

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

WRIT PETITION NO. 2208 OF 2015

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1. Kashinath Babu Bhand,
age 80 years, Occ. Nil.
2. Ashok Kashinath Bhand,
age 42 years, Occ. Service.
3. Bhaskar Kashinath Bhand,
age 40 years, Occ. Agri.
4. Shivaji Dagdu Misal,
age 56 years, Occ. Agri.
5. Bhagabai Ashok Veerkar,
age 57 years, Occ. Household.
6. Smt. Latabai Ramesh Bhaskar,
age 52 years, Occ. Household,

All R/o Rahuri Bk, Tq. Rahuri,
Dist. Ahmednagar.

Petitioners
(orig. defendants)

VERSUS

Macchindra Haribhau Sarode,
age 54 years, Occ. Agri,
R/o Rahuri Bk (Sarode Vasti)
Tq. Rahuri, Dist. Ahmednagar.

Respondents.

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Advocate for Petitioners : Mr R R Karpe
Advocate for Respondent : Mr H V Dhage

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CORAM : V.K. JADHAV, J.
Dated: January 29, 2016

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ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. The petitioners are the original defendants filed an application at Exh.16 for appointment of the Court Commissioner with certain directions to the Court Commissioner to carry out the local inspection and to find out whether the road is in existence from City Survey No.3671 or any other road is available besides that. The learned Judge of the Trial Court, by order dated 17.8.2013, allowed the said application directing thereby the Deputy Superintendent of Land Records, Rahuri to carry out the local inspection of city survey numbers 32 to 47, 88 to 99, city survey numbers 87 and CTS No.3671. The Court appointed Commissioner i.e. Deputy Superintendent of Land Records (for short hereinafter referred to as "T.I.L.R.") further directed to find out whether there is old road passes through CTS No.3671 and, if such road is in existence, to find out whether any other road is also available. The learned Judge of the Trial Court has directed the T.I.L.R. to submit report in detail alongwih map. However, the petitioners/defendants received a letter issued by the Deputy Superintendents of Land Record, Rahuri. It appears from the contents of the

said letter that, the parties concerned are directed to deposit commission fees of Rs.1,12,000/- for measurement of the lands as detailed in the order passed by the learned judge of the trial court dated 17.8.2013. The petitioners/defendants have, therefore, filed an application Exh.56 requesting the court that the petitioners/defendants have only prayed for local investigation and the existence of the roads, even then, the Court appointed Commissioner Taluka Inspector of Land Records proposes to measure all the lands and accordingly directed the petitioners/defendants to pay the huge commission fees of Rs.1,12,000/-. The petitioners/defendants have prayed in the said application Exh.56 that, Court Commissioner may be directed to strictly follow the directions given in the order dated 17.8.2013 and submit the report alongwith map. The said application was strongly opposed by the respondent/plaintiff. The learned Civil Judge J.D., Rahuri, by impugned order dated 8.1.2015 rejected the application at Exh.56.

3. Learned counsel for the petitioners submits that, by way of filing an application Exh.16 the petitioners/defendants have requested the trial court to appoint the Court Commissioner for carrying out local investigation of certain lands as detailed in the application

with a further direction to the Court Commissioner to find out whether there is a old road in existence in City Survey No.3671, and, if it is in existence, whether there is any other way available. Learned counsel submits that in light of the said application, after hearing the parties, the learned Judge of the Trial Court has passed the order appointing the Taluka Inspector of Land Records, Rahuri as Court Commissioner and directed him to carry out the local investigation and find out the existence of the way in the said City Survey Numbers 3671 and, if, it is in existence, find out alternate way, and submit the report alongwith map before the Court. Learned counsel further submits that, instead of following said directions, the Court Commissioner has informed to the petitioners/defendants to deposit the commission fees of Rs.1,12,000/- which is calculated for carrying out the measurement of the lands as mentioned in the order dated 17.8.2013. Learned counsel further submits that, respondent/plaintiff has not challenged the said order dated 17.8.2013 and, it has attained the finality. Learned counsel further submits that, the Trial Court has erroneously rejected the application at exh.56.

4. Learned counsel for respondents submits that, local investigation cannot be done unless City Survey numbers 32

to 47, 89 to 99, City Survey Numbers 87 and CTS No.3671 are measured by the Court Commissioner. Learned counsel submits that, so far as existence of the road or any alternate road is concerned, the same cannot be done by the Court Commissioner. Learned counsel submits that, Court Commissioner cannot be appointed for collection of evidence. Learned counsel for respondent/plaintiff submits that, TILR is appointed as Court Commissioner and, therefore, he has to carry out the measurement as per the Rules and therefore, the petitioners are liable to deposit the Commission Fees as informed by the Court Commissioner. Learned counsel, thus, submits that, Trial Court has rightly rejected the application at Exh.56. Learned counsel for respondents, in order to substantiate his submissions placed reliance on following judgments.

- i] Yeshwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar reported in 2010 (2) ALL MR page 694.
- ii] Syed Mushtaque Ahmad s/o Syed Ismail and others. Vs.Syed Ashique Ali Khan s/o Haidar Ali, Reported in 2012 (1) ALL MR page 80.
- iii] Sanjay son of Namdeo Khandare Vs. Sahebrao s/o Kachru Khandare and others reported in 2001(1) Bom.C.R. 800.

5. On careful perusal of the order passed below Exh.16 dated 17.8.2013, it appears that, the Trial Court has given directions to the Court appointed Commissioner; may be a

Taluka Inspector of Land Record, to carry out local investigation of a particular city survey properties and to find out whether road is in existence in CTS No.3671 and, if it is in existence, whether any alternate road is also available. It also appears from the said order that, the Court Commissioner is directed to submit the report alongwith the map. In light of this order, there is no question of carrying out measurement of entire City Survey properties i.e. CTS No.32 to 47, 89 to 99, CTS No.87 and CTS No.3671. The same is unwarranted and uncalled for.

6. Learned counsel for respondent/plaintiff with the help of case laws as mentioned above, submitted that the Court Commissioner cannot be appointed for collection of the evidence. However, the respondent/plaintiff has not challenged the order passed by the Trial Court dated 17.8.2013 and the same is also not the subject matter of this writ petition. The learned Judge of the Trial Court ought to have considered the directions given by order dated 17.8.2013 below Exh.16. Consequently, the Trial Court has committed an error while rejecting the application Exh.56. The Court appointed Commissioner is bound to follow the directions given as per order of the trial court dated 17.8.2013 below Exh.16. Hence, following order is passed.

O R D E R

1. Writ Petition is hereby allowed.
2. The impugned order dated 8.1.2015 passed below Exh.56 in Regular Civil Suit No.438 of 2012 is hereby quashed and set aside.
3. Application at Exh.56 in Regular Civil Suit No.438 of 2012 is allowed in terms of prayer clauses therein.
4. Rule is made absolute in above terms.
5. Writ Petition accordingly disposed of. No costs.

sd/-

(V.K. JADHAV, J.)

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aaa/-