

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9809 OF 2019

MADHUKAR MARUTI GOPHANE AND OTHERS
VERSUS
DNYANDEV SURYABHAN GOPHANE AND OTHERS

Mr.Shaikh Shoyab, Advocate for the petitioners.
Mr.S.G.Chapalgaonkar, Advocate for respondent Nos. 1 to 5.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 18/09/2019

PER COURT :

1. On 06/08/2019, this Court had passed the following order :-

"1. The petitioners / plaintiffs in RCS No.243 of 2013, are aggrieved by the order dated 14.2.2019, by which, the Deputy Superintendent of Land Records, Paranda is appointed as a Court Commissioner for measuring the suit property and for fixing the boundaries.

2. The learned Advocate for all the respondents submits that in fact, a Court Commissioner was initially appointed at the behest of these petitioners much prior to the commencement of the recording of oral evidence. An Advocate was appointed, who could not perform his functions properly. Defendant No.7, therefore, filed application Exhibit 17 seeking appointment of the Deputy Superintendent of Land Records, which has been allowed.

3. This Court has held consistently that a Court Commissioner should not be appointed before the recording of oral evidence is

concluded. Some of the orders passed by this Court are as under:-

(1) Syed Mushtaque Ahmad Syed Ismail and others Vs. Syed Ashique Ali Khan Hatdar [2011 (6) Mh.L.J. 334 = 212 (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.

4. Even today, the recording of oral evidence has not concluded in the pending suit. As such, going by the law laid down by this Court in the above referred orders, the appointment of the Court Commissioner needs to be scrutinized and if the law is to be applied equally, then the report of the Advocate who acted as the first Court Commissioner, will also have to be discarded.

5. Both the learned Advocates seek time to take instructions.

6. *S.O. to 22.8.2019 for passing orders after hearing the parties.”*

2. The learned Advocate for the respondents submits that the impugned order has been passed in RCS No.243/2013 in which the petitioners are the plaintiffs. Respondent Nos.7 and 8 have also filed RCS No.263/2013. Both the suit properties are identical in the sense that the suit properties in both the suits are the same. The plaintiffs in RCS No.243/2013 seek declaration of ownership on the basis of purported partition that is said to have taken place about 60 years ago. This is denied by the defendants in the first suit.

3. The learned Advocate for the respondents further submits that in the second suit RCS No.263/2013, an application for seeking measurement of the suit lands at Exh.20 has been rejected on the ground that the dispute is not as regards the boundaries, but as regards the rights of the parties.

4. The learned Advocate for the petitioners submits on instructions that though the 7/12 extracts of the land existing for more than 4 decades indicate different measurement and sizes of the parcels of lands, these petitioners concede that they are occupying more than that what is mentioned in the 7/12 extracts and the

revenue records. He quickly adds that they are occupying excess lands on the basis of the partition that has taken place more than 4 decades ago.

5. Peculiar circumstances have therefore been pointed out in so far as both the pending suits are concerned. The plaintiffs in the first suit are the defendants in the second suit and defendant Nos. 7 and 8 in the first suit are the plaintiffs in the second suit. All have raised a grievance about the sizes/measurements of the lands that they are in possession of.

6. I can therefore visualize that if a verdict is delivered in the first suit in favour of the plaintiffs independent of the second suit, the rights of the plaintiffs in the second suit would be affected by such a verdict. So also, contradictory judgments in both the suits are likely to affect all the litigating sides.

7. In the above backdrop, the learned Advocate for the respondents in this petition submits that both the suits can be clubbed as they are filed in the same year and are at the same stage. Litigating parties are the same and suit properties are identical. Moreover, as the plaintiffs in the first suit are attempting to legitimize

and legalize their occupation of excess land than what is evidenced by the revenue records and since the plaintiffs in the second suit allege that these petitioners are occupying more land, which they need to be divested of to the extent of the revenue records, it would be appropriate that the suit properties in both these suits could be measured after the suits are clubbed.

8. The learned Advocate for the petitioners in this petition, who are the plaintiffs in the first suit, neither agrees for clubbing of the matter, nor does he agree that there should be joint measurement of the suit properties in the peculiar facts of the case.

9. I also find that Exh.20 seeking appointment of a Court Commissioner in the second suit is rejected and Exh.70 seeking appointment of the Court Commissioner in the first suit has been allowed. As noted above, this Court has concluded that normally a Court Commissioner should be appointed after the recording of oral evidence in the suit is concluded. Some of such orders 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.

10. The impugned order indicates that only one Survey No.90/1 is sought to be measured for fixing the boundaries and preparing the

maps. In view of the law laid down by this Court in the matter of Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and others [2001 (1) Bom. C.R. 800], Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade [2011 (3) Bom.C.R.807] and Bento Antonio Gomes @ Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others [2014 (4) Mh.L.J. 360], the joint measurement of the suit properties would be advantageous as it would assist the Trial Court in better adjudication of the suits, in the peculiar facts of the case.

11. Considering the peculiar facts and circumstances as recorded above, this petition is disposed off with the following directions :-

- [a] RCS No.243/2013 and 263/2013 shall be clubbed.
- [b] All the litigating sides are at liberty to lead their oral and documentary evidence commonly in both the suits.
- [c] After the recording of common oral evidence in both the suits is concluded, the Trial Court would appoint the Deputy Superintendent of Land Records, Paranda as a Court Commissioner for measurement of all the suit properties, for fixing the boundaries and for submitting a report alongwith the map.
- [d] The impugned order dated 14/02/2019 would therefore merge in the above direction.

(Ravindra V.Ghuge, J.)