

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2556 OF 2016

ASARAJI YADAVRAO PAWAR AND ANOTHERS
VERSUS
TUKARAM SAHEBRAO POKALE AND OTHERS

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Advocate for Petitioners : Shri Dhase Rahul P.
Advocate for Respondents : Shri Narwade Patil R.B.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 06, 2017

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PER COURT :-

1. The petitioners are aggrieved by the order dated 26.11.2015, delivered by the trial Court, by which, their application Exhibit 67 has been rejected.
2. I have heard the strenuous submissions of the learned Advocates for the respective sides.
3. The dispute between the parties in RCS No. 176 of 2008 is with regard to the removal of illegal construction, encroachment and seeking perpetual injunction.
4. The petitioners had earlier moved an application under Order XVI Rule 9 of the CPC for seeking appointment of a TILR as the Court Commissioner. Since the said application was rejected, the

petitioners approached this Court in Writ Petition No.6567 of 2009. By order dated 8.7.2011, the Writ Petition was disposed off by observing in paragraph Nos.3 to 5 as under:-

“3. Shri Narwarde, learned counsel for respondent No. 1 submits that the order passed by the Trial Court does not suffer from any error of jurisdiction. The application was for collecting evidence and not for measurement of both the lands.

4. The suit is for perpetual and mandatory injunction. It appears that there is a dispute about the boundaries. In such disputes, the assistance of expert is normally taken. On perusal of the application, it is manifest that the said application is not for measurement of the land of petitioners and the respondents, but it is for a limited purpose. It is also trite law that Commissioner cannot be appointed to collect the evidence. The Trial Court, while passing the order also observed that in the instant application the plaintiff has not prayed for measurement of the land, but wants to measure only 1 Guntha of land. I do not see any error committed by the Trial Court, while rejecting the said application.

5. The petitioners are at liberty to move appropriate application for appointment of T.I.L.R., to measure the lands of petitioners and respondents, which application the Trial Court shall consider on its own merits.”

5. The petitioners were, therefore, at liberty to make an application for seeking a joint measurement of the property of both

the sides. An application Exhibit 67 was then filed by the petitioners seeking appointment of a Court Commissioner for measuring 21 Ares land, the land of defendant No.1 admeasuring 1 Are and the construction and encroachment made thereon.

6. By the impugned order, the trial Court has observed that the petitioners have once again sought measurement of a restricted portion of the land which is 24 Ares said to be owned by the plaintiff. 4 Ares land was excluded from the said application. The trial Court, therefore, observed that the petitioners have once again moved an application seeking measurement of the limited portion of the land and for identifying the encroachment, which cannot be permitted under Order XVI Rule 9 of the CPC.

7. In the light of the above and keeping in view the observations of this Court in its earlier order dated 8.7.2011, reproduced above, I do not find that the impugned order could be termed as being perverse or erroneous. This petition being devoid of merits is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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