

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

WRIT PETITION NO. 1757 OF 2016

Sayyed Imran Abdul Kadar and Another ..PETITIONERS

VERSUS

Rais Nasir Shaikh and Others ..RESPONDENTS

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Mr. N.V. Gaware, Advocate for petitioners.

Mr. P.S. Dighe, Advocate h/f Mr. V.R. Dhorde, Advocate for Respondent No.3.

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CORAM : T.V. NALAWADE, J.

DATED : 04th OCTOBER, 2016

ORDER :

1. The petition is filed to challenge the order made on Exhibit 23 in Regular Civil Suit No. 418 of 2015 by Joint Civil Judge, Senior Division, Ahmednagar. Heard both the sides.

2. The suit is filed by present Respondent Nos.1 to 3 for relief of injunction. It is their case that they and defendants have share in Plot No. 80-B which is having area of 323.22 sq.mtr. Out of that area of 185.7 sq. mtr. belongs to the petitioner and 139.4 sq. mtr. belongs to Respondent Nos.1 to 3. The learned Counsel for petitioner states that it is the case of the plaintiff that defendants have started making construction in the area

of plaintiff and they have encroached the land by 3.25 ft. from northern side. To prevent the defendants from making construction, they approached the Court. The Trial Court has refused the relief of temporary injunction.

3. The Application at Exhibit 23 is filed for appointing the surveyor to take measurement of the two portions, one of plaintiffs and one of defendants to ascertain as to whether defendants are making construction on the portion of the plaintiffs. After hearing both the sides, the Trial Court allowed the application and the surveyor is directed to take measurement as prayed by the plaintiffs. He is expected to prepare map of the measurement.

4. The objection was taken by the present petitioner to the application on the ground that there was no compliance of provision of Order 7 Rule 3 and map of so called encroachment was not produced alongwith plaint. The learned Counsel for petitioner also submitted that by using this commission, the plaintiffs are trying to collect evidence for the application which was being considered for temporary injunction. He placed reliance on three cases decided by this Court as ***Writ Petition No. 2749 of 2012 (Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad***

and Another), Writ Petition No. 8877 of 2013 (Chandrakant Kashinath Dike and Others Vs. Smt. Satyabhama Vishwanath Dike and Another) and Writ Petition No. 4756 of 2014 (Dhondiba Bapu Zaware Vs. Santosh Paraji Zaware and Others).

5. The facts and circumstances of each and every case are always different. It is trite law that before framing issues the commission for local investigation under provision of Order 26 Rule 9 cannot be appointed. In the present case plaintiff has come with specific contentions that defendants were trying to make construction in the portion of plaintiff and he has also given extent by which they were likely to make encroachment. Though it was the suit for injunction, it is always open to the plaintiff to show that defendants made encroachment during pendency of the suit as there was no order of temporary injunction in favour of the plaintiffs. As both sides have properties in the same gut number and plaintiffs have come with a specific case that these portions are adjacent to each other, it needs to be ascertained whether the defendants are making construction in the portion of the plaintiffs. If that is ascertained through the Court Commissioner, it will be open to the plaintiffs to take further steps like seeking relief of mandatory injunction for removal of encroachment or even seeking relief for possession.

6. In view of these facts of the present matter, this Court holds that the Trial Court has not committed any error in allowing the application. Petition stands rejected.

(T.V. NALAWADE, J.)

SSD