

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8896 OF 2014

1. Waman s/o Daulat Mali
Age-74 years, Occu- Agri.,
Through its Power of Attorney
Suryabhan Waman Mali,
Age-43 years, Occ- Agri.,
R/o. Savalivihir (Kh) Tq. Rahata,
Dist. Ahmednagar.
[Legal Heirs of Deceased Petitioner No. 1]
- 1.1 Kaushala Waman Mali,
Age-80 years, Occ- Household.
- 1.2 Uttam Waman Mali,
Age-57 years, Occ- Agri.,
- 1.3 Bhagitra Sopan Pawar
Age- 55 Years, Occ- Household.
- 1.4 Suryabhan Waman Mali
Age-50 years, Occ- Agri.,
- 1.5 Machhindra Waman Mali
Age- 48 years, Occ- Agri.,
- 1.6 Gorakh Waman Mali
Age- 46 years, Occ- Agri,
- 1.7 Hira Raju Gaikwad
Age-44 Years, Occ- Household.
All R/o. Savalivihir (Kh)
Tq. Rahata, Dist. Ahmednagar.

2. Sopan Narhari Jamdhade
Age- 64 years, Occ- Agri.,

...**PETITIONERS**
[Orig. Defendants]

VERSUS

1. Chandrakant Laxman Jamdhade
Age- 62 years, Occu- Agri.,
2. Prakash Laxman Jamdhade
Age- 59 years, Occ- Agri.,
3. Dilip Laxman Jamdhade
Age-49 years, Occu- Agri.,
All R/o. Savali Vihir Kd.,
Tq. Rahata, Dist. Ahmednagar.

...**RESPONDENTS**
[Orig. Plaintiffs]

.....
Mr. Ajay G. Talhar, Advocate for Petitioners.
Mr. C.K. Shinde, Advocate for Respondent No. 1 to 3.

.....
[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 24th FEBRUARY, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard with the consent of parties.
2. This petition challenges order dated 09.07.2014 passed by the District Judge-1, Kopergaon, below Exhibit-13, in Regular Civil Appeal No. 15/2011, thereby appointing T.I.L.R., as a Court Commissioner.

3. Regular Civil Suit No. 222/2007 was filed by Respondent-original plaintiff for possession of the encroached land by the Petitioner/Defendant No. 1. In the said suit Cadestal Surveyor was examined, however, the Trial Court has come to a conclusion that Cadestal Surveyor has not properly conducted the measurement and it is not clear that whether the defendants received notice about measurement carried out by the Cadestal Surveyor. It is not clear from the report of Cadestal Surveyor how much is the encroachment. The Trial Court, therefore, dismissed the suit.

4. Being aggrieved, the Respondents preferred Regular Civil Appeal No. 15/2011.

5. In the appeal, Respondent filed application Exhibit-5 seeking appointment of T.I.L.R. as a Court Commissioner, with a direction to him to carry out measurement of the suit property and submit his report. By order dated 13.01.2012 the said application was kept along with main appeal by consent.

6. The Respondent/appellant filed application Exhibit-13 contending that the suit was filed by him for possession of encroached portion of suit property. If the measurement of the suit property is carried out by T.I.L.R., the factual position of the suit property would come before the Court and dispute can be resolved. Hence, he prayed for appointing T.I.L.R./D.I.L.R., Ahmednagar for carrying out measurement of the suit property and for demarcation and fixation of boundaries. The said application was resisted by Petitioners/Respondents. The appellate Court allowed the application. Hence, the present petition.

7. Heard rival submissions of learned advocate for the Petitioner and learned advocate for Respondents.

8. It is not in dispute that the suit filed by Respondents for recovery of encroached portion of suit property is based on the Cadestal Surveyor's report. The Trial Court has held that the Cadestal Surveyor has not properly carried out the measurements and it is not clear from the report as to how much portion of the suit property is

encroached. While carrying the measurement by Cadestal Surveyor notices were not served on the defendants. The Trial Court therefore, dismissed the suit.

