

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.884 OF 2022

1. Vijaysing S/o. Nathesing Rajput,
Age 69 years, Occu. Agri.,
R/o. "Sakuba" Niwas,
Loknete Amadar Swargiya Thansing
Jibhau Chowk, Shindkheda, Dist. Dhule
 2. Pramod S/o. Bhika Gurav,
Age 45 years, Occu. Social worker,
R/o. Gurav Galli, Shindkheda,
Dist. Dhule
- .. Petitioners

Versus

1. Agriculture Produce Market Committee,
Dondaiche Branch, Shindkheda,
Dist. Dhule
Through its Secretary/Sabhapati
 2. S. Kumar Constructions Company, Amalner,
Opp. to Vijay Maruti Temple,
Dhule Road, Amalner, Dist. Jalgaon
 3. Assistant Engineer Class-I,
Sub-Division Z.P. Bandhakam,
Panchayat Samiti Premises,
Shindkheda, Dist. Dhule
- .. Respondents

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Mr. B. R. Waramaa, Advocate for Petitioners

Mr. S. P. Brahme, Advocate for Respondent No.1

Mr. A. R. Syed, Advocate holding for Mr. M. S. Shah, Advocate for
Respondent No.2

Mr. U. S. Patil, Advocate for Respondent No.3

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 04-03-2022

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
the consent of the parties.

2. This petition challenges the order passed by the learned Civil Judge, Junior Division, Shindkheda, below Exhibit-163 in Regular Civil Suit No. 102 of 2012, dated 16.12.2021, thereby rejecting the Application filed by the petitioners, under Order XXVI, Rule 10 of the Code of Civil Procedure, 1908 ("CPC"), for appointment of Court Commissioner.

3. The petitioners-plaintiffs filed the said suit in representative capacity for permanent injunction that, the respondents-defendants should be prevented from raising illegal construction of shopping complex. Further prayer is made that, for bringing correct position of the spot, a Cadesteral Surveyor be appointed as a Court-Commissioner.

. Application (Exhibit-9) is filed by the petitioners contending that, the defendants are raising construction, which is encroachment on the State Highway No. 66 Shindkheda-Varul-Dondaiche road, which is in contravention on the rules, therefore, a Cadesteral Surveyor be appointed for measurement of the disputed property.

. That application came to be allowed by the trial Court with the direction to the Cadesteral Surveyor to carry out the measurement of disputed land and submit a report and map to the Court. The said direction was carried out by the Cadesteral Surveyor. Thereafter, the evidence of Cadesteral Surveyor was

recorded, wherein, in the cross-examination, he has given vital admission to the effect that, no notices were given to the plaintiffs and defendants. He has measured City Survey No. 1753 (disputed property). However, the map of State Highway No. 66 and its record is not available in his office. Similarly, the map and record of Shindhkheda-Varul road is not available in the office. He is not aware that, as to when the said road was constructed and when its measurement was carried out, and what is the length and width of the said road. When he went for measurement, he did not have the map and record of Shindhkheda-Varul road. He did not requisition the map and the record of the said road from anybody.

. In view of the evidence so recorded, the plaintiffs preferred application (Exhibit-163) for appointment of Taluka Inspector of Land Records ("TILR"), Shindhkheda as a Court Commissioner, with a direction to him to measure the disputed property on the basis of map of Shindhkheda-Varul-Dondaicha State Highway No. 66, the distance of the disputed property from the said road and to ascertain as to whether the disputed construction is within 12 meters from the middle of the said State Highway. This application is rejected by the trial Court on the ground that, the plaintiffs are trying to collect evidence and trying to fill up lacuna in the evidence of Cadesteral Surveyor.

4. Heard rival submissions of the learned Advocate for the petitioners and the learned Advocates for the respondents.

5. It is a matter of record that, the Cadesteral Surveyor has not carried out proper measurement, which he was expected to do. Without having the map of the State Highway No. 66 and the map and record of Road No. 45, he simply appears to have measured the disputed property; whereas, it was expected of him to take into consideration the pleadings of the plaintiffs, that the disputed construction is being carried out as an encroachment on the public road and it is within 12 meters from the middle of the road. The Cadesteral Surveyor ought to have taken along with him the map and the record of both the roads and then ought to have carried out the measurement. In view of the admissions given by the Cadesteral Surveyor in the cross-examination, it is clear that the true and correct factual position has not come before the Court.

. The very purpose for which the Cadesteral Surveyor was appointed as Court Commissioner is frustrated, because of lapses of the Cadesteral Surveyor while carrying out the measurement. In that view of the matter, the trial Court ought to have allowed the application filed by plaintiffs. The trial Court has erroneously held that so as to remove lacuna in the evidence of the Cadesteral Surveyor, the present application is filed.

6. To decide the controversy between the parties, it is necessary to appoint the T.I.L.R. so as to bring correct and factual position before the trial Court, which would help the Court to resolve the dispute between the parties.

7. The ratio in *Vijay Shrawan Shende and others Versus State of Maharashtra and others, 2009(5) Mh.L.J. 279* supports the case of petitioners.

8. The impugned order, therefore, is unsustainable in law and facts of the case, and the same is liable to be quashed and set aside.

9. In the result, Writ petition is allowed in terms of prayer clause 'A'.

10. The impugned order passed by the learned Civil Judge, Junior Division, Shindkheda, below Exhibit-163 in Regular Civil Suit No. 102 of 2012, dated 16.12.2021, is hereby quashed and set aside.

11. The application (Exhibit-163) in Regular Civil Suit No. 102 of 2012 is allowed in terms of prayers made therein.

12. The T.I.L.R. shall carry out the measurement and submit the report within a period of four weeks from the date of receipt of this order.

13. Rule is made absolute in above terms with no order as to costs.

(NITIN B. SURYAWANSHI)
JUDGE

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