

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

WRIT PETITION NO.11963 OF 2016

**DNYANESHWAR SAHAKARI SAKHAR KARKHANA LTD. THROUGH ITS
GENERAL MANAGER, AHMEDNAGAR**

VERSUS

**DHONDIRAM S/O NAMDEV MISAL (DIED) THROUGH LRS.
BALASAHEB S/O DHONDIRAM MISAL AND OTHERS**

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Advocate for Petitioner : Mr. H.D. Deshmukh
Advocate for Respondent Nos.1(a) to 1(e), 3, 4 & 5 : Mr. Shubham
Jaybhar, Advocate h/f Mr. D.R. Jaybhar
Advocate for Respondent No.13 : Mr. A.M. Gaikwad

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 13th MARCH, 2023

PER COURT :

1. Petitioner is aggrieved by the order dated 17/10/2016, passed below Exhibit-67 in R.C.S. No.48/2013 and order dated 21/11/2016, passed in review of the order below Exhibit-67 in R.C.S. No.48/2013, by the learned Civil Judge, Senior Division, Newasa.

2. The plaintiff/respondent filed application for appointment of Court Commissioner under Order 26 Rule 9 contending that the suit property bearing Gut No.321 was originally Survey No.143. Plaintiff is owner and possessor of the suit property and some of the portion of suit property is utilized in the canal and 3H 80R land is in possession of the plaintiff. He,

therefore, prays for appointment of Court Commissioner for measurement of land and fixing of boundaries.

3. Said application was opposed by defendant Nos.10, 12 and 14. Trial Court allowed the application and the review application filed by the petitioner is also rejected. Hence, the present petition.

4. Heard learned advocate for petitioner, learned advocate for respondent Nos.1(a) to 1(e), 3, 4 & 5 and learned advocate for respondent No.13. Perused the documents placed on record.

5. Learned advocate for petitioner submits that in the plaint of the original plaintiffs/respondents, prayer clause 'क' is for fixing of the boundaries and measurement of suit property, and for removal of encroachment, if any, by defendant Nos.7 to 14. He, therefore, submits that the final prayer is granted by the trial Court by allowing application Exhibit-67, which is not permissible in view of the settled legal position of law. In support of his submissions, he relied on *Dnyandeo Vithal Salke and Others Vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314* and *Sanjay s/o Namdeo Khandare Vs. Sahebrao s/o Kachru Khandare and Others, 2001 (2) Mh.L.J. 959*.

6. Learned advocate for respondent Nos.1(a) to 1(e), 3, 4

& 5, on the other hand, supported the impugned order submitting that appointment of Court Commissioner will help the trial Court to arrive at right conclusion. In support of his submission he relied on ***Sulemankhan Mumtajkhan and Others Vs. Bhagirathibai Digamber Asalmol and Another, 2014 (4) Mh.L.J. 250.***

7. In ***Sanjay s/o Namdeo Khandare*** (supra), the learned Single Judge of this Court has held that Court Commissioner was appointed thereby directing him to visit and inspect the spot being suit field and to submit report regarding actual possession of the suit field. This amounts to collection of evidence. In ***Dnyandeo Vithal Salke*** (supra) by following ratio in ***Sanjay s/o Namdeo Khandare*** (supra) same view is adopted.

8. In the present case, it is a fact that by prayer clause 'क' plaintiffs have prayed for measurement, fixing of boundaries and removal of encroachment made by defendants and possession of the encroached portion. Application for appointment of Court Commissioner was filed before commencement of evidence of the parties. Now, the recording of evidence has commenced and the matter is posted for cross-examination of plaintiffs. It is the settled legal position that in cases of boundaries' dispute and for removal of encroachment, appointment of Court Commissioner would help the trial Court to arrive at a proper decision, as is held in

***Sulemankhan Mumtajkhan* (supra):-**

"9. In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute."

9. In the light of above observations and considering the fact that recording of evidence of the parties is commenced, it would be appropriate in the facts of the present case to direct the trial Court to execute the order impugned in the present petition after parties lead their evidence.

10. In *Sanjay s/o Namdeo Khandare* (supra), trial Court had directed the Court Commissioner to submit report regarding actual possession of the suit field. Such are not the facts of the present case.

11. In the light of the aforesaid facts and observations, writ petition is disposed of.

(NITIN B. SURYAWANSHI, J.)