9. The learned advocate for the Petitioner assailed the impugned order submitting that the appointment of Court Commissioner amounts to collection of evidence. When earlier application was by consent kept along with main appeal, the appellate Court ought not to have allowed the application Exhibit-13. The learned advocate for the Petitioner relied upon the decision in the case of Shaikh Isak Shaikh Amir Vs. State of Maharashtra & Anr¹, Venkatachlapathi @ Boopathi Vs. P.J. Venkataraman² and Nitya Nand Ghosh & Ors. Vs. Smt. Alo Ghosh & Ors³.

10. The learned advocate for the Respondents supported the impugned order. The learned advocate for Respondents in support of his submissions placed reliance on the decision of Bombay High Court in the case of Girish Vasantrao Bhoyar & Anr. Vs. Nimbaji Warluji

1 2010 DGLS (AHC) 1970

2 CRP (NPD) No. 4370/2011 & M.P. No. 1/2011

3 AIR 1999 Cal 89

Bambal⁴. The ration of this ruling supports the case of respondents.

11. It is settled legal position that whenever there is dispute of demarcation of disputed land and in order to determine whether there is encroachment, it is always desirable to get measurement of the land encroached upon. The Trial Court when found that the Cadestal Surveyor had not properly carried out the measurements, it ought to have issued directions under Clause (3) Rule 10 Order XXVI to the Cadestal Surveyor for carrying out proper measurement and demarcate the encroached portion. The First Appellate Court being Court of facts is justified in directing the appointment of Court Commissioner, so as to resolve the dispute in hand. If measurement is carried out by T.I.L.R., in terms of the order impugned in the present petition, no prejudice is likely to be caused to the Petitioner.

12. The Appellate Court has allowed application Exhibit-13 on the ground that the the suit has been dismissed on the basis of infirmities and latches of Cadestal Surveyor to measure the land. The dispute is regarding encroachment. The appellate Court has held that

4 2009 BCI 313

the surveyor has not mentioned encroached area by each defendants. Therefore, with a view to give proper opportunity to the plaintiff to prove his claim and also to the defendants to have proper measurement, T.I.L.R. needs to be appointed as Surveyor to have nimtana. Therefore, the appellate Court rightly allowed the application Exhibit-13. In the facts of the present case, this Court is of the view that the Appellate Court was justified in appointing T.I.L.R., as a Court Commissioner.

13. In the case of Shaikh Isak (*supra*), the issue before the coordinate bench of this Court was about the appointment of Commissioner during the trial and it is held that if the evidence is already recorded and written arguments are filed, the possibility of filing application for appointment of Commissioner to fill up the lacunae cannot be ruled out. Such are not the facts of the present case.

14. In the case of Venkatachlapathi @ Boopathi (*supra*), the facts were that the application for appointment of Commissioner was not filed during the trial and the suit was merely for injunction. At the

appellate stage, the Petitioner filed application seeking appointment of an advocate as a Court Commissioner only for noting down physical features of the suit property. In these facts, the Madras High Court ruled that it was not proper to grant application since the suit was only for injunction and application for appointment of Commissioner was not filed during the trial. This ruling does not help the case of the Petitioner.

15. In the case of Nitya Nand Ghosh (*supra*), the Calcutta High Court was considering the case where the application filed for appointment of Commissioner was allowed, when first application was decided on merits and rejected. The second application was allowed though it was not maintainable and was barred by *res judicata*. In the case in hand, the earlier application filed by the respondents was only kept by consent along with the appeal and it was not decided on merits. In that view of the matter, this ruling is not applicable to the facts of the present case.

16. In the light of aforesaid discussion, there is no merit in the writ petition and the same stands dismissed.

17. Rule is discharged.

18. Taking into consideration the fact that the appeal is of year 2011, the hearing of appeal is expedited.

[NITIN B. SURYAWANSHI]
JUDGE