

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

APPEAL AGAINST ORDER NO.13/2017

Mr. Ramdas Motiram Tharkar

..Vs..

Mr. Devendra Mahadeo Gadge

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri R.G. Kavimandan, Advocate for the appellant.
Shri Vishal Gangane, Advocate for the respondent.

CORAM : Z.A. HAQ, J.

DATE : 7.3.2018.

Heard.

The original defendant has filed this appeal under Order 43 Rule 1(u) of the Code of Civil Procedure challenging the judgment passed by the District Court by which the appeal filed by the respondent / plaintiff is allowed, the judgment and decree passed by the trial Court is set aside and the matter is remanded to the trial Court for fresh decision after appointing cadastral Surveyor as Court Commissioner and obtaining his report.

The submission on behalf of the appellant / defendant is that the plaintiff has failed to establish identification of the suit property and unless the plaintiff discharges preliminary burden of establishing identification of suit property, it would not be appropriate for the Court to undertake the exercise of

getting the property identified through Court commissioner. The argument is that the Court Commissioner cannot be appointed to gather the evidence.

After examining the documents placed on record of this appeal and going through the impugned judgment, I find that the conclusions of the learned District Judge recorded in paragraph Nos.11 and 12 are based on proper appreciation of evidence on record. The learned trial Judge had recorded that the plaintiff has established that he became owner of the suit property on the basis of the gift deed dated 2nd February, 1996. This finding was not challenged by the defendant.

The learned Advocate for the respondent / plaintiff has submitted that the directions given by the learned District Judge for appointment of Court Commissioner are in consonance with the law laid down by the Hon'ble Supreme Court in the case of *Haryana Waqf Board V/s. Shanti Sarup and others* reported in **(2008) 8 SCC 671** and the judgment given by this Court in the case of *Kolhapuri Bandu Lakade V/s. Yallappa Chinappa Lakade, since deceased through Pooja @ Pooajari Y. Lakade and others* reported in **2011 (3) Mh.L.J.348**. The submission made by the learned Advocate for the respondent is proper and has to be accepted.

I find that the learned District Judge has not committed any error by remanding the matter to the trial Court. The appeal is **dismissed**. In the circumstances,

the parties to bear their own costs.

The plaintiff and defendant shall appear before the Civil Judge, Senior Division, Telhara on 17th April, 2018.

JUDGE

Tambaskar.