

**Order below Exh.32 in Regular Civil Appeal No.100 of 2024**  
**(Balu Nale & Ors. V/s. Rajaram Karande & Ors.)**

The appellants sought for appointment of Court Commissioner for measurement of the land Gat No.216/2.

**02. Submission of the Appellants(Defendants)-**

The plaintiffs had filed suit for division of the land Gat No.216/1 and 216/2 as per purchase deed dated 10.10.1977 through Court and for that purpose they prayed to sent the decree to the District Collector Satara. If there is any technical difficulty in division of the original Gat No.216 the plaintiffs prayed for partition of the land Gat No.216 through Court and for that purpose the decree be sent to the District Magistrate as per Section 54 of the C.P.C.

**03.** The suit was partly decreed. However, there is no sketch map in the purchase deed Exh. 59. The dispute is not regarding the purchase deed but it is in respect of the possession of the plaintiffs and defendants.

**04.** After purchase of the land, the defendants have upgraded it as irrigated land by lifting water, so also the plaintiffs are in their possession of their respective land. Therefore, it will be justifiable to partition the land as per possession of the plaintiffs and defendants.

**05.** It was necessary for the Trial Court appoint Court Commissioner to bring the cultivation of the plaintiffs and defendants as there is no averment regarding measurement of length and width in the purchased deed Exh.59. In this background the defendants had produced rough sketch map of the land but it is not accepted by the plaintiffs. The application Exh.26 for appointment of Court Commissioner was also rejected by the Ld. Trial Court. The plaintiffs have admitted share of the land Gat No.216 as per 7/12 extract but, the land Gat No.216 is not divided.

**06.** Therefore, to bring the actual situation on the record itself appointment of T.I.L.R. Tal. Phaltan, District Satara as Court Commissioner. If Court Commissioner is appointed it will assist the Court for decision of the dispute on merits and the appellants will not suffer any loss.

**07. Reply of the respondents (Plaintiffs) :**

The defendants have filed this application to collect evidence, therefore, Court Commissioner can not be appointed as prayed for.

**08.** The map is not available to show location of the land Gat No.216/1 and 216/2. The defendants are trying to measure the land Gat No.216/2 with ulterior motive though he has knowledge

of the said fact. Prayer of the defendant is prematured. The Court Commissioner can not be appointed as there is dispute in respect of possession. Moreover, the earlier application before the Ld. Trial Court was rejected and therefore, the plaintiffs prayed to reject the application as there is bar of the principle of res-judicata. Hence, prayed for rejection of the application.

09. I have heard Ld. advocates for the respective parties.

10. Description of the property under sale deed of the purchase deed dated 10.10.1977 is also not disputed. However, the dispute raised in the plaint about sell of the South-West of the land in South-West corner is raised after more than 33 years. In the reply to this application also, it is specifically contended that Court Commissioner can not be appointed as there is dispute in possession. Therefore, as submitted by the Ld. advocate for the defendants and even from the pleadings it is clear that there is dispute regarding possession of the land 216/2. In the above said background the Ld. Trial Court was required to appoint Court Commissioner as prayed for in the application Exh.26 before it.

11. The Ld. Trial Court had rejected the application Exh.26 on 03.04.2012 with the reasons that Court Commissioner can not be appointed to collect even on the basis of Judgment of Hon'ble Bombay High Court in the case of *Sanjay Namdev Khandare V/s.*

**Sahebrao Kachru Khandare, 2001(2) Mh.L.J.959.** The Ld. advocate for the defendants relied upon the judgment of Hon'ble High Court of Karnataka in the case of **Sri. H.V. Onkarappa V/s. Smt. Suvarnamma, 2023:KHC:34258.** In this case also, appointment of Court Commissioner was earlier sought for at the stage of before commencement of the evidence. Again later-on application for appointment of Court Commissioner was filed after completion of evidence. Therefore, the objection of the other side was rejected and appointment of Court Commissioner was upheld.

12. Ld. advocate for the defendants relied upon judgment of the Hon'ble Bombay High Court in the case **Yasin Gulab Shikalkar V/s. Maruti Nagnath Aware, (2023)4 BCR 403,** wherein it has been observed that there is no finality to the decision of the Trial Court yet as the appeal against itself judgment is still pending before the Appellate Court. In cases where Court Commissioners fails to present before the Court correct picture prevailing at the side, the Trial Court itself is empowered to appoint another Court Commissioner and there is no question of attracting the principle of res-judicata. Even the case of **Vachhalabai w/o Kundalik Gavane V/s. Chinkaji s/o Malhari Jadhav 2012(3) ALL M.R. 91** is referred in the said judgment for rejecting objection of res-judicata. In view of this latest view, as it was opined that correct picture prevailing at the side has to be brought on record.

