

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

WRIT PETITION NO.6950 OF 2014

1. Dilip Shantilal Mehta,
Age 56 years, Occu.Business,
2. Dilip Budhamal Mehta,
Age 47years, Occu. Business

Both r/o Shrigonda,
Taluka Shrigonda,
District Ahmednagar

.. Petitioners
(Orig.defendants No.1 &2)

Versus

1. Nirmala s/o Dadasaheb Mote,
Age 65 years, Occu. Agriculture
2. Babasaheb Sahadu Bhos,
Age 66 years, Occu. Agriculture
3. Sau.Vaijyanta Babasaheb Bhos,
Age 59 years, Occu. Agriculture
and Household
4. Vijaykumar Harishchandra Mache,
Age 47 years, Occu. Agriculture
and Business
5. Sau.Chhaya Vijaykumar Mache,
Age 45 years, Occu. Agriculture
and Service

Respondent Nos.1 to 5
R/o Shrigonda, Taluka Shrigonda,
District Ahmednagar

6. Dattatray Sonba Galbale,
Age 49 years, Occu. Agriculture
7. Sau.Pushpa Dattatray Galbale,
Age 45 years, Occu. Agriculture
and Household

Respondents No.6 & 7
R/o Deulgaon, Taluka Shrigonda,
District Ahmednagar

8. Bhagwan Abasaheb Mote,
Age 57 years, Occu. Agriculture
R/o Shrigonda, Taluka Shrigonda,
District Ahmednagar

.. Respondents
(Respondent No.1 to 7 -
orig.plaintiffs &
Respondent No.8 -
orig.defendant No.3)

Mr A.K. Gawali, Advocate for petitioners
Mr N.V. Gaware, Advocate for respondents No.2 to 7
Respondents No.1 and 8 served

CORAM : N.W. SAMBRE, J.

DATE : 13th April 2015

PER COURT

1. The petitioners who are defendants in Regular Civil Suit No.15 of 2005 have moved the present petition questioning the validity of order passed by the learned Civil Judge, Senior Division, Shrigonda on 14th July 2014 below Exh.55 in Regular Civil Suit No.15/2005. The application Exh.55 was moved by the plaintiffs for issuance of directions to the Court Commissioner to the effect that after re-recording the measurement report, he be ordered to put marking on the same identifying the encroached portion.

2. The present petitioners-defendants, while questioning the legality of the order, have invited attention of this Court to the fact that the respondents, before filing of the suit have not ascertained the exact encroachment. By moving application for appointment of Court Commissioner under Order XXVI, Rule 9 of the Code of Civil Procedure (hereinafter referred to as the "Code" for brevity), attempt is made by the respondents for collection of evidence. So as to substantiate their

contention, they have placed reliance upon the prayer made in the plaint at record page 24 and the earlier order of appointment of Court Commissioner dated 2nd March 2005, map prepared pursuant thereto by the said Court Commissioner at page 37, the subsequent order dated 13th September 2012 appointing Court Commissioner, the report/map drawn by the Court Commissioner.

3. Learned Counsel for the petitioners would urge that the order which is questioned in the present petition is contrary to the very scheme of Order XXVI, Rule 9 of the Code, as according to him, it is premature for the Court below to form an opinion based on the second report of Court Commissioner which is, of course, subject to scrutiny as per sub-clause (2) of Order XXVI, Rule 9 of the Code to accept the encroachment as claimed. In addition to above, he would urge that the report/map prepared by the Court Commissioner pursuant to the order of Court below dated 13th September 2012 speaks enough about the very claim of the parties to the suit. He would further urge that if there is any objection raised to the said map or report by the parties to the suit, the Court is duty bound to look into the appropriate objection, as would be raised, however, it is not within the scheme of Order XXVI, Rule 9 of the Code to pass an order in pre-emption.

4. According to learned Counsel for the petitioners, the order impugned is not sustainable.

5. Learned Counsel for the respondents-plaintiffs would oppose the above referred contentions, as according to him, the order of appointment of Court Commissioner is in accordance with the scheme of Order XXVI, Rule 9 of the Code and would further urge that the Court is duty bound to pass such effective orders, as are necessary for drawing appropriate conclusion, particularly having regard to the language of clause (1) of Order XXVI, Rule 9 of the Code. He prayed for dismissal of the present petition.

6. Having considered the prayer made in the plaint and the two orders passed by the learned Court below appointing Court Commissioner and the map prepared pursuant to such appointment of Court Commissioner, it is not in dispute that while executing the sale deed of the land to the extent of 80-R in favour of present petitioners by the respondents, measurement was carried out. It is perhaps based on the said fact the suit came to be filed and one cannot lose sight of the fact that the provisions of Order XXVI, Rule 9 of the Code are available to the party in case the cause in the suit so contemplates. Rule 9 of the Order XXVI of Code provides for the duty upon the Court in case such cause is brought before the Court and the satisfaction of the Court for conducting local investigation for the purpose of elucidating its requirement for exercising powers therein. What is noticed in the present case is, after receipt of the second map/report from the Court Commissioner, the fact about non-mentioning/marking of the alleged encroached portion pursuant to the entries made in the map are not specifically clarified by the T.I.L.R. In

view thereof, the respondents-plaintiffs have moved the application which was granted by the learned Court below to the extent of directing the T.I.L.R. to submit specific report in relation to the encroached portion.

7. One cannot miss the very object while accepting the report of the Court Commissioner is, to act in aid of the Court for reaching to an appropriate conclusion. The report of the Court Commissioner is not required to be accepted as it is, but is always subject to scrutiny and parties to the suit have every right to object the same by cross-examining the Court Commissioner. Perusal of the second report of the Court Commissioner depicts that though there was appropriate marking *qua* the area of the plaintiffs, defendants and the land owned by the plaintiffs, same in clear terms, mentions about excess holdings by the present petitioners and the brother of the plaintiffs. The Court is not presuming on the date of passing of the order that the present petitioners-defendants have encroached upon but, in my opinion, in view of Order XXVI, Rule 9 of the Code, every power is vested in the Court to have specific observation from the Court Commissioner as regards the markings *qua* the encroachment as is noticed during such execution of commission.

8. In view of above, in my opinion, the order passed by the Court below is strictly in tune with the requirement of Order XXVI, Rule 9 of the Code.

9. The petition, being devoid of merits, stands rejected.

(N.W. SAMBRE, J.)

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