



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 3229 OF 2020

- | | | |
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| 1) Mangesh Raghupati Mohod
age : Major, Occu : Agriculturist

2) Umesh Raghupati Mohod
age : Major, Occu : Agriculturist
Both R/o Kural-Purna Po.Kural-Purna
Tq chandurbazar Distt. Amravati | } | .. Petitioner |
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Versus

- | | | |
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| 1) Narendra Bhimrao Mohod
age : Major, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati

2) Madhukar natthuji Wasankar
age : 50 years, Occu : Agriculturist
R/o Behind Sant Gadge Maharaj
Mandir Gadge Nagar, Amravati Tq
and Distt Amravati

3) Bhimrao Sankarrao Mohod
age : 70 years, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati

4) Rajendra Bhimrao Mohod
Age : 55 years, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati

5) Surendra Bhimrao Mohod
Age : 53 years, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati

6) Dnyanneshwar Narayanrao Kalkar
Age : 54 years, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati | } | .. Respondents |
|---|---|-----------------------|

7) Vishnupant Naraynrao Kalkar
Age : 56 years, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati

8) Vidyadhar Madhukarrao Mohod
Age : 47 years, Occu : Agriculturist
R/o Kural-Purna Po.Kural-Purna
Tq Chandurbazar Distt. Amravati

.. Respondents

Mr. Anand Deshpande, Advocate for petitioner.
None for the respondents.

CORAM : ABHAY J. MANTRI, JJ.

DATED : JANUARY 02, 2025

ORAL JUDGMENT

I heard the learned counsel for the petitioners at length.
None appears for the respondents though served.

(2) The petitioners/original plaintiffs challenged the order dated 24/01/2020 passed by the learned Ad-hoc District Judge-2 Achalpur, below Exh.29 in R.C.A. No.15/2009, thereby rejecting the petitioner's application for appointment of a Court Commissioner to conduct the joint measurement of plaintiffs' and defendants' fields.

Succinctly, the facts are as under.

(3) The petitioners are the original plaintiffs who filed a suit for declaration and recovery of possession of the encroached land. The suit was dismissed on 05/01/2009 as the plaintiffs failed to prove that

the defendants had carried out encroachment over the suit field.

(4) The said judgment and order have been challenged in Regular Civil Appeal No.15/2009 before the first appellate Court; the same is pending. During the pendency of the said appeal, on 14/01/2019, the petitioners moved the application under Order XXVI Rule 9 of the Civil Procedure Code (for Short-"CPC") for the appointment of a Court Commissioner for joint measurement of fields. After considering the facts of the case, the appellate Court rejected the said application. Being aggrieved by the said order, the petitioners preferred this writ petition.

(5) Learned Counsel for the petitioners vehemently contended that in view of the provisions of Order XLI Rule 33 of the CPC, the appellate Court is empowered to pass any order which ought to have been passed as the case may require. However, the appellate Court failed to exercise the jurisdiction vested in it and thereby erred in rejecting the application.

(6) He further contended that in view of the law laid down in **Jamir Khan s/o Amir Khan vs. Dharamchand s/o Roopchand Sawala and others reported in 2018 (1) Mh.L.J. 174**, the petitioners are entitled to appoint Court Commissioner to carry out the joint measurement of the fields in question. However, the learned appellate Court rejected the application, holding that if the Court

Commissioner is appointed, it will certainly amount to a collection of evidence. The learned Judge has not considered the settled position of law that for the purpose of identifying the boundaries of the suit property, the appointment of Court Commissioner is necessary. In fact, the learned appellate Court sou-motu ought to have exercised the said power to determine the controversy between the parties.

(7) He further canvassed that the learned trial Court has come to the conclusion that the measurement carried out by the Taluka Inspector of Land Records was not according to the procedure laid down in the Act and discarded the said measurement. Therefore, re-measurement of the suit property is necessary to decide the real controversy between the parties. As the petitioners have no option but to opt to appoint a Court Commissioner for joint measurement, he has submitted that passing of the order by the learned appellate Court is improper and contrary to the settled position of law, and therefore, the order is liable to be set aside.

(8) He further propounded that to curtail the multiplicity of litigations, it would be proper to permit the petitioners/plaintiffs to appoint a Court Commissioner to determine the controversy between the parties. However, the learned trial Court did not consider this aspect and the settled position of law and erred in rejecting the application. Therefore, he has prayed for allowing the petition by

quashing and setting aside the impugned order.

(9) To buttress his submissions, learned Counsel for the petitioners is relying on the following judgments :

- (a) **Jameer Khan** (supra) and pointed out paragraphs 17, 18 and 19;
- (b) **Sanjiv K. Simepuruskar v.s Dhaku Tukaram reported in 2023 SCC OnLine Bom 2230** and pointed out paragraphs 9, 10, 12 and 16;
- (c) **Kashinath s/o Ramkrishna Chopde vs. Purushottam Tulshiram Tekade and others reported in 2005(4) Mh. L. J. 471** and pointed out paragraphs 14 and 15; **and**
- (d) **Haryana Waqf Board vs. Shanti Sarup and others reported in (2008) 8 Supreme Court Cases 671** and pointed out paragraphs 4, 5, and 7.

And submitted that in view of the mandate laid down in the afore-cited judgments, it would be proper on the part of the learned appellate Court to appoint a Court Commissioner to conduct joint measurement of the fields instead of rejecting the same.

(10) I have appreciated the submissions of learned Counsel for the petitioners, perused the impugned order and record, as well as the judgments relied upon by the petitioners.

