

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
NAGPUR BENCH, AT NAGPUR.**

**Writ Petition No. 859 of 2022**

- (1) Kasabai @ Shantabai Sukhadev Sawang  
Aged about 60 years, Occu : Agriculturist,
- (2) Sukhadeo S/o Mari Sawang,  
Aged about 65 years, Occu : Agriculturist,
- (3) Sanjay S/o Sukhadev Sawang,  
Aged about 41 years, Occu : Agriculturist,  
All R/o. at Panchala, Post, Bawanber,  
Tq. Sangrampur, Distt. Buldhana.  
Pin – 444204, Mobile no. - 9921100764.

... Petitioners

... Versus ...

Kishor Mahadev Tayade,  
Aged about 40 years, Occu : Agriculturist,  
R/o. Panchala, Tq. Sangrampur,  
Distt. Buldhana.

... Respondent

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Smt. S. W. Deshpande, Advocate for the petitioners  
Mr. S. B. Gandhe, Advocate for the respondent  
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**CORAM : ROHIT B. DEO, J.**

**DATED : 24-3-2022**

**ORAL JUDGMENT**

Rule. Rule made returnable forthwith. The petition is heard finally with consent of the learned counsel appearing for the parties.

2. The petitioners are the respondents in Regular Civil Appeal 31/2019 which is preferred by the respondent herein assailing

the judgment and decree dated 17-4-2019 rendered by Civil Judge Junior Division, Sangrampur in Regular Civil Suit 10/2017.

3. The bone of contention is nature of the right of way which the original plaintiff has through the field of the defendants. According to the original plaintiff, the right extends to use of bullock-carts while the original defendants assert that what is available is only a foot way.

4. On the basis of the evidence on record, the trial Court dismissed the suit and in appeal, an application, which appears to have been made invoking the provisions of Order XXVI Rule 9 of the Code of Civil Procedure (Code) for appointment of Court Commissioner to inspect the spot, is allowed by order dated 16-12-2021.

5. The learned counsel for the petitioner, Smt. Deshpande inter alia relying on the decision of this Court in *Maria Pereira and others Vs. Dolorosa Christina Rodrigues (D) thr. L.Rs. [2015(5) Mh.L.J. 577]* would argue that the learned trial Court having recorded a finding of fact on the basis of evidence on record, there was no occasion for the appellate Court to appoint Court Commissioner to inspect the spot. Smt. Deshpande would emphasize that the dispute was not pertaining to either boundary or encroachment as such and to establish the nature of the right of way, an expert is not necessary. Smt. Deshpande would further submits that in the absence of an application seeking permission

to adduce additional evidence under Order XLI Rule 27 of the Code, the appointment of Court Commissioner virtually permits the defendants to bring on record additional evidence since the report of the Court Commissioner will not be clarificatory or elucidation of the existing material.

6. While the learned counsel for the original plaintiff, relying on the decision of this Court in ***Bento Antonia Gomes alias Antonio Beno Gomes Vs. Rosario Salvador Carneiro and others [2014(4) Mh.L.J. 366]*** would support the order impugned, I am satisfied that the appellate Court committed an error in appointing Court Commissioner at the askance of the original defendants. Perusal of the order impugned reveals that having noted, the existence of the measurement map, Court Commissioner is appointed to inspect the spot without giving any reason as to why such appointment is necessary for just and effective decision. It does not appear from the order impugned, that the learned Judge has addressed the relevant issues. One issue would be whether the evidence on record is sufficient to decide the controversy. It is not even found by the appellate Court that appointment of Court Commissioner to inspect the spot shall throw clarificatory light on certain evidence on record. The order impugned further does not lay

the contours of the authority of the Commissioner and an omnibus mandate to inspect the spot is issued/given.

7. In my considered view, the learned appellate Court committed serious error in appointing Court Commissioner without recording a finding why such appointment was necessary to throw light on any particular piece of evidence or why the appointment was necessary for just decision. While the learned appellate Judge was alive to the legal position that Commissioner cannot be appointed to collect evidence, the effect of the order impugned is precisely that the Court Commissioner will as a fact collect evidence as regards the right of way. Such a course is impermissible.

8. The order impugned is set aside.

9. The petition is allowed.

10. It is, however, clarified that the observations are restricted to the consideration of issue of appointment of Commissioner. The defendants shall be free, if so advised, to take recourse to the provisions of Order XLI Rule 27 of the Code and if such an application is preferred, the same shall be considered on its own merits.