbhani
[Deleted vide order dated 12.01.2018]

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Advocate for Petitioner : Mr. Arvind Deshmukh

Advocate for Respondent : Mr. A. P. Gaikwad

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CORAM : MANGESH S. PATIL, J.

DATE : 04.09.2018

ORAL JUDGMENT :

Rule. The rule is made returnable forthwith. With the consent of parties, the matter has been heard finally.

2] In this petition under Article 227 of the Constitution of India the original plaintiff has approached this Court impugning the order passed by the First Appellate Court, below his application (Exh. 37) preferred in Regular Civil Appeal No. 85/2016 rejecting his application for appointment of the T.I.L.R Parbhani as a Court Commissioner for

measurement and demarcation of the suit land.

3] The learned Advocate for the petitioner submits that rather an innocuous prayer was made for getting the lands measured so as to demarcate then distinctly. There is no dispute about the right of the parties to their respective properties and it was merely a matter of demarcation and fixing of the boundaries, which would have resolved the entire dispute. The learned Advocate would submit that though the lands were duly got measured during the trial, the learned Civil Judge, while dismissing the suit had disbelieved the Surveyor which had necessitated the petitioner to once again make an attempt to get the lands measured and the boundaries fixed. Ignoring all these aspects the first appellate Court has refused the request. As a result the stalemate would continue. The learned Advocate for the petitioner would further submit that even the respondents in their say had not whole heartedly opposed the request for measuring the lands. In fact they had consented for such a measurement and their only request was to measure the lands of both the parties and still by the impugned order the learned District Judge has refused to accede to the request being made by the petitioner. The order is illegal and may be set-aside and application for measurement (Exh. 37) may be allowed.

4] The learned Advocate for the respondent submits that since the

petitioner had filed a suit for perpetual injunction simplicitor, in fact such a course of getting the lands measured was not open even to the trial Court. The petitioner has to stand on his own legs and cannot resort to creation of some evidence that too at an appellate stage by seeking Court Commissioner to be appointed for measuring the lands once again when such an attempt has apparently failed in the trial Court. The learned Advocate would further submit that merely because for the reasons not known the respondent had consented for such measurement, such a consent should not be taken into consideration, particularly, in view of the Judgment of this Court in the case of *Dnyandeo Vithal Salke and others Vs. Dagdu Kadar Inamdar;* *2017(3) Mh.L.J. 314*. The learned Advocate would further submit that a Court Commissioner cannot be appointed to collect evidence and precisely that is being sought to be done by moving the application (Exh. 37) which has been rightly rejected by the learned Additional District Judge. The learned Advocate would also refer to and rely upon the decision in the case of *Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and others;* *2001 (2) Mh.L.J. 959*

5] I have carefully gone through the papers with the able assistance of the learned Advocates of both the sides. Admittedly, it was a suit for perpetual injunction restraining the defendants/respondents from interfering in the petitioner's possession over the land survey No. 635/2

to the extent of 2940.35 Square Meters. Bearing in mind this fact, indeed, the question of demarcation of any boundaries would not sustain. The petitioner will have to substantiate his exclusive possession over that piece of land by leading necessary evidence. The attempt was made to lead such evidence by getting the land measured during the pendency of the suit by appointing a Court Commissioner. The learned Civil Judge has also considered the evidence of such land Surveyor, Deputy Inspector of Land Record who was also examined as a witness (P.W. No.2) on behalf of the petitioner. It is also apparent that the learned Civil Judge has disbelieved such result of the measurement for the reasons recorded in the Judgment and order passed by him. It is thus quite clear that perhaps apprehending that it is a *fate accompli* the petitioner has made another attempt to get the land measured by submitting the application (Exh. 37), which would be nothing but an attempt at getting some evidence at the First Appellate stage which cannot be allowed as has been laid down in the case of **Sanjy Namdeo Khandare (supra)**.

6] Again, though the respondents had apparently consented for carrying out the measurement in their say, even such an admission would be of no consequences much less of any avail to the petitioner in the light of this Court's Judgment in the case of **Dnyandeo Vithal Salke and others (Supra)**

7] In the circumstances, in my considered view, no fault can be found in the impugned order passed by the learned Additional District Judge in rejecting the application (Exh. 37).

8] The Writ Petition is dismissed.

9] The rule is discharged.

(MANGESH S. PATIL, J.)

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