

Yusuf Imam Sukiwale,
Aged – 43 years,
Occ. - Business/Agriculturist,
R/o. Mohta Mill Road, Jam
Mohalla, Gawlipura, Akola,
Tq. & Dist. Akola

// VERSUS //

- (1) **Sheikh Baddrudin Sheikh Babu Luluwala,**
Aged – 39 years, Occ. Business,
R/o. Gawlipura, Mankarna Plots, Akola
- (2) **Akola Municipal Corporation,**
Through Commissioner, AMC,
Akola, Tq. And Dist. Akola

.... RESPONDENT(S)

Shri V.B. Bhise, Advocate for Petitioner

Shri C.A. Joshi, Advocate for Respondent No. 1

Shri A.S. Deshpande, Advocate for Respondent No. 2

CORAM : M.S. JAWALKAR, J.

CLOSED FOR JUDGMENT ON :- JANUARY 14, 2025
JUDGMENT PRONOUNCED ON :- JANUARY 21, 2025

JUDGMENT:-

- (1) The present Petition is filed by the Petitioner challenging the orders dated 21/09/2022 and 15/03/2024 passed by the

learned 8th Joint Civil Judge Senior Division, Akola, whereby the Application filed by the Respondent No. 1 (original Plaintiff) for appointment of TILR as Court Commissioner to carry out measurement of suit land came to be allowed.

(2) The facts giving rise for filing of the present Writ Petition are as under:-

(3) The Respondent No. 2 (Defendant No. 1) has granted 40 ft x 80 ft. land out of Nazul Plot No. 8, Sheet No. 37/B vide Resolution No.8 of Special body meeting held on 19/08/2004. This property is in possession of the Plaintiff through his grandfather. It is the case of the Respondent No.1 (original Plaintiff) that the Petitioner is keeping an eye on the said plot, therefore, he acquired the adjoining Plot No. 9 of Sheet No. 37/B of Akola.

(4) In the year 2013, the Respondent No.1 (original Plaintiff) filed suit bearing Regular Civil Suit No. 145/2013 for permanent injunction before the Civil Judge Senior Division, Akola against the Petitioner. On 02/03/2016, the Petitioner appeared in the

said Suit and filed his written statement and resisted the claim of the Respondent No.1 (original Plaintiff). The learned Trial Court, by the order dated 23/10/2018, framed the issue in the said Suit at Exhibit 70. In pursuance of framing of issues, the Plaintiff failed to adduce his evidence. Therefore, the learned Trial Court, by the order dated 18/03/2019, dismissed the Suit in default. Subsequently, the said Suit came to be restored.

(5) Thereafter, on 17/07/2019, the Respondent No. 1 (original Plaintiff) moved an Application for appointment of TILR as a Commissioner for measurement of the Suit Property. According to the Petitioner, the learned Trial Court, without considering the contentions of the Petitioner in proper perspective, by the order dated 21/09/2022, allowed the said Application of the Respondent No. 1 (original Plaintiff). In pursuance of the said order, on 20/01/2023, the TILR, Akola came to the spot for conducting the measurement of the Suit Property. However, the Respondent No. 1 (Plaintiff) was not present on the said date, therefore, the concerned TILR could not measure the Suit Property and on 23/03/2023, TILR informed the said fact to the learned Trial Court. Thereafter, on 06/04/2023, the Respondent

No.1 again made similar Application before the learned Trial Court to appoint TILR as a Court Commissioner to measure the Suit Property on the count that, on 20/01/2023, the Respondent No.1 went to Ajmer, and therefore, he could not remain present at the time of measurement. Learned Trial Court passed the order dated 23/08/2023 wherein it is observed that the Application of the Respondent No. 1 (Plaintiff) is pending since 06/04/2023, he did not come to the Court till 4:00 pm and did not argue. On that day also, the Respondent No. 1 as well as his Counsel failed to remain present for hearing on the said Application.

