

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

**CIVIL APPLICATION NO. 13391 OF 2019
IN
`WRIT PETITION NO. : 5152 OF 2009**

Vinayak s/o Bhujangrao Kulkarni
Age : 58 years, Occ. Agriculture
R/o Gaund Galli, Ambajogai
Dist. Beed.

... APPLICANT

[Respondent No.1 in W.P.]

VERSUS

1] Rambhau w/o Gopinath (Walekar)
Sonwane, Age : 50 years, Occ.Agri.
R/o Mahavir Nagar, Ambajogai
Dist. Beed. [Petitioner in W.P.]

2] Gunjali Masaji Waval
Age : 60 years, Occ. Agri.

3] Prabhu Gunaji Waval
Age : 33 years, Occ. Agri.
Both R/o Village Pokhari,
Tq. Ambagajogai, Dist. Beed.
[Respondents 2 and 3 in W.P.]

... RESPONDENTS

**...
WITH**

WRIT PETITION NO. : 5152 OF 2009

Rambhau w/o Gopinath (Walekar)
Sonwane, Age : 40 years, Occ.Agril.
R/o Mahavir Nagar, Ambajogai
Tq. Ambajogai, Dist. Beed.

...PETITIONER

VERSUS

1. Vinayak s/o Bhujangrao Kulkarni
Age : 40 years, Occ. : Service & Agril.
R/o Gaund Galli, Ambajogai
Tq. Ambajogai, Dist. Beed.
At present residing at
Branch officer,
Marathwada Gramin Bank,
Branch Bhoom, Tq. Bhoom,
Dist. Osmanabad.
2. Gunaji s/o Masaji Waval,
Age : 50 years, Occu : Labourer,
R/o At Post. Pokhari, Tq. Ambajogai,
Dist. Beed.
3. Prabhu s/o Gunaji Waval,
Age : 23 years, Occu. Labourer,
R/o At Post. Pokhari, Tq. Ambajogai,
Dist. Beed.

...RESPONDENTS

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Advocate for the Applicant : Shri S. G. Bhalerao
(in WP)
Advocate for respondent Nos.1 to 3 : Shri Shrikant
Kulkarni

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 15th NOVEMBER, 2019.

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ORAL JUDGMENT :

1. The Civil Application is allowed.
2. The Writ Petition was heard by the consent of the

parties.

3. Both the learned Advocates have vehemently canvassed their respective grounds.

4. The record reveals that Regular Civil Suit No. 117/2000 was filed 19 years ago for seeking perpetual injunction, by the petitioner plaintiff against the respondent defendants. The suit land bearing Gat No. 79 at village Pokhari was the issue and the dispute was regarding a drain in between Gat Nos. 79, 86 and 87, of the defendants.

5. By the consent of the parties, a court commissioner was appointed by order dated 01/07/2006 below Exhibit 72. The TILR was appointed as a court commissioner. However, the grievance voiced by the defendant vide Exhibit 92 was that the TILR has not measured the properties as per the directions and a fresh court commissioner therefore, needs to be appointed. By order dated 23/07/2009, the Trial Court recorded that the Cadestral Surveyor

measured the property instead of the TILR and the direction of the Trial Court was flouted. By order dated 23/07/2009 below Exhibit 92, the Trial Court appointed a TILR to perform the work of a court commissioner. Apparently, the Cadestral Surveyor has unauthorisedly carried out the measurement when the Trial Court had specifically passed an order on 01/07/2006 directing the TILR to carry out the measurement.

6. This Court has consistently held that a court commissioner should not be appointed until the recording of oral evidence is over. Some of the orders passed by this Court deprecating the practice of appointing court commissioner before recording of oral evidence is concluded, are as under :

(1) *Syed Mushtaque Ahmad Syed Ismail and others Vs. Syed Ashique Ali Khan Hatdar* [2011 (6) Mh.L.J. 334 = 2012 (2) Bom. C.R. 790],

(2) *Nalubai Shinde and others Vs. Gopinath Shinde* [2011(2) Mh.L.J.991],

(3) *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar*, 2017 (3) Mh.L.J. 314.

(4) *Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided*

on 17.01.2014.

(5) *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.*

(6) *Dipak Laxman Gadekar and anr. Vs. Trimbak Ravji Shirsath, Writ Petition No. 11593/2015 (Aurangabad Bench), decided on 23/08/2017,*

(7) *Mahadeo s/o Vaijanath Bembalge Vs. Chandrakala w/o Ramesh Athane, Writ Petition No. 832/2018 (Aurangabad Bench), decided on 04/06/2018,*

(8) *Dhondiram Nivrutti Pawar through L.Rs. Vs. Laxman Khashaba Pawar and others, Writ Petition No. 1196/2017, (Bombay Bench), decided on 23/01/2018,*

(9) *Sanjay Balasaheb Khandare Vs. Vivek Surinder Mahajan and another, Writ Petition No. 4958/2018,(Aurangabad Bench), decided on 29/01/2018.*

(10) *Bhika Mahadu Katkar and another Vs. Arjun Bhimraj Ghode, WP No.1890/2019 (Aurangabad Bench) decided on 09/07/2019.*

(11) *Sitaram Suklal Patil and another Vs. Vasudeo Suklal Patil, WP No.9626/2016 (Aurangabad Bench), decided on 31/07/2017.*

(12) *Sarjerao Nathu Bangar and others Vs. Namdeo Keru Bangar and others, WP No.13441/2019 (Aurangabad Bench), decided on 07/11/2019.*

7. In view of the above, this petition is partly allowed. The impugned order dated 23/07/2009 is quashed and set aside. The Trial Court would discard the measurements carried out the by the Cadestral

Surveyor since he has unauthorisedly carried out the measurement. The litigating sides shall proceed to lead oral evidence before the Trial Court. Needless to state, after the recording of oral evidence is concluded, if any application for appointment of a court commissioner is filed in the said suit by any litigating side, the Trial Court would consider the said application on its own merits.

8. Since the suit is more than 19 years old and was stayed by the order of this Court dated 07/08/2009, the Trial Court shall endeavour to decide the said suit as expeditiously as possible and preferably on or before 30/06/2020.

9 . Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

shp/-