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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7150 OF 2013

Dattarao Apparao Deshmukh (Died) LRs & Others PETITIONERS

VERSUS

Kishan Narsing Charlewad (Died) LRs & others RESPONDENTS

.....
Mr. R. L. Kute, Advocate for the petitioners
.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 27th JULY, 2016

ORDER :

1. No appearance is caused on behalf of the respondents, though served.
2. Heard learned advocate for the petitioner.
3. The petitioner, is plaintiff in Regular Civil Suit No.28 of 1999 filed for recovery of possession of areas of 45 X 40 feet and 45 X 20 feet.
4. Learned advocate for the petitioners adverts to that under an agreement of sale, original defendant had been put in possession of 45 X 40 feet area. However, thereafter, he had gradually caused encroachment over an additional area of 20 X

45 feet.

5. The petitioner has claimed back the possession of aforesaid property from the original defendant in the suit proceedings. Initially, the suit proceeded *ex parte*. It was decreed in 2000. The defendant had been in regular civil appeal before the appellate court and under an order of the appellate court the matter was remanded to trial court. As such, the suit is being proceeded with in which the petitioner has once again filed his examination in chief.

5. It is contended by Mr. Kute, learned advocate that during the course of the proceedings, the petitioner filed an application Exhibit-117 for appointment of court commissioner in order to elucidate subject matter of encroachment. However, said application has been turned down on an erroneous impression that the same would tantamount to collection of evidence.

6. Learned advocate further contends that there does not appear to be any particular resistance to the application Exhibit-117, since no appearance has been caused on behalf of the defendants in the present writ petition.

7. Learned advocate contends that the petitioner is owner of

larger area and he is claiming back possession of the area in possession of the defendant and since the defendant has caused encroachment, it would be appropriate to measure the land, which would give clear indication about area having been encroached upon by the defendant. He further refers to that in the matter of recovery of possession of encroached area, generally, courts have been liberal in allowing applications for appointment of court commissioner for measurement.

8. To aforesaid submissions, there is no resistance on behalf of the defendants. As such, the writ petition will be required to be allowed considering that the averments and submissions are neither traversed nor controverted.

9. In the circumstances, the writ petition is allowed in terms of prayer clause "B" and stands disposed of.

[SUNIL P. DESHMUKH, J.]