

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

WRIT PETITION NO. 3717 OF 2017

1. Subhash Lingappa Wade
Age: 58 years, Occu.: Agri.,
R/o Near Zilla Parishad School,
Sundarwadi, Post. Chikalthana,
Tq. & Dist. Aurangabad.
2. Sumanbai Subhash Wade
Age: 51 years, Occu.: Household,
R/o Near Zilla Parishad School,
Sundarwadi, Post. Chikalthana,
Tq. & Dist. Aurangabad.
3. Ravi Subhash Wade
Age: 26 years, Occu.: Agri.,
R/o Near Zilla Parishad School,
Sundarwadi, Post. Chikalthana,
Tq. & Dist. Aurangabad.
4. Raju Subhash Wade
Age: 22 years, Occu.: Agri.,
R/o Near Zilla Parishad School,
Sundarwadi, Post. Chikalthana,
Tq. & Dist. Aurangabad.

..PETITIONERS

VERSUS

1. Ankush Rambhau @ Ramji Wade
Age: 51 years, Occu.: Agri.,
R/o Sundarwadi, Post. Chikalthana,
Tq. & Dist. Aurangabad.
2. Anil Rambhau @ Ramji Wade
Age: 44 years, Occu.: Agri.,
R/o Sundarwadi, Post. Chikalthana,
Tq. & Dist. Aurangabad.

..RESPONDENTS

....
Mr. D.A. Mane, Advocate for petitioners.
Mr. A.R. Kawade, Advocate for respondents.
....

CORAM : S.B. SHUKRE, J.
DATED : 20th MARCH, 2017

ORAL JUDGMENT :

1. Issue notice to respondents. Mr. Kawade, learned Counsel waives service of notice for respondents. Reply of respondents is taken on record.
2. Rule. Rule made returnable forthwith. Heard finally by consent of both sides.
3. This writ petition challenges the order dated 07th March, 2017 passed by the learned Ad-hoc District Judge-2, Aurangabad, thereby allowing the application below Exhibit 16 filed during pendency of Miscellaneous Civil Appeal No. 30 of 2016. By the application below Exhibit 16, appointment of Court Commissioner for carrying out measurement of portion of land in possession of the respondents – original plaintiffs is made.

4. It is the submission of learned Counsel for petitioners that such an order could not have been passed during pendency of the Miscellaneous Civil Appeal filed against the order of temporary injunction under Order 39 Rules 1 and 2. The scope of jurisdiction to be exercised in such a case by the Appellate Court is confined only to examining the legality, correctness or propriety of the order under challenge. It is also the submission on behalf of the petitioners that there are two maps drawn by the T.I.L.R. which are in existence and filed on record, out of which one has been drawn at the instance of the petitioners and the other at the behest of the respondents. When correctness of these maps is yet to be decided in evidence, at a premature stage, the application for appointment of yet another Court Commissioner for drawing of the measurement map cannot be made. It is further submitted by learned Counsel for petitioners that even prayer in application below Exhibit 16 seeks only measurement of the portion of land, which is in possession of the respondents and does not seek measurement of the entire portion of the land, which is not permissible in law, because the encroachment is an issue to be determined.

5. Learned Counsel for respondents submits that there is ample power vested in the Appellate Court for exercising its power under Order 43 Rule 1 to grant application for appointment of the Court Commissioner

in as much as the stage at which this has been done in the instant case is not premature. He also submits that the prayer in application below Exhibit 16 is incomplete. It can be allowed to be completed by directing appointment of the Court Commissioner for taking measurement of the entire piece of land.

6. On going through the impugned order, the only impression that one gets is of its patent illegality and being against the well settled principles of law, as rightly submitted by the learned Counsel for petitioners. There is no provision under Order 43 akin to the provision of Order 41 Rule 3 of the Code of Civil Procedure, conferring similar ample power upon the First Appellate Court to pass any order or decree, which is necessitated by the demands of justice. In the instant case, the appeal has been preferred against an order of temporary injunction passed under Order 39 Rules 1 and 2 and therefore this appeal has necessarily been filed under the provisions of Order 43 Rule 2 of the Code of Civil Procedure. It is well settled principle of law that while exercising the power under this provision of law, particularly when it is in respect of an equitable relief like granting of temporary injunction, the power is confined to no more than examining the legality, correctness or propriety of order under challenge, the appeal being on principle only. If the First Appellate Court is of the opinion that no temporary injunction could have

been granted without there being sufficient reason available on record or in the absence of another measurement carried out by the T.I.L.R., at the most, the Appellate Court could remand the case back to the Trial Court for deciding the application in accordance with law, after giving appropriate liberty to bring additional material on record to the concerned party. But, Appellate Court cannot, by itself grant liberty to the appropriate party to bring on record fresh material while considering the legality and correctness of the order granting temporary injunction. Unless and until the material was available for appropriate consideration by the Court below, the legality or correctness or otherwise of the impugned order cannot be tested by the First Appellate Court. It appears that this basic principle of law has been ignored by the Ad-hoc District Judge-2, Aurangabad.

7. It is not in dispute that in the instant case, two reports of T.I.L.R., one at the instance of the petitioners and one at the behest of the respondents are already produced on record. The concerned T.I.L.R. is yet to be examined as a witness and therefore these reports have not been tested as yet for their correctness or otherwise. Unless and until their correctness is determined, the need for having two reports of the T.I.L.R. cannot be examined in its proper perspective by the Trial Court. Therefore, as rightly submitted by the learned Counsel for petitioner, this

is a premature stage for considering the application below Exhibit 16.

8. Even otherwise, application below Exhibit 16 seeks only appointment of T.I.L.R. for measurement of only the portion of the property and not the entire property and therefore such measurement partially done, is not likely to render any assistance to Court in effectively determining the controversy and as such would be an exercise in futility.

9. On all these grounds I find that the impugned order is patently illegal. It is passed in breach of settled principles of law and therefore it must be quashed and set aside.

10. Writ petition is allowed with cost. The impugned order dated 07th March, 2017 is quashed and set aside. Application below Exhibit 16 stands dismissed with costs. Rule made absolute in these terms. However, liberty to file fresh application for appointment of Court Commissioner if the need arises, is reserved for both sides.

(S.B. SHUKRE, J.)

SSD