Moreover, this application is in appeal and after complete evidence of the parties as held in the case of ***Onkarappa***, cited above. Hence, not prematured.

13. Ld. advocate for the plaintiffs relied upon judgment of Hon'ble Bombay High Court in the case of ***Dnyandeo Vithal Salke V/s. Dagdu Kadar Inamdar 2017(3) Mh.L.J. 314***. In this case there was simplicitor suit for injunction. Therefore, the appointment of Court Commissioner was not upheld by the Hon'ble High Court. However, in view of judgment in the case of ***Yasin***, cited above, appointment of the Court Commissioner as sought for will not only help the Court to visualize situation of the land on the spot but will also help in appreciation of the evidence already on the record.

14. Ld. advocate for the defendants relied upon judgment of the Hon'ble Bombay High Court (Panaji Bench) in the case of ***Mr. Santosh Savlo Kothawale V/s. Shri. Harishchandra Savlo Kothawale, 2022(7)ALL MR 273*** wherein possession of the property was claimed on the basis of sale deed and there was serious dispute regarding identity of the property. In the case in hand also the plaintiffs pleaded that property in the South-West direction of land Gat No.216 was sold there was averment of sale of the land mentioning it as "जिरायत पड जमीन" and it is further pleaded that in the year 1981 the land was purchased in the

name of the defendants by calling it by name as "रयतावा सरकारी लिफ्ट बागायत जमीन". As per contention of the defendants they have upgraded the land in their possession since purchased but with the help of pleading in the plaint the plaintiffs are trying to grab their irrigated land, it can not be said that during more than 33 years the defendants would have kept their land as barran.

**15.** The disputed sale deed is of dated 10.10.1977. The plaintiffs had filed the suit on dated 07.06.2011 i.e. after more than 33 years. It is not at all case of the plaintiffs that they were and are not in possession of the land went in their share out of Gat No.216. In the plaint itself there are specific averment that the plaintiffs are in possession of the land having subdivision numbers in plaint para 1A) i.e.216/1/1, 216/1/1/1, 216/1/2, 216/1/3 and 216/1/4. Division of Gat No. 216/1 is not possible without division of 216 as 216/1 and 216/2.

**16.** It is objected in the reply that there is no availability of the map of Gat No.216 in the office of Deputy Superintendent of the land revenue with divisions and particularly showing the location of Gat No.216/1 and Gat No.216/2. Had there been any such situation there could not be divisions of the said land of the said spot division as pleaded and shown in the plaint. If it is so the revenue officer of the T.I.L.R. have to verify as to how further sub-division of the land 216/1 and 216/2 were effected.

Consequently, the T.I.L.R. and certainly as per the record available in his office or the office of Deputy Superintendent of the land revenue and even at the time local inspection he has to verify the actual possession of the parties and to demarcate the same along with the boundary of their actual possession and subdivisions of the land Gat No.216/1 within collective boundaries as described in the plaint of the said land and the land described in the purchase deed dated 10.10.1977.

17. After giving final consideration to the above said legal settled position applicable to the case in hand I am of the opinion that appointment of Court Commissioner as sought for is necessary for the reasons mentioned above. Hence, I pass the following order.

### **ORDER**

1. Application Exh. 32 is allowed.
2. T.I.L.R Tal. Phaltan, District Satara is hereby appointed to carry out measurement of the original land situated at Mouje Jawali, Tal. Phaltan, District Satara survey no. 216 showing the location of the land Gat No.216/1 within collective four boundaries as described in the plaint and 216/2 and actual possession by particularly pointing out possession of the plaintiffs and the defendants on the spot, respectively, by particular demarcation and also with the help of record available with him.

3. The appellants (Defendants) to bear the fees of measurement/Court Commissioner as per rules after verifying the said amount in the office of the T.I.L.R. The defendants would be entitled to recover half of the commission fees in the decree.

4. The Court Commissioner is requested to carry out measurement after due notices to the plaintiffs and defendants, within 3 months from the deposit of fees of Court Commission.

5. Issue writ accordingly.

**Phaltan.**  
**Date: 19.04.2025.**

**(Pravin V. Chatur)**  
**District Judge-1, Phaltan**