

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

WRIT PETITION NO.5065 OF 2018

MD SHAFIODDIN MD FASIODDIN AND OTHERS
VERSUS
KHIYAMODDIN SHAHABUDDIN MOHAMMED

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Advocate for the Petitioners : Shri Pathan Hamzakhan I.
Advocate for the Respondent : Shri Deshpande Siddharth R.

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CORAM: RAVINDRA V. GHUGE, J.
DATE :- 07th March, 2020

Per Court:

1 The petitioners, original defendants in RCS No.298/2017, are aggrieved by the order dated 29.03.2018 passed by the Trial Court vide which, the application exhibit 37 filed by the plaintiff for seeking appointment of a court commissioner, has been allowed even before the framing of issues.

2 I have considered the submissions of the learned advocates for the respective sides.

3 The learned advocate appearing on behalf of the respondent/ original plaintiff has strenuously opposed this petition. He submits that, notwithstanding that the issues were not cast when the Trial Court allowed exhibit 37, this Court has crystallized the law that in case of boundary disputes, there should be measurement of the property by appointing a court commissioner. Reliance is placed on the judgments

delivered in the case of *Girish Vasantrao Bhoyar and another vs. Nimbaji Warluji Bambal*, 2009 (4) Mh.L.J. 371 and *Habibkhan Inauttalakhan and others vs. Waman Govind Rathod and others*, 2012 (1) ALL MR 803.

4 The law is now well settled that in cases of boundary disputes, the joint measurement of all properties of the litigating sides should be carried out. (See *Sanjay Namdeo Khandare vs. Sahebrao Kachru Khandare and others*, 2001 (2) Mh.L.J. 959, *Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade and others*, 2011 (3) Mh.L.J. 348 and *Haryana Waqf Board vs. Shanti Sarup and others*, 2008 (8) SCC 671). However, in the instant case, the plaintiff sought the measurement of his property alone in the backdrop of his averments in the plaint. The Trial Court has granted exhibit 37 within months of the filing of the suit and has permitted the measurement of the property of the plaintiff alone. This is unsustainable.

5 This Court has consistently held in the following judgments/orders that a court commissioner, normally should not be appointed before the recording of oral evidence is concluded :-

(a) *Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan Haidar Ali*, 2012 (1) ALL MR 80 : 2011 (6) Mh.L.J. 334.

(b) *Gangaram Baban Tagad and others Vs. Sarubai*

Yashwant Tagad and others (WP No.6700/2011 dated 12/06/2013).

- (c) *Chandrakant Kashinath Dike and others vs. Smt. Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.*
- (d) *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.*
- (e) *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314.*
- (f) *Dipak Laxman Gadekar and another vs. Trimbak Ravji Shirsath, Writ Petition No.11593/2015 (Aurangabad Bench) decided on 23.08.2017.*
- (g) *Dhondiram Nivrutti Pawar through L.Rs. vs. Laxman Khashaba Pawar and others, Writ Petition No.1196/2017 (Principal Seat Bombay) decided on 23.01.2018.*
- (h) *Sanjay Balasaheb Khandare vs. Vivek Surinder Mahajan and another, Writ Petition No.4958/208 (Aurangabad Bench) decided on 29.01.2018.*
- (i) *Shantabai Pralhad Anantwad Vs. Tahsildar, Tahsil Office Latur and others (WP No.1096/2018 dated 31/01/2018).*

- (j) *Mahadeo Vaijanath Bembalge vs. Chandrakala Ramesh Athane, Writ Petition No.832/2018 (Aurangabad Bench) decided on 04.06.2018.*
- (k) *Baburao Jairam Borade vs. Fakira Tukaram Lanekar, Writ Petition No.1743/2018 decided on 28.08.2018 (Aurangabad Bench).*
- (l) *Sarjerao Nathu Bangar and others vs. Namdeo Keru Bangar and others, Writ Petition No.13441/2019 decided on 07.11.2019 (Aurangabad Bench).*

6 In view of the above, this Writ Petition is partly allowed. The impugned order dated 29.03.2018 is quashed and set aside and the application exhibit 37 stands rejected. By the consent of the parties, the application exhibit 79 filed by the defendants on 03.08.2018 seeking appointment of a court commissioner before commencing the recording of evidence, shall also stands disposed off. The Trial Court would note the same.

7 After the recording of oral evidence is concluded, if any of the litigating parties files an application for seeking appointment of a court commissioner, the Trial Court would consider the same on it's own merits and in the light of the oral and documentary evidence available on record.