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

WRIT PETITION NO.538 OF 2015

- 1 Shri Ganesh Popatlal Gugale
Age : 40 years, Occu. Agriculture,
R/o At Post Bhangaon, Taluka Shrigonda,
District Ahmednagar.
- 2 Sau. Prajakta Prafulla Mehta
Age : 49 years, Occu. Agriculture
R/o. Kalkai Chowk, Shrigonda,
Taluka Shrigonda, Dist. Ahmednagar.
- 3 Prafula Shantilal Mehta,
Age : 56 years, Occu. Agriculture,
R/o. Kalkai Chowk, Shrigonda,
Taluka Shrigonda, Dist. Ahmednagar.
- 4 Shri Hemant Navinchand Gugale,
Age : 44 years, Occu. Agriculture,
R/o. At Post Bhangaon,
Taluka Shrigonda, District Ahmednagar.
...Petitioners

Versus

Ashok Mahadu Sidankar
Age : 64 years, Occu. Agriculture,
R/o. Kalkai Chowk,
Taluka Shrigonda, District Ahmednagar.
...Respondent
...

**WITH
WRIT PETITION NO. 539 OF 2015**

- 1 Shri Ganesh Popatlal Gugale
Age : 40 years, Occu. Agriculture,
R/o At Post Bhangaon, Taluka Shrigonda,
District Ahmednagar.

(2)

- 2 Sau. Prajakta Prafulla Mehta
 Age : 49 years, Occu. Agriculture
 R/o. Kalkai Chowk, Shrigonda,
 Taluka Shrigonda, Dist. Ahmednagar.
- 3 Prafula Shantilal Mehta,
 Age : 56 years, Occu. Agriculture,
 R/o. Kalkai Chowk, Shrigonda,
 Taluka Shrigonda, Dist. Ahmednagar.
- 4 Shri Hemant Navinchand Gugale,
 Age : 44 years, Occu. Agriculture,
 R/o. At Post Bhangaon,
 Taluka Shrigonda, District Ahmednagar.

...Petitioners

Versus

Veerchand Mahadu Sidankar
Age : 64 years, Occu. Agriculture,
R/o. Kalkai Chowk,
Taluka Shrigonda, District Ahmednagar.

...Respondent

...
Mr. A. K. Gawali, Advocate for Petitioners.
Mr. D. B. Rode, Advocate for Respondents

CORAM : N.W. SAMBRE, J.

DATE : 23rd November, 2015

ORAL ORDER :

Since the common issue is involved in the petitions as regards rejection of prayer for appointment of Cadestral Surveyor as Court Commissioner, the petitions are heard and decided together, as are coupled with similar set of facts.

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2. It is the case of the petitioners that pursuant to measurement carried in 1998, the property was identified by him, which was subsequently encroached upon by the present respondents.

3. At the time of recording of evidence, the petitioners moved an application for appointment of Court Commissioner, which came to be rejected by the learned Court below, on the ground that already there was a measurement of the property before filing of the suit and it is for the plaintiffs to establish their case.

4. Mr Gawali, learned Counsel appearing on behalf of the petitioners, would urge that the suit in question came to be filed in 2010, having noticed that there is an encroachment on the land of the petitioners by the respondent herein. He would then urge that after filing of the suit, since more portion was encroached it has prompted the petitioners to file an application for appointment of Court Commissioner. He would then urge that the earlier measurement was not through a Court Commissioner, but through a private Surveyor and as the suit is for removal of encroachment, it is necessary that the Court must exercise powers under Order XXVI, Rules 9/10 of the Code of Civil Procedure.

5. Mr Gatne, learned Counsel appearing on behalf of the respondent, while opposing the petition and supporting the impugned order, would urge that the plaintiffs have come out with a case for removal of encroachment

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and are required to establish same on their own, as burden lies on them. He would then urge that the application for appointment of Court Commissioner cannot be used as a tool for collection of evidence and the natural course, as is required to be followed is upon appreciating the evidence of the petitioners, the Court will come to a conclusion as regards the encroachment, if any. According to him, the application was rightly rejected by the Court below.

6. Having considered rival submissions and bestowed my anxious thought over the same, it is required to be noted that the suit in question was filed for the purpose of removal of encroachment and possession. For the purpose of reference, the petitioners have relied upon the measurement of 1998 and purchase of the suit property in 1996. The fact of which this Court must take note is that after purchase of the property by the petitioners, based on 1998 measurement, the suit for removal of encroachment came to be filed.

7. The application moved for appointment of Court Commissioner appears to be at the stage of recording of evidence, particularly having noted that there is further encroachment carried out by the respondent – defendant on the property of the plaintiffs.

8. The measurement of 1998 that is relied on is a measurement carried out privately and not with the assistance of the Court

Commissioner.

9. The Court Commissioner is required to ascertain the boundary by measurement and not to give verdict as to who is encroacher in the matter. It is for the Court thereafter to ascertain from the documentary and oral evidence submitted by the Court Commissioner and upon examination of the Court Commissioner, who will be subjected to cross-examination. The Court below, upon analysis of the same, may grant declaration or refuse the same. It is required to be noted in the present case that since the suit of the present petitioners was for removal of encroachment, in my opinion, appointment of Court Commissioner is necessary, so as to ascertain boundaries and nature of encroachment, if any. The Trial Court, while rejecting the application, has without considering above has relied upon the earlier measurement of 1998, without acceding to the relevant fact as regards the date of the sale deed, the date of measurement, the alleged date of encroachment, which is formed to be cause of action in the matter.

10. Having regard to the above referred fact and requirement of Order XXVI, Rules 9/10 of the Code of Civil Procedure, the impugned orders are accordingly set aside. Consequently, applications for appointment of Court Commissioner (Exh.27 & Exh.29) stand allowed.

(6)

Writ Petitions stand allowed in above terms with no order as to costs.

(N.W. SAMBRE, J.)

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