

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

WRIT PETITION NO. 6541/2017

1. Sunita Ashok Kachre,
Age: 43 years, Occu: Household,
R/o: Chapadgaon Tq.Shevgaon,
District Ahmednagar.
2. Ashok Babasaheb Kachre,
Age: 51 years, Occu: Service,
R/o: Chapadgaon Tq.Shevgaon,
District Ahmednagar. ...PETITIONERS

Versus

Santram Bapurao Patkal,
Age: 51 years, Occu: Agriculture,
R/o: Chapadgaon Tq.Shevgaon,
District Ahmednagar. ...RESPONDENT

.....
Mr. Nikhil S. Jaju, Advocate for Petitioners.

Mr. A.A. Khedkar & Mr. A. B. Chalak, Advocates for
Respondent (sole).

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CORAM : T. V. NALAWADE, J.

DATED : 06TH JULY, 2017.

ORAL ORDER :-

1. This petition is filed to challenge the order made by learned Civil Judge, Junior Division, Shevgaon, District Ahmednagar, on exh.31 filed in Regular Civil Suit No.

53/2016. The application at exh.31 was filed by plaintiff for appointment of Court Commissioner, to take measurement, and this application of respondent/ plaintiff is allowed by the Trial Court.

2. Heard both the sides.

3. It is case of the plaintiff that, he has purchased space admeasuring around 12 square meter, which is part of CTS No.87 and village Panchayat House No.83, situated at village Chapadgaon, Tahsil Shevgaon. He has purchased the property under registered sale deed of year 2011. It is contention of plaintiff that, some portion of CTS No.87 was purchased by defendant under sale deeds of 1999 and 2010, and that portion has no concern with the portion purchased by plaintiff. It is contended that, the defendants are trying to make construction over the space of the plaintiff and so, cause of action took place for the suit. Relief of injunction is claimed in the suit to prevent defendant from making construction in the property purchased by the plaintiff under aforesaid registered sale deed. Defendants have denied the aforesaid contentions and they have contended that, no property was left with the

owner in CTS No.87, which could have been sold to the plaintiff.

4. In view of the aforesaid rival claims, the application at exh.31 was filed by the plaintiff, and the trial Court has appointed Deputy Superintendent of Land Records, Surveyor, to take measurement. Direction is given that measurements is to be made as per the sale deeds and it is to be ascertained as to whether the defendant has made encroachment.

5. The learned Counsel for petitioners / defendants argued on law points and also on some factual aspects. The learned counsel submitted that, when application for temporary injunction was not yet decided, it was not proper on the part of the Trial Court to appoint court commissioner as that amounts to collection of evidence. He has placed reliance on observations made by this Court, in the case reported as **2013(11) LJSOFT, Page 145**, (Ramkrishna Santu Kakad Vs. Raojee Sahadu Kakad & Anr.), and observations made by this Court in **Writ Petition No. 8877/2013** (Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama Vishwanath Dike & Anr.) decided on

17.01.2014.

6. This Court has carefully gone through the observations made by this Court. The points involved in those matters and facts of the present matter are altogether different. The provision of Order 26 Rule 9 of Civil Procedure Code shows that, there is no prohibition to appoint Court Commissioner at such stage. This is enabling provision and no stage is fixed in the provision. Further facts of the present matter show that the dispute can be resolved effectively after taking the measurement through Government Surveyor, if such measurement is possible.

7. This Court has gone through the copies of sale deeds produced by both sides and property card of CTS No.87. To take care of the grievance of the petitioner/ defendant, the property purchased by the defendants under the two sale deeds can be measured first, and then it can be ascertained as to whether any space from the aforesaid city survey number was left which could have been purchased by the plaintiff. After that, it can be ascertained as to whether there is encroachment. As this way the measurement can be taken, there is no scope for grievance to the petitioner/

defendant. In the result following order is made.

ORDER

1. Petition is dismissed. However, surveyor is expected to consider the sale deeds executed first in time viz. 1999 and 2010 and accordingly to take the measurement and then consider the availability of space, which could have been sold to plaintiff as per the sale deed of 2011.

[T. V. NALAWADE, J.]

vjg/-