

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

WRIT PETITION NO. 7684 OF 2019

**RAHUL UTTAMRAO CHAVAN
VERSUS
ANUSAYABAI LAXMAN BODKE AND OTHERS**

...
Advocate for the Petitioner : Shri S. S. Gangakhedkar
Advocate for the Respondents : Shri V. P. Latange

...
CORAM : RAVINDRA V. GHUGE, J.
DATED : 22nd JULY, 2019.

...
PER COURT :

1. The petitioner original plaintiff in RCS No. 32/2015 is aggrieved by the order passed by the Trial Court dated 30/04/2019, by which, his application Exhibit 61, seeking appointment of the TILR as a court commissioner, after the recording of oral evidence has concluded, has been rejected.

2. I have heard the learned Advocates for the respective sides at length. I have perused the petition paper book and the voluminous affidavit in reply filed on behalf of respondent Nos. 1, 2 and 3.

3. The petitioner has preferred the suit for seeking measurement and fixation of the boundaries to the extent of

the share of the plaintiff admeasuring 31 R. in land Gat No. 448 and for seeking perpetual injunction restraining the defendants from causing obstruction and interference over the land purchased by him. The petitioner plaintiff has based his entire claim on a registered sale-deed dated 23/05/2014 bearing No. 527/2014 when he purchased 31 R. land in Gat No. 448 from Datta Piraji Hamand. Datta has posed to be the owner of that land and has sold 31 R. vide the registered sale-deed to the plaintiff.

4. The recording of oral and documentary evidence has been concluded. The plaintiff and the defendants were before this Court (Coram : S. V. Gangapurwala- J.) in Writ petition No. 11069/2016. The plaintiff had made a grievance that his application, seeking appointment of the TILR as a court commissioner, has been rejected. This Court, by order dated 06/12/2016 recorded that the request to appoint a court commissioner has been put forth at a premature stage. The plaintiff can adduce evidence and after the conclusion of the recording of oral evidence, if it is found that the assistance of a court commissioner is necessary to measure the property, the

parties can make an application for seeking appointment of a court commissioner.

5. The plaintiff moved application Exhibit 61 making a reference to the order of this Court dated 06/12/2016 and pointing out that the exact boundaries of his portion of land purchased by a registered sale-deed, need to be measured and the boundaries need to be marked. The defendants have opposed the said application through a written say. By the impugned order dated 30/04/2019, the Trial Court has rejected the application on the ground that the appointment of the TILR for measuring the land, will cause unnecessary delay in deciding the suit and it will kill time of the Court. It is undisputed that the suit is lodged in 2015 and is only 4 years ago.

6. The learned Advocate for the defendants has strenuously opposed this petition and prayed for its dismissal. He relies on the voluminous affidavit in reply to contend that the plaintiff is unable to locate his 31 R. land. Datta, from whom the plaintiff has purchased the land, has also deposed that he had only 4 to

5 R. land under his cultivation. Reference is made to the cross-examination of Datta and the defendants submit that Datta admits that he had only 4 to 5 R. land and therefore, could not have sold 31 R. land to the plaintiff. Reliance is placed on the judgments delivered by this Court in the matter of *Nalubai Narayan Shinde and ors. Vs. Gopinath Dagdu Shinde, 2011 (2) Mh.L.J. 991* and in the matter of *Syed Mushtaque Ahmad Syed Ismail and ors. Vs. Syed Ashique Ali Khan Haidar Ali, 2011 (6) Mh.L.J. 334*.

7. The learned Advocate for the plaintiff submits that because of the peculiar circumstances, he has been placed in a precarious condition. The revenue authorities have been won over by the defendants and when he approaches the revenue authorities for measurement of his land, he receives no assistance. This was the reason why he has lodged the suit as the defendants desire to grab his land and corner him by rendering him with no assistance from the revenue authorities. The Court is the only remedy for the plaintiff and if the Court concludes that the Court machinery cannot be used for identifying the land of the plaintiff, he would be rendered

remediless and would never get justice. He relies upon the judgment by this Court in the matter of *Kolhapuri Bandu Lakade Vs. Yallapa Chinappa Lakade - 2011 (3) Mh.L.J. 348.*

8. It cannot be ignored that the plaintiff has approached the Trial Court for seeking measurement of the suit land and perpetual injunction for restraining the defendants from causing obstruction and interference by any mode over the suit land. The person from whom the plaintiff has purchased the land, was brought by the plaintiff as his witness. In the examination in chief the said predecessor in title namely Datta submits that he sold 31 R. land from Gut No. 448 in village Dongaon, Taluka Mudkhed to the plaintiff. It was a permanent sale which was through a registered sale-deed. He has received the entire amount for selling the said land and he has handed over possession to the plaintiff.

