

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

WRIT PETITION NO. 8314 OF 2014

Machindra s/o Nana Korde,
Age: 65 years, Occ: Agri.,
R/o. Kordewadi, Tal. Kaij,
Dist. Beed.

...Petitioner

versus

1. Santram s/o Kisan Warpe,
Age: 40 years, Occ: Agri.,
R/o. Kordewadi, Tal. Kaij,
District Beed.
2. Daivshala D/o Bhiku Korde,
Age: 35 years, Occ: Agri.,
R/o. As above.
3. Sitabai W/o. Kisan Warpe,
Age: 70 years, Occ: Agri.,
R/o. As above.
4. Rukmanand @ Uttam s/o Bhikurao Korde,
Age: 40 years, Occ: Agri.,
R/o. As above.
5. Sampat s/o Wadaju Dhumak,
Age: 60 years, Occ: Agri.,
R/o. As above.
6. Janardhan s/o Nana Korde,
Age: 55 years, Occ: Agri.,
R/o. As above.
7. Govardhan s/o Nana Korde,
Age: 50 years, Occ: Agri.,
R/o. As above.
8. Bhagwat s/o Nana Korde,
Age: 45 years, Occ: Agri.,
R/o. As above.

...Respondents

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Mr. S.S. Thombre, Advocate for petitioner.
Mr. S.A. Dhengle, Advocate for respondent No.1.
Mr. R.T. Deshmukh, Advocate for respondent Nos. 2 & 4.

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CORAM : N.W. SAMBRE, J.

DATED : 5TH JANUARY, 2015

PER COURT :

. The petitioner is the original plaintiffs, who filed Regular Civil Suit No. 220 of 2004 for possession in which petitioner has claimed that respondent-defendant Nos. 1 to 4 on 20th June 2004 has encroached on his land. Parties to the suit are real brothers.

2. After the suit has reached to the stage of recording of evidence, an application Exhibit-35 came to be filed by the plaintiff styling the same to be under Section 75 read with Order 26 Rule 9 of Code of Civil Procedure for appointment of Court Commissioner. The application was objected by present respondents-defendants, same came to be rejected by learned trial Court by its order dated 02/07/2014. As such, present writ petition.

3. Shri. S. S. Thombre, learned Counsel for the petitioner-plaintiff strenuously urged that the order impugned ought not to have been passed by the learned trial Court as in the facts of the case exercising discretion in favour of plaintiff, would have been justifiable act. According to him, same was considered by the Court below that

same amount to collecting evidence and more particularly, having regard to the background of the case history.

4. The petitioner moved an application for appointment of Court Commissioner, which came to be rejected by the order impugned dated 02/07/2014 on the ground that while filing the suit by plaintiff, the plaintiff has not taken recourse to the measurement of the suit property. Moreover, it was mandatory to place on record the suit plaint map, which was also not placed.

5. The learned trial Court, while dealing with the claim of the present petitioner-plaintiff, has noticed that petitioner-plaintiff was duty bound to prove his possession over the suit property and unless such possession is proved, it will not be appropriate to reach to the conclusion as regards ordering removal of encroachment over the suit property.

6. The observations made by the learned trial Court in the back ground of requirement for filing of the suit in question, in my opinion, prima facie appears to be correct. The plaintiff was duty bound to place on record the plaint map so as to demonstrate the degree of encroachment with appropriate specification. So also, it was expected of the present petitioner-plaintiff to place on record the

basis for forming an opinion about encroachment by respondents prior to filing of the suit.

7. In the light of observations made by the learned trial Court, no case for interference is made out, same stands rejected.

8. At this stage learned Counsel for petitioner-plaintiff seeks liberty to move an application for amendment for placing on record the map containing encroached portion in the background of observations made by the learned trial Court and if the same is granted by the learned trial Court, then to move an application under Order 26 Rule 9 of the Civil Procedure Code for appointment of Court Commissioner.

9. Liberty, subject to provisions of law.

[N.W. SAMBRE, J.]