

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6489 OF 2016

Shri. Kerba Balu Dhere And Ors. ...Petitioners
Versus
Shree Adrushya Kadeshwar Guru
Muppin Kadeshwar Swami ...Respondent

....
Mr.Anand S. Patil, Advocate for the Petitioners.
Mr. Pratap P. Bhosale, Advocate for the Respondent.
....

CORAM : R. G. KETKAR, J.

DATE : 2nd DECEMBER, 2016

P.C.

1. Heard Mr.Anand Patil, learned Counsel for the petitioners and Mr.Pratap Bhosale, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the judgment and order dated 30.1.2016 passed by the learned trial Judge below Exhibit-27 in R.C.S. No.1019/2014. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter referred to

as the 'plaintiff', under Order XXVI Rule 9 of C.P.C. and appointed the Deputy Superintendent of Land Records, Karveer to carry out the measurement and submit report along with map.

3. In support of this Petition, Mr. Patil submitted that the plaintiff has annexed hand map. Except that he has produced nothing. Before instituting the suit, the plaintiff did not get the land measured through Survey Officer. By the present application, the plaintiff wants to collect the evidence by using machinery of the Court. He has taken me through paragraph-1 of the plaint and hand map annexed to the plaint and it is submitted that the land of the defendants is not adjacent to the plaintiff's land. On this ground alone, the learned trial Judge should not have appointed the Court Commissioner.

4. On the other hand, Mr. Bhosale supported the impugned order.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The plaintiff has instituted suit *inter alia* alleging that the defendants have made encroachment

in his land to the extent of 0.01.5 Ares. The suit is instituted for recovery of encroached area by the defendants. While allowing the application, the learned trial Judge has referred to the decision of this Court in ***Shri Bhupendra Bhagwat Turkar v. Shri Homraj Zituji Meshram, 2014(3) ALL MR 635***, wherein it was held thus :

“The cases of boundary dispute are clearly distinguishable in which the identity of land, measurement thereof and area of the land is needed to be considered preferably on the basis of the authentic evidence and map of the land drawn by competent public official on behalf of the Central or State Government, the trial court is benefited by such map of the land authentically drawn and produced in order to decide the suit correctly, effectively and finally in the larger interest of justice so that no such dispute shall remain pending in courts for long time in respect of alleged encroachments over the suit property. It is, therefore, always desirable to get the suit land or field measured by an expert or competent public official to find out the area of the suit land encroached upon, more so, when oral evidence cannot help the court when it is in the form of words against words by rival parties. ”

6. Even accepting the submissions of Mr. Patil that the defendants land is not adjacent to the plaintiff's land, that will be substantiated during the course of inspection. Thus by appointment of Court Commissioner, no prejudice will be caused to the defendants. Hence, the Petition fails and the same is dismissed.

7. It is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)