9. In cross-examination conducted on 11/09/2018, in one breath, Datta submits that "*It is not true that he was not cultivating 31 R. land*". In another breath, he submits that he is

not aware whether 31 R. land was noticed in Gut No. 448. He then submits to an answer as to how much land was he cultivating at the time of the sale and he has submitted that he had 4 to 5 Gunthas land with him. This answer seems to be an answer in inadvertence. He then submits that it is untrue to say that when he sold the land to the plaintiff, he was not the owner or possessor of 31 R. land. Then he submits that it is untrue to say that his name was wrongly recorded in the 7/12 extract as being the owner and possessor of 31 R. land which was inadvertently recorded in his name.

10. In my view, the above stated cross-examination of Datta does not indicate that he never had 31 R. land. In fact it appears that he insists that he was the owner of 31 R. land and he sold it to the petitioner plaintiff.

11. In *Nalubai Narayan (supra)*, this Court refused to appoint a court commissioner since the prayer was to appoint a court commissioner to find out as to who is in possession of which portion of land. In *Syed Mushtaque (supra)*, while considering the suit for challenging a sale-deed, this Court

concluded that a court commissioner cannot be appointed for collecting evidence. The request made was that the court commissioner be directed to report as regards the possession of the respective parties and the extent to which instruction is being carried out.

12. I have no reason to disagree with the views expressed in the two judgments since a court commissioner can never be appointed for collecting evidence. In the instant case, the plaintiff has specifically prayed that a TILR, Mudkhed be appointed as a court commissioner for measurement of the suit land. The Trial Court has delivered a lengthy order concluding, before the suit is adjudicated upon, that earlier a surveyor had filed a report, prior to the filing of the suit, that the plaintiff was not in possession of any land. A panchanama was carried out which also bears the signature of the plaintiff.

13. In my view, had the plaintiff been satisfied with the report of the surveyor, he would not have approached the Trial Court with a suit for seeking appointment of a court commissioner and for perpetual injunction against the defendants from disturbing his suit land. The Trial Court

could not have ignored this fact that the plaintiff is practically rendered without any assistance as the revenue authorities are merely creating a farce that there is no land in his possession. It is for the Trial Court ultimately to decide on the basis of oral and documentary evidence as to whether the plaintiff is the title holder to 31 R. land.

14. The learned Advocate for the defendants has strenuously supported the impugned order by contending that prior to the lodging of the suit, a surveyor had made an effort to measure the land and it could not find the plaintiff in possession.

15. The issue is that if the plaintiff has purchased 31 R. land from Datta and Datta contends in his deposition that he had sold 31 R. land, this portion of land cannot disappear from the earth. If the defendants are found to be in possession of land in excess of what they owned as per the revenue records, it would be obvious that the purported disappearance of the share of the plaintiff's land has landed in their possession.

16. I also find in the impugned order that the Trial Court,

while dealing with an application seeking appointment of a court commissioner, has practically concluded that the plaintiff has no land in his possession, as if to conclude that he had never purchased 31 R. land. In a situation in which a litigant is rendered helpless on account of the non co-operation of the revenue authorities, it is the duty of the Court to do justice and for the said purpose, no stone has to be left unturned. As I have found from Exhibit 61 that the plaintiff has only sought measurement of the suit land, no loss or harm would be caused to the defendants if the land is measured. In fact it would assist the Trial Court in view of the confusing answers given by Datta in his cross-examination.

17. In view of the above, this petition is allowed. The impugned order dated 30/04/2019 stands quashed and set aside. Application Exhibit 61 is allowed. The Trial Court would proceed to issue appropriate directions for the appointment of the TILR as a court commissioner and for payment of requisite fees, forthwith.

(RAVINDRA V. GHUGE, J.)

shp/-