

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

WRIT PETITION NO. 11873 OF 2015

Manoj s/o Sudhakar Kathe

.. Petitioner

vs

Balasaheb s/o Shankar Khandagale and ors.

.. Respondents

Mr. Amol S. Gandhi, Advocate for petitioner

Mr. Rahul R. Karpe, Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.

DATE : 13th July, 2016

ORDER :

1. Petitioner-appellant in regular civil appeal no. 64 of 2013 had preferred suit bearing regular civil suit no. 176 of 2010 against present respondents - defendants for recovery of possession on the ground of encroachment by defendants over plaintiff's property.

2. Said regular civil suit has been dismissed on 21-09-2013 by 3rd Joint Civil Judge, Junior Division, Shrirampur. Regular civil appeal no. 64 of 2013 referred to above has been filed by the plaintiff and moved application Exhibit - 25 in said appeal, seeking appointment of court commissioner for measurement of petitioner-appellant's property. Exhibit-25 has been rejected by

appellate judge on 29-08-2015 which has been impugned in present writ petition.

3. Learned counsel for petitioner Mr. Gandhi vehemently submits that measurement of land, to quite a large extent, would resolve the dispute among the parties. He submits that there is no definitive defence coming forward from the respondents about the land in their possession save and except solitary certificate issued by Sarpanch without depicting necessary particulars in the same. With such a slender evidence, the court should not have come to final conclusion about claims on either side. In such a case, measurement would resolve the controversy and as such application Exhibit-25 should have been given treatment accordingly and allowed.

4. Learned counsel in support of his submissions cites two judgments, namely, *Vijay Shrawan Shende vs. State of Maharashtra*, reported in 2009 (5) Bom.C.R. 306, and *Bento Antonio Gomes alias Antonio Bento Gomes vs. Rasario Salvador Carneiro*, reported in 2014 (1) Bom.C.R. 678, contending that the courts have considered even at the second appellate stage that the appointment of court commissioner for resolution of dispute would be necessary. He, therefore, urges to grant indulgence and consider the request being made.

5. Learned counsel Mr. Karpe appearing for respondents-defendants, however, opposes the request being made by petitioner, stating that the suit has been dismissed finding that the petitioner-plaintiff had not been able to show any encroachment. In the circumstances, under the garb of further encroachment, claiming appointment of court commissioner to ascertain the same, a fact asserted which had not been proved and such a failure to that effect is sought to be rectified by seeking appointment of court commissioner at the appellate stage and that too when the regular civil appeal is at the fag end of its hearing. He submits, having regard to the same, petition may not be considered at this stage for grant of relief in favour of the petitioner.

6. Perusal of impugned order shows that application Exhibit-25 has been construed as application for measurement of further encroachment caused by respondents over petitioner's property. Such a construction has been placed on the prayer and the application has been given treatment accordingly resulting into its rejection. The contents and prayer as appearing in the application cannot be said to give exact impression as has been carried by the appellate court.

7. However, as the matter would progress, during the course of hearing of appeal, if parties feel, as well as if court thinks it necessary, it would be open for the parties to make a request afresh and in such a case, appellate court may consider the same and decide on appointment of court commissioner having regard to facts, evidence, circumstances and law.

8. Writ petition, with aforesaid, stands disposed of.

SUNIL P. DESHMUKH,
JUDGE

pnd