

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

WRIT PETITION NO. 2873 OF 2017

SATISH PRAKASH MANE AND OTHERS
VERSUS
DHANRAJ ABHANGRAO MANE AND OTHERS

...
Advocate for Petitioners : Mr Patil Indrale Anand V.
Advocate for Respondents : Mr M.G. Biradar

...
CORAM : V.K. JADHAV, J.
Dated: November 22, 2017

...
PER COURT :-

1. Petitioners/original defendants have challenged the order passed by the 6th Jt. Civil Judge J.D., Udgir dated 9.1.2017 below exh.18 in Regular Civil Suit No.337 of 2015. Respondents/plaintiffs have filed said application for appointment of the Court Commissioner.

2. Respondents/plaintiffs have instituted the suit for removal of the encroachment over the suit land by the petitioners/defendants. The petitioners/defendants have strongly resisted the

said application by filing their say. According to the defence of the petitioners/defendants, father of the plaintiff had acquired only 8 acres and 3 aars of land in S.No.3/2 by way of partition and out of which 25 R of land was acquired by the State of Maharashtra and father of the defendants had acquired 13 acres and 8 aar of land in S.No.3/1 in partition out of which 92 R of land acquired by the State Government. Accordingly, defendants contends that there is no encroachment over the land of respondents/plaintiffs. Trial Court has allowed said application and appointed the Deputy Superintendent of Land Records to measure both the survey numbers i.e. S.No.3/1 and 3/2 and also directed to fix the actual boundaries of both the survey numbers and submit report alongwith map. Hence, this writ petition.

3. Learned counsel for the petitioners submits that, even though, the trial of the suit is yet to

commence, respondents/plaintiffs have filed aforesaid application seeking appointment of the Court Commissioner. Learned counsel submits that, trial court has not considered the defence of the petitioners/defendants while allowing application exh.18.

4. Learned counsel for the petitioners/defendants in order to substantiate his case relied upon the following cases :-

1. Dhondiba Bapu Zaware Vs. Santosh s/o Paraji Zawere and others in WP No.4756/2014.
2. Chandrakant Kashinath Dike and others Vs. Satyabhama Vishwanath Dike and anr. Reported in 8877/2013.
3. Ramkrishna Santu Kakad Vs. Raojee Sahadu Kakad in WP No.2749/2012.

Wherein, this Court has taken a view that before commencement of the trial, appointment of the Deputy Superintendent of Land Record as a Court

Commissioner would be premature and the same should be avoided as far as possible considering the provisions of Section 75 of the Civil Procedure Code.

5. Learned counsel for respondents/original plaintiffs submits that, suit has been instituted for removal of the encroachment and it is well settled that, in a suit seeking relief of removal of encroachment, invariably the Court Commissioner has to be appointed to measure both the lands and find out the actual encroachment, if any. Learned counsel submits that, respondents/plaintiffs have not claimed any relief of temporary injunction in the suit, and, as such, no prejudice is likely to be caused to the petitioners-defendants. Learned counsel submits that, trial court has directed the Deputy Superintendent of Land Records to measure the suit land and also the land owned by the petitioners-defendants.

6. On perusal of the plaint and the relief claimed, it appears that, respondents-plaintiffs have instituted a suit for removal of the encroachment over the suit land. It further appears that, respondents/plaintiffs have not filed any application seeking issuance of the order of temporary injunction in respect of the suit property. So far as defence raised by the petitioners/defendants is concerned, even if the suit land as well as land of the petitioners/defendants is measured as directed by the trial court, no prejudice is likely to be caused to the petitioners/defendants in any manner. In case, any encroachment is shown in the report submitted by the Court Commissioner, it is always open for the petitioners/defendants to point out to the Court that, in fact, respondents/plaintiffs have got less portion of the land in partition and the land which is shown as a encroached area in fact cannot be treated as encroachment over the suit land.

7. Learned counsel for the petitioners relied upon the aforesaid cases to demonstrate that it is not desirable to allow such an application seeking appointment of the Court Commissioner before commencement of the trial. However, this court consistently taken said view on the backdrop that if an application for issuance of the temporary injunction is pending, such order should not be passed by taking recourse to the provisions of Section 75 of the Civil Procedure Code. In the instant case, as discussed above, I do not find any prejudice likely to be caused to the petitioners/defendants. It is well settled that in a case wherein relief is claimed for removal of the encroachment, assistance of an expert is required to fix the boundaries for the just disposal of the case and to resolve the controversy between the parties.

8. In view of the above, I do not find any fault in

the impugned order passed by the trial court. I find no merit in this writ petition. Writ Petition is hereby dismissed. No costs.

sd/-

(V.K. JADHAV, J.)

...