

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

WRIT PETITION NO. 4017 OF 2017

Pandit @ Pandharinath s/o Dasrath Inamdar,
Age 32 years, Occ: Agriculture,
R/o. Maroti Mandir, Phulambri,
Taluka Phulambri,
District Aurangabad.

...PETITIONER
(Petitioner is Ori.Defendant)

VERSUS

Ganpat s/o Kaluba Devmali,
Age 70 years, Occu. Agri.,
R/o Maroti Mandir, Phulambri,
Taluka Phulambri,
District Aurangabad.

...RESPONDENTS

...
Shri S.S.Gangakhedkar, Advocate, for petitioner.
Shri S.A.Gaikwad, Advocate for respondent.

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CORAM: P.R.BORA, J.

DATE : APRIL 7th, 2017

...

P.C.:-

1. The petitioner has challenged the order dated 29th of July, 2016, passed by the Civil Judge, Junior Division, Phulambri, in an application below Exh.91 in

R.C.S.No.86/2009. The aforesaid application was filed by the petitioner, who is original defendant in the civil suit, for appointment of Court Commissioner for local inspection and measurement of the suit property invoking provisions under Order 26 Rule 9 and Order 39 Rule 7 of Code of Civil Procedure read with Section 151 of the Code.

2. It was the contention of the petitioner - defendant that, in the application filed by him at Exh.91 the claim of the original plaintiff, based on title, is challenged by the petitioner - defendant, more particularly to the extent of 4 Are land included in Gat No.841 as 39 Are, instead of 35 Are. It was his further contention that in view of the defense taken by him, and the claim so raised by the plaintiff, it was necessary to get measured the land in possession of the petitioner, and to take the local inspection of the suit property through the Taluka Inspector of Land Records. It was the further contention of the petitioner - defendant that, to avoid multiplicity of the litigation, the appointment of the Commissioner was must. Learned trial Court, however, did not accept the request made by the petitioner-defendant and rejected the

application vide the impugned order.

3. Shri Gangakhedkar, learned Counsel appearing for the petitioner, assailed the impugned order on various grounds. Learned Counsel submitted that the trial Court has patently erred in rejecting the application filed by the petitioner-defendant without taking into account the respective pleadings of the plaintiff and the defendants. Learned Counsel submitted that the trial Court has wrongly observed that the civil suit is not in respect of removal of encroachment. Learned Counsel further submitted that though there may not be any specific pleading and prayer in the plaint in respect of encroachment and removal of the said encroachment, the plaint read as a whole, and considering the purport of the pleadings in the plaint, the suit filed by the plaintiff is also in respect of encroachment and removal of the purported encroachment and, in such circumstances, the appointment of the Commissioner for local inspection was necessary. Learned Counsel relied upon the judgment of the Honourable Apex Court in the case of Haryana Waqf Board v. Shanti Sarup and Ors. (AIR 2008 SC (Supp) 616) and the judgment of this Court

in the case of Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, dead, Thru. Pooja @ Poojari Y.Lakade & ors. (2011 (3) Bom.C.R. 807).

4. On perusal of the impugned order, apparently, I do not find any error in the impugned order. Learned trial Court has rightly observed that the plaintiff is under obligation to prove his title as per his assertion whereas, the defendants are under obligation to prove their lawful possession on the basis of available evidence. The trial Court has further observed that the suit filed by the plaintiff is for recovery of the suit property based on the title, and not on the basis of encroachment made by the defendant. The trial Court has further observed that the defendant since beginning is firm on the point of his previous possession over 4 Are land and, according to him, the 4 Are land is part and parcel of old Survey No.502-2 which was in the name of his father who is not party to the suit. The trial Court has further observed that by filing such an application the defendants intended to get measured the suit property as well as 4 R. land which is in their possession with the help of old survey No.509-2,

however, after the consolidation scheme old survey No.509-2 has been merged into Gat No.481. In paragraph no.19 of the order, the trial Court has made following observations:

"19. In present suit both parties are under obligation to prove their case as per the evidence available with them. They can't take the assistance of the court to collect the evidence on the point of possession. Therefore, there is no necessity to appoint the court commissioner either to inspect or measure the suit property and property of the defendant. Therefore, application is liable to be rejected with cost. Hence I record my findings to the point No.1 & 2 in the negative and proceed to pass following order. "

5. After having gone through the material on record, it does not appear to me that the trial Court has committed any error in rejecting the application filed by the petitioner. The observations made and the law laid down in the judgments relied upon by the learned Counsel for the petitioner may not apply to the facts involved in the present matter. The petition, being devoid of any substance, stands rejected, however, without any order as to the costs.

(P.R.BORA)
JUDGE

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BENCH AT AURANGABAD

Date of decision:

For approval and signature

HON'BLE MR.JUSTICE

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| 1. Whether the Reporters of Local Papers may be allowed to see the Judgment ? | Yes |
| 2. To be referred to the Reporter or not ? | Yes/No |
| 3. Whether Their Lordships wish to see the fair copy of the Judgment ? | No. |
| 4. Whether this case involves a substantial? question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ? | No. |
| 5. Whether it is to be circulated to the Civil Judges ? | No. |
| 6. Whether the case involves an important question of law and whether a copy of the Order should be sent to Bombay, Goa and Nagpur Office ? | No |

Private Secretary
AGP/fa677.08