

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4782 OF 2014

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| 1. | Kishanrao s/o Yadavrao Lomte
Age - 57 years, occup. Agril. | |
| 2. | Sheshrao s/o Yadavrao Lomte
Age - 59 years, occup. Agril. | |
| 3. | Sidram s/o Baburao Lomte,
Age 27 years, occup. Agril.

All r/o Jawala (Bk.) Tq. and
Dist. Latur. | .. Petitioners /
Original
Plaintiffs |
| versus | | |
| 1. | Dnyanoba s/o Rajaram Lomte
Age - 71 years, occup. Agril., | |
| 3. | Motiram s/o Rajaram Lomte,
Age 61 years, occup. Agril.

Both r/o Jawala (Bk.),
Tq. & Dist. Latur | .. Respondents /
Original
Defendants |

Mr. S. S. Manale, Advocate for petitioners
Respondent served.

CORAM : SUNIL P. DESHMUKH, J.

DATE : 15th December, 2017

ORAL JUDGMENT :

1. Heard learned counsel for the petitioners Mr. Manale.
Respondents, despite service, have not caused appearance.

2. Learned counsel Mr. Manale contends that regular civil suit no. 394 of 2008 had been instituted by petitioners - plaintiffs seeking declaration of ownership and injunction against respondents-defendants in respect of land bearing gut no. 86 admeasuring 5 hectare, 56 are, situated at village Jawala (Bk.) Tq. Latur, as the respondents had been causing interference in petitioners' possession. The respondents are the owners of adjacent land on the northern side of petitioner's land, bearing gut no. 6 admeasuring 2 hectare, 31.

3. Subsequently, respondents instituted suit bearing regular civil suit no.696 of 2008 also for declaration of ownership and injunction against present petitioners and defendants in said suit in respect of area of 2 hectare, 31 are from land gut no.6. Respondents herein filed application in their suit bearing regular civil suit no. 696 of 2008 under order XXVI, rule 9 of Civil Procedure Code, 1908 for appointment of court commissioner.

4. The trial court allowed the application and appointed Taluka Inspector of Land Records as court commissioner. He accordingly had carried out joint measurement of lands of the plaintiffs and defendants. Pursuant to the same, in said suit, Examination at Exhibit 67 of Nimanatdar indicated that the respondents in the present petition had caused encroachment over landholding of present petitioners in respect of gut no. 86.

5. Petitioners and respondents filed applications for temporary injunction in both the suits.

6. In view of evidence by Nimanatdar, present petitioners had moved application at Exhibit 110 in his suit (R.C.S. No.394 of 2008) for amendment to the plaint with additional relief being claimed for possession of portion encroached by respondents. The same had been objected to by respondents and impugned order came to be passed.

7. Learned counsel Mr. Manale fairly refers to that map filed earlier on record may be showing some encroachment on southern side not relating to gut no.6. According to learned counsel, the court had erroneously considered that the encroachment being shown now on measurement after respondents' application is the one shown on earlier map and was within knowledge of present petitioners, however, factually it is not so as stated hereinabove.

8. The submission of petitioners due to non appearance on behalf of the respondents goes uncontroverted. If that be so, assumption of the trial court appears to be erroneous. In the circumstances, the court appears to have considered that application for amendment has been moved after span of four years from the date of measurement while it is contended by learned counsel Mr. Manale that as a matter of fact the same was

necessitated because of measurement by Nimanatdar. In any case, it appears, the case is sought to be made out with reference to record and evidence. The claim of petitioners is not controverted and may be required to be amended for proper adjudication or real controversy in the matter. Non appearance of respondents depicts there is no serious resistance to such claim. Writ petition, thus, deserves to be allowed, subject to costs.

9. Writ petition, under the circumstances, is allowed in terms of prayer clauses (A) and (B) subject to payment of costs of Rs.5,000/- to be paid within a period of four weeks from the date of receipt of writ of this order by the trial court. Suits of the parties be proceeded with and disposed of expeditiously.

10. Writ petition is disposed of. Rule made absolute in aforesaid terms.

SUNIL P. DESHMUKH
JUDGE

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