(6) In view of that, on 22/10/2023, the Respondent No. 1 had again made similar Application to appoint the TILR as Court Commissioner to measure the Suit Property. Thereafter, the learned Trial Court, by the order dated 25/01/2024, without giving any opportunity of hearing to the Petitioner, proceeded without the say of the Petitioner. In pursuance of that, the learned Trial Court, by the order dated 15/03/2024, allowed the Application of the Respondent No. 1 (original Plaintiff) and directed the concerned Measurement Officer to measure the

land after due service of notice to all the parties. The aforesaid orders dated 21/09/2022 and 15/03/2024 passed by the learned Trial Court are subject matter of challenge in the present Writ petition.

(7) Learned Counsel for the Petitioner contended that the learned Trial Court erred in overlooking the legal aspect of the matter that the machinery of the Court cannot be used for the purpose of collecting evidence, in order to enable the Respondent No. 1 (Plaintiff) to prove the facts on the basis of which he is claiming the relief of injunction. It is further contended that the learned Trial Court failed to consider the other aspect of the matter that, it is not the case of the Respondent No. 1 that the Petitioner has made encroachment on their land. Therefore, the Respondent No.1 ought to have proved the same by the documentary evidence on record. The Suit filed by the Respondent No.1 is for simpliciter injunction, and hence, in such matters, it is settled principle of law that Court Commissioner cannot be appointed. Hence, on this ground, interference of this Court is required and aforesaid impugned orders are liable to be quashed and set aside.

(8) Learned Counsel for Petitioner, in support of his contentions, relied on the following citations:-

(1) Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017(3) Mh.L.J. 314; and

(2) Shantaram Dattatray Kekan and others vs. Bhausaheb Karbhari Kekan & another, 2023(2) Mh.L.J. 77.

(9) Learned Counsel for the Respondents supported the impugned orders passed by the learned Trial Court and submitted that the learned Trial Court has rightly taken into consideration the facts on record and passed appropriate orders which need to be confirmed.

(10) Learned Counsel for Respondent No. 2, in support of his contentions, relied on the unreported judgment of Bombay High Court, Bench at Aurangabad in Writ Petition No. 2749/2012 dated 04/03/2013 (**Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad and another**).

(11) Heard learned Counsel for the respective parties. Perused the impugned orders and considered the citations relied on by both the parties.

(12) There is no dispute over the fact that the Respondent No. 1 (original Plaintiff) filed the Suit bearing Regular Civil Suit No. 145/2013 for permanent injunction. The said Suit was once dismissed, however, it was restored. The Plaintiff moved an Application, thereafter, for appointment of TILR as a Commissioner for measurement of the Suit Property. The learned Trial Court passed an order on 21/09/2022 and allowed the said Application. However, on the day of the measurement, the Plaintiff was not present as he was at Ajmer at the relevant time. Though the concerned TILR was present, however, he could not measure the Suit Property due to the absence of the Plaintiff. The TILR reported the said fact to the learned Trial Court on 23/03/2023. The Plaintiff moved an Application on 06/04/2023 and informed that he was required to go to Ajmer on 20/01/2023, and therefore, he could not remain present at the time of measurement. The said Application came to be “filed” as Counsel for the Applicant was absent since 06/04/2023. The

Plaintiff moved third Application for direction to the TILR for measurement and submitted that he was absent as the matter was pending for say of the Defendant and the Application is rejected due to non-appearance of the Plaintiff. In the third Application, though the copy was served to the Defendant on 28/10/2023, no reply was filed till 25/01/2024 and ultimately, the order came to be passed to proceed without the say. Then, the matter was posted on 17/02/2024 for arguments. The arguments of both the parties were heard on 15/03/2024 and the learned Trial Court directed to measure the land after due service of notice to all the concerned.

