

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO.35269 OF 2017

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| 1. Sanjay Kisan Thorat, |] |
| Age 40 years, Occ. Agriculture |] |
| 2. Mohan Ananda Thorat, |] |
| Age 52 years, Occ. Agriculture |] |
| 3. Suresh Ananda Thorat, |] |
| Age 50 years, Occ. Agriculture |] |
| 4. Sambhaji Rajaram Thorat, |] |
| Age 48 years, Occ. Agriculture |] |
| 5. Abaso Tanaji Thorat, |] |
| Age 25 years, Occ. Agriculture |] |
| 6. Annaso Balasaheb Thorat, |] |
| Age 32 years, Occ. Agriculture |] |
| All residing at Sawade (East), |] |
| Tal. Karad, Dist. Satara. |] Petitioners |

Versus

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|---------------------------------|--------------------|
| 1. Ramchandra Parsu Thorat, |] |
| Age 58 years, Occ. Agriculture |] |
| 2. Vilas Parsu Thorat, |] |
| Age 50 years, Occ. Agriculture |] |
| Both residing at Sawade (East), |] |
| Tal. Karad, Dist. Satara. |] Respondents |

Mr. Kalpesh U. Patil for the Petitioners.

Mr. Chandrakant P. Yadav for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 23RD JANUARY 2018.

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Patil, learned counsel for the Petitioners, and Mr. Yadav, learned counsel for the Respondents.
2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 28th November 2017 passed by the 6th Joint Civil Judge, Junior Division, Karad, below "Exhibit-39" in Regular Civil Suit No.311 of 2017.
3. The application at "Exhibit-39" was filed by the Respondents-Plaintiffs for appointment of T.I.L.R. as a 'Court Commissioner', to bring on record the factual position, like the existence of house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc. This application was opposed by the Petitioners herein contending that, Respondents are trying to collect evidence by appointment of 'Court Commissioner' and the suit land is already measured by T.I.L.R. himself.
4. The Trial Court, after hearing learned counsel for both the parties, was pleased to hold that, the appointment of T.I.L.R. to measure the property would help it to determine the real controversy between the parties and it is necessary to elucidate the real dispute. Therefore, the appointment of T.I.L.R. as 'Court Commissioner' is necessary to measure

the suit property. Accordingly, the Trial Court allowed the said application and also directed the T.I.L.R. not only to measure the properties bearing Gat Nos.34 and 197, but also to inspect and mention in his report the existence or otherwise of house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc.

5. Being aggrieved by this order, the submission of learned counsel for the Petitioners is that, the impugned order passed by the Trial Court is against the express legal position laid down by this Court in number of its Judgments that, appointment of 'Court Commissioner' cannot be made for collection of evidence. Here in the case, it is submitted that, the Respondents are expressly doing so and hence, the impugned order passed by the Trial Court needs to be quashed and set aside.

6. Per contra, learned counsel for the Respondents has supported the said order for the reasons stated therein and also on the count that, in order to decide the real controversy between the parties, the appointment of the 'Court Commissioner' is utmost necessary to bring on record the existing situation.

7. The facts of this case reveal that, Respondents herein have filed a Suit simplicitor for injunction stating that, they are in peaceful possession of the suit land and the Petitioners-Defendants be restrained

from causing obstruction to their possession in the suit property. In paragraph No.1 of the plaint, Respondents have described, in detail, the suit property, which is an area admeasuring 15 R, on the Eastern side of the land bearing Gat No.34 and in the said land, it is stated that, they are having their house property, constructed in bricks and stones with tin-sheets as a roof; then, one more house property of tin-sheets, the cattle-shed, the bio-gas, the toilet, the open space, the agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc. They have further stated in the plaint that, the Petitioners herein have got their land bearing Gat No.197 measured and on the basis of the same, they are causing obstruction to the Respondents' possession in the suit land.

8. Along with the Suit, Respondents have also filed an application for interim injunction at "Exhibit-5". That application is yet to be decided and at this stage, this application at "Exhibit-39" is filed by the Respondents for appointment of T.I.L.R. as 'Court Commissioner', in order to bring on record existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc. A specific prayer is made in the said application that, the 'Court Commissioner', so appointed, be directed to note the existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc. in his map. Along with it, an additional prayer is also made that the 'Court Commissioner'

may also be directed to inspect the lands bearing Gat Nos.34 and 197 and fix their boundaries.

9. Thus, though the prayer for fixing of the boundaries in respect of the lands bearing Gat Nos.34 and 197 is made, the material produced on record shows that, an endeavour to that effect is also made. There is a map drawn by the T.I.L.R. himself, fixing the boundaries of the lands bearing Gat Nos.34 and 197. The said map is produced on record, which shows that, inspection and measurement of the lands was done on 18th November 2016, just before filing of the Suit. In such situation, the application filed on the pretext of fixing the boundaries of the lands bearing Gat Nos.34 and 197, does not appear to be correct.

10. The main intention and object of the Respondents in filing such application appears to be, only to bring on record the existence of the house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc. In respect of these very matters, Respondents are seeking the relief of interim injunction and in order to get that relief, they want to bring this evidence on record about its location and existence.

11. Hence, as rightly submitted by learned counsel for the Petitioners, the law in this respect is fairly well settled, as held by this Court time and again and also in the authority relied upon by learned counsel for

the Petitioners that of *Dnyandeo Vithal Salke & Ors. Vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314*, that,

“The appointment of 'Court Commissioner', even that of T.I.L.R., to submit the factual report as regards possession or user of the land is amounting to collection of evidence and it is not permissible in law.”

12. When the Respondents are coming before the Court with a specific case of the existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc., the burden lies upon them to prove the said existence and their location. They cannot, under the pretext of appointment of T.I.L.R. as a 'Court Commissioner', when the measurement of the lands is already done at their instance only and the boundaries are also fixed, seek appointment of 'Court Commissioner' to bring on record the factual position at the site, so as to help them in proving their case for interim injunction. The Trial Court has not considered this settled position of law and, therefore, the impugned order passed by the Trial Court needs to be quashed and set aside.

13. The Writ Petition is, accordingly, allowed. The impugned order passed by the Trial Court is quashed and set aside.

14. Rule is made absolute in the above terms.

[DR. SHALINI PHANSALKAR-JOSHI, J.]