

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

WRIT PETITION NO. 4983 OF 2018

1. Baburao Kashinath Kotalwar,
Age : 58 years, Occ. Agri.
2. Balaji s/o Baburao Kotalwar,
Age : 33 years, Occ. Agri.
3. Govind s/o Baburao Kotalwar,
Age : 24 years, Occ. Agri.
All residents of Zari (Bk.)
Tq. Chakur Dist. Latur

**...PETITIONERS/
ORIG. DEFENDANTS**

VERSUS

1. Vithal Kashinath Kotalwar,
Age : 66 years, Occ. Agri.
2. Sachin s/o Vithal Kotalwar,
Age : 40 years, Occ. Agri.
Both residents of Zari (Bk.)
Tq. Chakur Dist. Latur

**...RESPONDENTS
ORIGINAL PLAINTIFFS**

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Advocate for the Petitioners : Shri R. B. Deshmukh
Advocate for Respondent Nos. 1 and 2 : Ms. Anjali Dube
(Bajpai)

...

CORAM : RAVINDRA V. GHUGE, J.

DATED : 30th JANUARY, 2019.

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ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally

by the consent of the parties.

2. The petitioners are aggrieved by the impugned order dated 12/04/2018, by which, the Trial Court has appointed a court commissioner for the second time in RCS No. 17/2003 by allowing the application of the plaintiffs Exhibit 193.

3. I have heard the extensive submissions of the learned Advocates for the respective sides.

4. It is not in dispute that the suit was earlier dismissed. The First Appeal was dismissed. In the Second Appeal, this Court delivered an order on 26/09/2017 considering the rival contentions and the following observations were made in paragraph 9 while disposing of the Appeal :-

“8. In the wake of above submissions, in my opinion, the appeal can be disposed of by consent, with following order :-

The impugned judgments and decrees rendered by the Courts below, are set aside, subject to appellants depositing costs of Rs. 60,000/- before the Trial Court within a period of eight weeks from today, to which the respondents shall be entitled to.

If costs as aforesaid is not deposited, it be deemed the present second appeal is dismissed.

The matter stands remitted back to the Trial Court with a direction to decide the same afresh, in accordance with law, taking into consideration the observations made herein.

With consent of the parties, Taluka Inspector of Land Records, within whose jurisdiction the disputed property is located, is appointed as Court Commissioner, who shall measure the land in question and submit his report to the Trial Court, in any case by 30th November, 2017.

The entire costs of measurement shall be borne by the appellants- plaintiffs.

In the circumstances, it is expected of the Trial Court to decide the suit within a period of six months from the date of receipt of such report from the Taluka Inspector of Land Records, after giving due opportunity to the respective parties including that of adducing evidence.

Parties hereto undertake that they shall appear before the Trial Court on 9th October, 2017.

With above observations and directions, second appeal stands partly allowed.

In view of disposal of the appeal, pending Civil Applications do not survive and stand disposed of accordingly."

5. There is no dispute that the TILR was appointed as a court commissioner. The plaintiff deposited Rs. 60,000/- as fees. The TILR has measured the land and has submitted his report.

6. Application Exhibit 193 is filed by the plaintiffs for seeking appointment of a cadastral surveyor as a court commissioner for inspecting the suit land and for submitting his report on the following factors :-

- (a) A steep decent from south to north west land of gat No.189.
- (b) The position of the well.
- (c) The situation of the 15 mango trees.
- (d) The electric connection supplied from the well to irrigate the land.
- (e) The pipeline from the river and the well.
- (f) The pipeline outlets which show that the southern side portion of land Gat Nos. 189

and 188 have been allotted to the plaintiff.

- (g) The topology documenting height difference of lands in question.

7. By the impugned order, the Trial Court has appointed a cadestral surveyor as a court commissioner for performing the above tasks.

8. It requires no debate that a court commissioner cannot be appointed for collecting evidence. A cursory glance at Exhibit 193 setting out the tasks for which the court commissioner is desired to be appointed, would clearly indicate that the plaintiffs desire to collect evidence. This cannot be permitted. The impugned order clearly indicates non-application of mind to the contents of Exhibit 193 and the law applicable.

9. I do not find the single reported judgment having been cited by the parties before the Trial Court for assisting the Court with regard to the law that is applicable. The judgments delivered in the matters of

(1) Kolhapuri Bandu Lakade Vs. Yellapa Chinappa Lakade ,

2011(3) Mh.L.J. 348,

(2) Sanjay s/o Namdeo Khandare Vs. Sahebrao s/o Kachru Khandare, 2001 (1) BCR 800 : 2001 (1) ALL MR 653 : 2001

(2) Mah. L.J. 959,

(3) Bento Antonio Gomes vs. Rosario Salvador Carnero and others, 2014 (4) Mh.L.J. 366 clearly crystalize the law that the court commissioner is not to be appointed for collecting evidence.

10. The learned Advocate for the plaintiffs relies upon the judgment delivered by this Court in **Lalitprabha Krishnaji Ajgaokar and others Vs. Yunus Khan and others, 2017 (1) Bom.C.R. 179**, in which it is concluded that it is for the petitioners to lead evidence to prove their case and they cannot seek assistance of a court commissioner to collect evidence. In a dispute about location of boundaries of land, the court commissioner can be appointed. Needless to state, this judgment is in tune with the earlier view taken by this Court in *Sanjay s/o Namdeo Khandare and Bento Antonio Gomes* (supra).

11. In view of the above, this petition is allowed. The

impugned order dated 12/04/2018 is quashed and set aside. Application Exhibit 193 stands rejected. The Trial Court shall proceed to decide RCS No. 17/2013 within the time frame as is granted by this Court in the Second Appeal.

12. Rule is made absolute accordingly.

(RAVINDRA V. GHUGE, J.)

shp/-