(13) It is a matter of record that the first order directing the TILR to measure the land was not challenged by the Petitioner and allowed TILR to take steps. Therefore, he cannot raise objection on such ground that machinery of the Court cannot be used for the purpose of collecting the evidence in order to enable the Plaintiff to prove the facts on the basis of which he is claiming the relief of injunction. It is contended that the orders passed by the learned Trial Court are cryptic and unreasoned and the same are also passed without giving any opportunity of

hearing to the Petitioner, however, the Roznama shows otherwise. In spite of opportunities granted, no say was filed by the Petitioner for around four dates. Thereafter, the matter was fixed for arguments on Exhibit 81. It appears that on 15/03/2024, Counsel for the Plaintiff as well as the Petitioner was present and the arguments were heard on Exhibit 81. The order came to be passed whereby the measurer was directed to measure the land after giving due notice.

(14) Learned Counsel for the Petitioner relied on **Dnyandeo Vithal Salke & Shantaram Dattatray Kekan (supra)**. In **Shantaram Kekan (supra)**, it is held that appointment of Taluka Inspector of Land Records to submit report on actual possession amounts to collection of evidence. It is held that the Plaintiffs have not adduced evidence in support of their claim that the land has been encroached by the Defendants, before that Application for measurement, through Court Commissioner, was filed. It is further held that in such peculiar facts and circumstances of the case, the appointment of Court Commissioner for measurement of the land and fixation of boundaries before the Plaintiffs adduced their evidence is not

warranted. In the said matter, it is also observed by the Court that there is no hard and fast rule that Court Commissioner can be appointed only at a particular stage. If facts of a particular case requires the Court to ascertain the physical status of land, the Court's power to appoint Court Commissioner, at any stage, is not circumscribed. It all depends upon the facts and circumstances of each case.

(15) Learned Counsel for the Respondent No. 2 relied on **Ramkrishna Santu Kakad (supra)** wherein the issues were also not framed by the learned Trial Court and at the threshold of hearing of the Suit, the Application filed by the Defendants for appointment of Court Commissioner was entertained by the learned Trial Court. In view of that, it was held that the stage of Proceedings for appointment of Court Commissioner is premature.

(16) In my considered opinion, the order dated 21/09/2022 passed below Exhibit 72 is a well reasoned order and it was the Court who thought it necessary to ascertain whether the Suit Property is Government land and used as road as alleged by the

Defendants or in exclusive possession of the Plaintiff, which can be ascertained only after locating it on the site. It is specifically observed that if the boundaries of the Suit Property are inspected, the fact in dispute can be resolved effectively. There is no dispute that this Application was moved after the issues were framed.

(17) In view of the reasons given in the order below Exhibit 72, I do not see any infirmity either in the order dated 21/09/2022 or in the order dated 15/03/2024. As such, there is no substance in the contention of the Petitioner that no opportunity of hearing was granted to him. The order dated 15/03/2024 passed by the learned Trial Court is nothing but continuation of the order dated 21/09/2022. The reasons for appointment of such TILR are already given in the order dated 21/09/2022 below Exhibit 72. The said order is not challenged by the Petitioner till the TILR went to the spot to carry out the measurement. The said order dated 21/09/2022 is challenged by the Petitioner along with the order dated 15/03/2024 in the present Writ Petition.

(18) It is clear from the record that due opportunity was already granted to the Petitioner to file his say. Moreover, his Counsel was present on the date when the arguments were heard. In my considered opinion, the Petition is devoid of any merit and the same is liable to be dismissed. However, this fact cannot be ignored that the Plaintiff is not diligent in pursuing his matter.

(19) Accordingly, the Writ Petition stands **dismissed**. Pending Application(s), if any, stand(s) **disposed of**. Considering the conduct of the Respondent No. 1 (Plaintiff) in not pursuing his matter diligently, he shall pay costs of Rs. 5,000/- to the Petitioner within a period of two weeks from today.

(20) The learned Trial Court is hereby directed not to proceed with the matter unless the costs, as directed by this Court, is paid to the Petitioner by the Plaintiff.

(M.S. JAWALKAR, J.)