

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

WRIT PETITION NO. 438 OF 2022

Bhanudas Lahanu Anap
Since deceased through his L.Rs.
Rajendra Bhanudas Anap and others .. Petitioners

Versus

Tukaram Kushaba Anap
Since deceased through his L.Rs.
Subhadra Tukaram Anap and others .. Respondents

Shri Mahesh R. Sonawane, Advocate for the Petitioners.
Shri Kunal Kale, Advocate for the Respondent Nos. 1(B) to 1(D).

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 30TH JANUARY, 2023.

FINAL ORDER :

. By this petition, petitioners challenge the orders dated 12th October, 2021 passed below Exhibit 28 and Exhibit 32 in R.C.A. No. 69 of 2021, whereby the petitioners' application under Order XXVI Rule 9 read with Order XLI Rule 7 of the Code of Civil Procedure (for short "Code") seeking appointment of Court Commissioner to measure the suit land and demarcate the boundaries and to submit the report as well as the application under Order XLI Rule 27 of the Code to produce additional documents at the appellate stage came to be rejected.

2. R.C.S. No. 211 of 2007 was instituted by the petitioner/plaintiff for recovery of possession of encroached area of 25R land in Block No. 184 admeasuring 70R situated at village Malewadi-Kukrewadi, Satral, Tq. Rahata. During the pendency

of R.C.S. No. 211 of 2007, an application for appointment of Court Commissioner was preferred by the petitioner/plaintiff which was allowed, measurement was carried out by the Cadastral Surveyor and the report was submitted. The Trial Court after consideration of the evidence on record has dismissed the suit as well as the counter claim of the defendant Nos. 2 to 5, as against which R.C.A. No. 69 of 2016 has been preferred by the petitioner.

3. Learned counsel appearing for the petitioner submits that there is a finding of the Trial Court that there is no evidence on record that the notice was issued through R.P.A.D. to all the adjacent land holders of suit land and that there is no evidence on record that the alleged measurement has been carried out in the presence of all the parties of the suit. He would further point out from the judgment of the Trial Court dated 05.01.2016 that the Trial Court has come to a finding from the evidence of Cadastral Surveyor that order was given to him to measure the land Block No. 184 of village Songaon and not of village Satral and he has measured Block No. 184 of village Satral. Learned counsel for the petitioner submits that, considering this fact there being error in carrying out measurement by reason that the surveyor has measured block No. 184 of village Satral instead of village Songaon, so also there is discrepancy in the evidence of the Cadastral Surveyor in respect of measurement, therefore, there is necessity of appointment of Court Commissioner at the appellate stage. He further submits that additional documents which are sought to be produced are pertaining to the report of the Court Commissioner in as much as the documents are produced to show that there is one revenue

village namely Satral for the lands of Satral, Malewadi, Kukrewadi and Songaon, which are adjacent. He would urge that the documents are necessary to elucidate the matter in issue. In support of his submissions, the learned counsel has relied upon decisions of this Court in the case of **Bhupendra Bhagwat Turkar Vs. Homraj Zituji Meshram** reported in **2014(4) Mh. L. J. 231** and in the case of **Vasantrao Digambarrao Nalkande Vs. Raghunath Deolal Nalkande** reported in **2016(5) All MR 349**.

4. *Per contra*, learned counsel for the respondents submits that it is clear from the evidence of the Cadastral Surveyor that the petitioner was present at the time of measurement. As far as submission of additional documents is concerned, he would submit that requirement of Order XLI Rule 27 of the Code has not been complied with.

5. I have considered the rival submissions of the parties.

6. The application for appointment of Court Commissioner at the appellate stage has been preferred by the petitioner for the reason that the Trial Court has dismissed the suit by holding that there is no evidence on record that measurement has been carried out in presence of the parties and that the Cadastral Surveyor has admitted that he has measured Block No. 184 of village Songaon. In the present case, the suit is for possession of the encroached portion and the Court Commissioner came to be appointed at the instance of the petitioner. The learned counsel for the petitioner during his submissions has submitted that the measurement report in fact

shows the encroachment and the Trial Court has misdirected itself in dismissing the suit. He would further submit that correct land has been measured. Considering the submissions made at the bar, it is not necessary for appointment of Court Commissioner for carrying out fresh measurement, which is in the nature of production of additional evidence at the appellate stage. On the basis of the report of the Cadastral Surveyor, the Petitioner can advance submissions on the correctness of the finding of the measurement map.

7. As regards the production of additional evidence for the purpose of showing revenue village is concerned, it is petitioner's own submission that the correct land has been measured, although there is an error only in the description, in my opinion, same can be pointed out to the Appellate Court at the time of arguments. The other aspect which is required to be considered is that the petitioner is seeking production of additional evidence at the appellate stage and for that purpose provisions of Order XLI Rule 27 of the Code are required to be followed. Perusal of the application preferred by the petitioner for leading additional evidence does not even contain a bare averment that this additional evidence, which the petitioner is now seeking, in spite of due diligence could not be produced at the time of decision by the Trial Court. On the basis of findings of the Trial Court, the petitioner has to argue the appeal and point out the perversity in those findings and for that purpose it is not necessary for production of additional evidence which can be permitted only in the contingency which is contemplated under the provisions of Order XLI Rule 27 of the Code.

8. As far as the decisions which are relied upon by the learned counsel for the petitioner is concerned, the decision in the case of **Bhupendra Bhagwat Turkar Vs. Homraj Zituji Meshram** (supra) reiterates the position as far as appointment of Court Commissioner during the trial is concerned and is not applicable to the facts of the present case. The decision in the case of **Vasantrao Digambarrao Nalkande Vs. Raghunath Deolal Nalkande** (supra) was rendered in second appeal wherein this Court after considering the defects in the procedure of preparing the map had dismissed the matter and it was observed that instead of dismissing the matter, the Appellate Court could have remanded the matter back to the Trial Court. The decision in the case of **Vasantrao Digambarrao Nalkande Vs. Raghunath Deolal Nalkande** (supra) would assist the case of the petitioner during his arguments before the Appellate Court, but not in the matter under Order XLI Rule 27 of the Code.

9. For the reasons set out above, there is no merit in the writ petition. The writ petition is devoid of merits and same stands dismissed. There shall be no order as to costs.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23