(11) At the outset, it appears that the petitioners are the original plaintiffs who filed a suit for declaration and recovery of possession of the encroached land. The suit was dismissed on

05/01/2009. Wherein the learned trial Court has categorically observed that although plaintiffs have examined the cadastral surveyor (PW-1) to prove encroachment over the suit fields, however, he failed to prove the same. The cadastral surveyor could not state who had encroached the land and how much area of land was in possession of them. Thus, the plaintiffs have failed to prove that the defendants have carried out encroachment over the suit field and therefore, dismissed the suit.

(12) It is pertinent to note that the petitioners filed the suit; therefore, it was incumbent upon them to prove that the defendants made encroachment over the suit fields by adducing cogent evidence. Though the petitioners examined the cadastral surveyor in support of their case, they failed to prove the encroachment over the suit property, and therefore, the suit was dismissed.

(13) It further appears that against the said judgment and order, the petitioners have preferred Regular Civil Appeal No.15/2009 before the appellate Court; the same is pending. During the pendency of the said appeal, on 14/01/2019, the petitioners moved the application under Order XXVI Rule 9 of the C.P.C. for the appointment of a Court Commissioner for joint measurement of fields, as the defendants have denied the accuracy of the measurement map and learned trial Court has also observed that "measurer has not measured the fields of the plaintiffs and defendants by following due procedure of the law."

(14) After considering the facts of the case, the appellate Court rejected the said application, holding that "the appointment of a Court Commissioner to measure the fields in dispute would amount to the reopening of the trial, and the same is not permissible and appropriate before the appellate Court." It is further observed that "no explanation is forthcoming on the part of the petitioners as to why they have not availed the opportunity of conducting joint measurement of the entire survey number before the trial Court. Therefore, the petitioners cannot take advantage of their own negligence." "It is a settled principle of law that a Court Commissioner would not be appointed to collect the evidence."

(15) Perused the judgment in **Jamir Khan** (supra) wherein the facts were that 'the first appellate court remanded the matter for re-measurement of the land in dispute by government surveyor, as the suit was dismissed on the count that measurement of the land was not found correct and proper. The said order was challenged before this Court. This Court upheld the said judgment and order, holding that "the first appellate Court has rightly sent the matter for re-trial, as entire controversy has to be decided again afresh." In the said case, the first appellate Court did not appoint the Court Commissioner but remanded the matter to the trial Court for re-trial.

(16) Similarly, in ***Sanjiv Simepuruskar*** (supra), the plaintiff therein had moved an application before the learned trial Court to appoint a Court Commissioner to determine the controversy between the parties and the said application was rejected. Therefore, considering the law laid down in the 'Surya Dev Rai' case, this Court held that to facilitate the progress of the suit, jurisdiction under Article 227 ought not to be declined and allowed the application and permitted the petitioner/original plaintiff to appoint a Court Commissioner.

(17) In the case of ***Kashinath*** (supra), the suit was filed for declaration that the suit site is owned by them and restrained the defendants from interfering with their possession over the suit site. The decree was drawn on the basis of the map annexed with the plaint. So, the question of the law involved in the appeal was 'whether the map which formed the part of the decree is admissible in evidence in view of Section 83 of the Indian Evidence Act and whether the decree passed by the trial Court based on the said map can be sustained in the law as the map did not appear to be accurate. Moreover, neither the City Surveyor nor any expert had been appointed for the purpose of local investigation under Order XXVI, Rule 9 of the CPC. Though the dimension of the property has been mentioned in the sale deed in the absence of evidence of the person who prepared the map, it is not possible to accept the said map. Therefore, in the second appeal, the judgments and decrees passed by the Courts below were set aside and

the matter was remanded back to the trial Court with a direction to appoint a Court Commissioner or Surveyor from the Office of the City Survey to carry out the measurement.

(18) In the case of **Haryana Waqf Board** (supra) before the trial Court, an application for the appointment of a Court Commissioner for the demarcation of the disputed land was filed. The same was rejected, which was challenged up to the Supreme Court, wherein the Hon'ble Apex Court held that the first appellate Court and High Court ought to have considered whether, in view of the nature of the dispute and the facts of the case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land and therefore, set aside the judgment and decree passed in the second appeal. The second appeal was restored to its original file.

(19) Notably, in the case at hand, the petitioners have not moved the application before the learned trial Court to appoint the Court Commissioner under Order XXVI Rule 9 of the CPC to measure the disputed lands, but the same was filed before the first appellate Court during the pendency of the appeal. This shows that the petitioners failed to avail the said remedy at the first instance before the trial Court, but after concluding the trial and failing to prove their case, they moved this application before the appellate Court. So also, it is not the case of the petitioners that they are claiming that the order

of the trial Court be set aside and the matter be remanded back to the learned trial Court for fresh consideration, as held in the case of **Jamir Khan** (supra). Thus, it reveals that facts in the afore-cited judgments and the case at hand are different, and therefore, the mandate laid down in the said judgments is not helpful to the petitioners in support of their case. In such circumstances, in my opinion, the law laid down in the afore-cited judgments is not helpful to the petitioners.

(20) On the contrary, it appears that the order passed by the learned appellate Court is well-reasoned. The petitioners failed to point out illegality and perversity in the said order. Hence, I do not find substance in the contention of the learned Counsel for the petitioners in that regard.

(21) In the above discussion and background, the petition seems bereft of merit. Hence, it stands dismissed. No order as to costs.

(22) As a sequel to the above, interim orders, if any, stand vacated.

(23) Inform the learned Trial Court accordingly.

[**ABHAY J. MANTRI, J.**]