

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

WRIT PETITION NO. 3766 OF 2015

Shaikh Mishru Shakikh Umar,
Age : 58 years, Occupation : Agriculture
Resident of : At Jalchakra Budruk,
Taluka Bodwad, District Jalgaon **.... PETITIONER**

VERSUS

Jainabi Dalil Vanjari
Age : 58 years, Occupation : Household
Resident of : At Jalchakra Budruk,
Taluka Bodwad, District Jalgaon
Since deceased hence through
Legal Representatives :

- 1A. Shaikh Dalil Shaikh Farid Multani
(Wanjari) Age : 70 years, Occupation :
Agriculture
- 1B. Shaikh Mustafa Shaikh Dalil Multani
(Wanjari), Age : 47 years,
Occupation : Agriculture
- 1C. Shaikh Ahmed Shaikh Dalil Multani
(Wanjari), Age : 45 years,
Occupation : Agriculture
- 1D. Shaikh Akbar Shaikh Dalil Multani
(Wanjari), Age : 43 years,
Occupation : Agriculture
- 1E. Shaikh Gulam Shaikh Dalil Multani
(Wanjari), Age : 47 years,
Occupation : Agriculture
- 1F. Shaikh Mukhtar Shaikh Dalil Multani

(Wanjari), Age : 47 years,
Occupation : Agriculture

All residents of : At village Jalchakra
Bk. Tanda, Taluka Bodwad,
District Jalgaon.

.... **RESPONDENTS**

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Advocate for the Petitioner : Shri M. S. Kulkarni
Advocate for the Respondents : Shri A. M. Gholap

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 01st JULY, 2019.

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ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is the original defendant in RCS No.03/2005, who is aggrieved by the order dated 10/02/2015 passed by the Trial Court rejecting application Exhibit 107 filed by him for seeking appointment of a court commissioner after the recording of oral evidence has concluded.

3. By order dated 13/04/2015, this Court has noted the submissions of the petitioner that the application was filed after the recording of evidence in the matter was over before

framing of an additional issue.

4. Since the suit is pending final hearing before the Trial Court, I am not making any observations about the pleadings and the averments made by the respective sides in the plaint and their written statement on the basis of which they have led evidence.

5. Issue is that the defendant made a prayer to the Trial Court vide Exhibit 107 application on 06/12/2014 that the Taluka Inspector of Land Records, Bodwad, be appointed as a court commissioner to inspect Gat Nos. 14/1, 14/2, 17 and 11 as well as their sub-divisions and find out as to how a road is available for the petitioner/defendant to approach his Gat No. 17 and also find out as to whether Gat No. 11 is a government land or not. I am, therefore, dealing with the issue as to whether such a prayer is an innocuous prayer or whether it amounts to collecting evidence through the court commissioner.

6. The petitioner defendant undisputedly is the owner of

land Gat No. 17. The respondent lady who is the original plaintiff, is the owner of land Gat No.14/2. Her husband, who had initiated Regular Civil Suit No. 191/1999, is the owner of land Gat No. 14/1. This husband has raised an issue about the same right of way in the said suit. By the judgment and decree dated 13/08/2007, the Trial Court had decreed the suit. While doing so, it recorded that the husband of the present plaintiff had proved that this petitioner has a '*wahiwat*' upto his Gat No. 17 from the northern side 'cart way' upto Gat No.11, then through Gat No. 11 travelling to the eastern side and then to the western side for entering the eastern bandh of Gat No.17. This issue was subject matter of a Regular Civil Appeal No. 243/2007 preferred by the petitioner herein, who was also the original defendant and which has been dismissed. A Second Appeal between the parties is pending before this Court wherein orders are yet to be passed.

7. In view of the above backdrop, the issue in RCS No. 03/2005 is that the original plaintiff claims that the petitioner herein would not have a right of way through her Gat No. 14/2 in order to reach his Gat No.17. The issues cast would indicate

that the plaintiff has to prove ownership over the suit property, establish that the defendant is causing obstruction in her land and whether she proves that the defendant has an alternate way to enter his land, other than the disputed land.

8. All the parties have led evidence through their witnesses. Though an additional issue was cast on 06/01/2011 as issue No. 2A, after the recording of evidence was concluded, the plaintiff has not chosen to lead additional evidence in the last 8 years. So also, the petitioner herein, has not expressed any desire to lead additional oral evidence. The record of the Trial Court indicates that the suit was listed for advancing final arguments on 30/10/2010. The said suit was stayed in March-2012 by the Trial Court.

9. Considering the issues cast and the evidence led by the parties, the Trial Court will have to adjudicate upon the suit to assess as to whether the plaintiff is right in contending that the defendant need not pass through her land Gat No. 14/2 so as to reach his land Gat No.17. On the one hand, the plaintiff has to establish that the defendant has an alternate way and per contra, the defendant will have to establish that he has no

other path except travelling through Gat No.14 to reach his Gat No.17. In this backdrop, whether such a path is available and whether such a path could be designed is not the subject matter of the suit. As noted, the plaintiff has to prove that the defendant need not travel through her land. Hence, in my view the application for appointment of a court commissioner filed by the petitioner defendant praying to the Trial Court that the court commissioner should inspect the properties and suggest through his report as to how such a road or path would be available, cannot be permitted.

10. In the light of the above, I do not find that the impugned order dated 10/02/2015 delivered by the Trial Court could be termed as being perverse or erroneous. This petition, being devoid of merit is, therefore, dismissed.

11. The present petitioner, who was the Appellant in the earlier suit before the First Appellate Court, had filed an application praying for the stay of the present suit bearing RCS No. 03/2005. In the light thereof, the Trial Court has stayed the present suit. Subsequently, as the First Appeal of the present petitioner in connection with the earlier suit was

dismissed on its merits, the stay granted in this suit stood vacated. Subsequently, this Court stayed the suit vide order dated 13/04/2015.

12. Since the suit is of 2005 and was actually ripe for advancing final arguments on 30/10/2010, I deem it appropriate to direct the parties to appear before the Trial Court on 19/07/2019 and advance their final arguments. If they are not concluded on 19/07/2019, the Trial Court would post the matter on 20/07/2019 in order to enable the parties to conclude their oral submissions. Thereafter, the Trial Court would deliver its judgment in the said suit on or before 31/08/2019.

13. The Trial Court would note that the observations in this judgment are restricted to the application seeking appointment of a court commissioner and it would decide the suit after considering the oral and documentary evidence on its own merits.

(RAVINDRA V. GHUGE, J.)

shp/-