

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

Writ Petition No. 1348 of 2021

[Meghraj S/o Kaluramji Malani and ors. ..vs.. Dnyaneshwar S/o Govindrao Mhaske and ors.]

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mrs. Smita V. Taksande, Advocate for petitioners
Mr. S. G. Karmarkar, Advocate for respondent 1
Mr. K. B. Ambilwade, Advocate for respondent 3

CORAM : ROHIT B. DEO, J.

DATED : 13-1-2022

The petitioners are defendants 3 to 5 in Special Civil Suit 576/2013, and are aggrieved by the order dated 18-6-2019 rendered by 14th Joint Civil Judge (Sr.Dn.), Nagpur to the extent that the order of appointment of commissioner does not direct measurement and fixing boundaries.

2. The issue involved in the suit is whether the sale deed executed by defendants 1 and 2 in favour of defendants 3 to 5 of portion of the agricultural field is valid. According to the plaintiff, since a limited right was given to the defendant 1, to enjoy the property during her lifetime, and that possession was not given, further alienation by her is illegal and at any rate not binding on the owner/s.

3. During the pendency of the civil suit, defendants 3 and 5 applied for appointment of commissioner to measure the portion in their possession. The learned Judge referred to the order dated 20-10-2014 rendered on the application under Order XXXIX Rules (1) and (2) of the Code of Civil Procedure and observed it is already held that *prima facie* defendants 3 to 5 are in possession and, therefore, the application seeking temporary injunction is rejected.

4. The learned Judge then observed that admittedly, there is no partition effected and, therefore, the measurement would be unnecessary. Having so observed, the learned trial Judge nonetheless has appointed a Court Commissioner to make local inspection, record findings and observations as regards possession. This part of the order is not under challenge and I am not, therefore, required to make any further observation.

5. Defendants 2 to 5 are however, insisting that the order is illegal to the extent that measurement is not directed.

6. I see no reason why there should be, at this stage, a Court Commissioner to measure the land since

admittedly, the land in possession of the defendants 3 to 5 has not been carved out after partitioning the total land.

7. If after recording the evidence, the trial Court finds that such measurement is necessary to decide the issues arising in the suit, the trial Court shall revisit the issue, if an application is preferred by the defendants 3 to 5 at that stage.

8. Subject to the observations supra, the petition is dismissed.

JUDGE

wasnik