

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 11008 OF 2015

Ram Bhaguram Mirkale,
Age 60 years, Occu. Agri.,
R/o. Sale Galli, Latur,
Dist. Latur.

.....Petitioner

Vs.

1. Satish Shrikrushna Salunke,
Age 34 years, Occu. Agri.,
 2. Sopan Shrikrushna Salunke,
Age 32 years, Occu. Agri.,
 3. Shrikrushna Namdeo Salunke,
Age 60 years, Occu. Agri.,
Dist. Latur.
 4. Archana Sopan Salunke,
Age 30 years, Occu. Agri &
Household, All R/o. Bhoisamudrga,
Tal. & Dist. Latur.
-Respondents.

...
Mr. R.P. Adgaonkar, Advocate for petitioner.
Mr. T.M. Venjane, Advocate for respondent Nos. 1 to 4.
...

CORAM : T.V. NALAWADE, J.
DATED : 14th October, 2016.

JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent,
heard both the sides for final disposal.
2. The present proceeding is filed to challenge the

order made on Exh. 27 in Regular Civil Suit No. 301/2013, presently pending in the Court of Civil judge, Junior Division, Latur. The application was filed by the present petitioner, plaintiff for appointment of Court Commissioner, Cadestral Surveyor, T.I.L.R. for taking measurement to ascertain the encroachment made by the defendants on the land of plaintiff. The Trial Court has rejected the application by observing that two contradictory reliefs are claimed in the plaint like injunction and possession. It is also observed that prior measurement was not taken and the record of prior measurement was not produced and due to that such relief cannot be given.

3. It appears that even the rough hand sketch map along with plaint is not filed which is the requirement as per the Maharashtra Amendment to Order 7, Rule 3 of Civil Procedure Code. However, the plaint shows that it is specifically mentioned that the defendants have made encroachment of 5 R. portion from western side and 2 R. portion from southern side and thus, there is allegation that there is encroachment over 7 R. portion. There is no requirement of law that the measurement needs to be done first through surveyor and only after that suit can be filed for removal of encroachment and possession. Thus, the reasoning given by the Trial Court cannot sustain in law. Other

reason that there are two contradictory reliefs claimed is also not acceptable. The area of land owned by plaintiff is around 83 R. and he is claiming injunction against the defendant to see that no further encroachment is made and no damage is caused to the common bandh. However, the plaintiff has formed opinion that there is encroachment made of 7 R. and for ascertaining the encroachment he wants the measurement through T.I.L.R. In view of these circumstances and to have final decision in respect of the dispute, it is desirable that the Court Commissioner needs to be appointed.

4. So, the petition is allowed. The order made by the learned Judge of the Trial Court is hereby set aside. The application at Exh. 27 in aforesaid suit is allowed. T.I.L.R. of the concern Tahsil is hereby appointed as Court Commissioner. The Court Commissioner is to take measurement of the land of plaintiff and surrounding lands including the lands of defendants to ascertain the encroachment. The cost of the measurement is to be born by the plaintiff which is to be deposited well in advance.

Rule is made absolute in aforesaid terms.

[T.V. NALAWADE, J.]

ssc/