

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

Writ Petition No. 06392 of 2013

District : Ahmednagar

1. Sandeep Dnyandeo Sangle,
Age : 32 years,
Occupation : Business & Agri.

2. Sachin Dnyandeo Sangle,
Age : 30 years,
Occupation : Business & Agri.

Both R/o. Hotel Sandeep,
Nagar-Aurangabad Road,
Shingwetukai, Taluka Newasa,
District Ahmednagar.

.. Petitioners
(Original defendant
nos.01 & 02)

versus

1. Ganesh Sudhakar Chothe,
Age : 26 years,
Occupation : Agri.
R/o. Shingwetukai,
Taluka Newasa,
District Ahmednagar.

2. Somnath Rangnath Harer,
Age : 36 years,
Occupation : Agriculture,
R/o. Khospuri, Tal. Nagar,
Dist. Ahmednagar.

3. Pradeepkumar Gulabchand Rathod,
Age : 40 years,
Occupation : Business,
R/o. Ghodegaon,
Taluka Newasa,
District Ahmednagar.

4. Bhagwan Bhanudas Avhad,
Age : 40 years,
Occupation : Agriculture,
R/o. Pangarmal, Tal. Nagar,
District Ahmednagar.

5. Sharda Ashok Gaware,
Age : 35 years,
Occupation : Agriculture,
R/o. Jeur (Adhavwadi),
Taluka Nagar,
District Ahmednagar.

.. Respondents
(Nos.01 & 02 -
original plaintiffs
&
Nos.03 to 06 -
original defendants)

6. Dattatreya Nanabhau Andhale,
Age : 35 years,
Occupation : Business,
R/o. Gulmohar,
Taluka & Dist. Ahmednagar.

.....

Mr. A.P. Bhandari, Advocate, for petitioners.

Mr. R.A. Tambe, Advocate, for respondent no.01.

Respondent nos.02 to 06 served (Absent).

.....

CORAM : R.M. BORDE, J.

DATE : 20TH NOVEMBER 2017

ORAL JUDGMENT :

01. Rule. Rule made returnable forthwith. By consent of the parties, taken up for final disposal.

02. The petitioners are objecting to the order passed by the 3rd Joint Civil Judge (Junior Division), Newasa, below Exhibit 12 in Regular Civil Suit No. 863 of 2012, dated 26.07.2013, directing appointment of court commissioner to carry out measurement of the entire land bearing Gat No. 360 of village Shingave Tukai, Taluka Newasa, District Ahmednagar. The commissioner appointed to conduct measurement of the property is further directed to

take into consideration sale deeds executed in favour of the plaintiffs and defendant nos.01 and 02 while conducting measurement and preparing map.

03. Respondent nos.01 and 02 - original plaintiffs instituted suit a decree of perpetual injunction restraining the defendants from committing any encroachment over his property as well as from constructing unauthorizedly a toilet block in the disputed property.

04. The facts giving rise to the controversy need not be recorded in detail. However, there appears to be dispute in respect of the boundaries and location of the properties belonging to the petitioners and the defendants. The plaintiffs claim to have purchased the property on 28.02.2012 out of Gat No.360, whereas defendants are also purchasers of part of the property out of the said Gat number. The defendants have raised construction of a hotel after purchase of the property and it is alleged by the plaintiffs that the defendants are trying to enforce their possession by committing encroachment over the property belonging to the plaintiffs. The plaintiffs also alleged that the defendants have commenced construction of toilet block in the disputed area which attempt needs to be stalled.

05. The defendants in their written statement have raised objection in respect of the boundaries of the property. According to the defendants,

boundaries of the property demonstrated by the plaintiffs are not correct and plaintiffs have not been put in possession over the property described by them in the plaint.

06. The plaintiffs along with the suit, tendered an application seeking temporary injunction. At the same time, plaintiffs moved an application seeking a direction for appointment of Taluka Inspector of Land Record, Newasa, as a court commissioner for carrying out measurement of entire gat number as well as for preparation of map. The application tendered by the plaintiffs has been allowed by the trial court, which order is impugned in the present petition.

07. According to the petitioners - original defendant nos.01 and 02, the application tendered by the plaintiffs is an attempt to collect evidence at the stage of determination of application for grant of temporary injunction which would not be permissible. It is contended that the suit is at the initial stage and issues have not been framed. The plaintiffs have to prove *prima facie* case for consideration of grant of temporary injunction and at preliminary stage, an application seeking appointment of court commissioner for collecting evidence for the parties would not be permissible. Reliance is placed on judgment of this Court delivered in Writ Petition No. 09089 of 2011 (*Ayyaz s/o. Shoukatali Sayyed & another Vs. Mohd. Moid @ Ajamatali s/o. Mohd. Yasin Shaikh & 09 others*), on 17.01.2012.

08. On perusal of the pleadings of the parties and the impugned order passed by the trial court, it does appear that there is a dispute as regards location of the property and its boundaries. The defendants are justified in contending that at the initial stage while considering application for temporary injunction, parties cannot be permitted to seek appointment of court commissioner for collection of evidence. According to the defendants, the application tendered by the plaintiffs at the initial stage, seeking appointment of court commissioner for conducting measurement, is an attempt to collect evidence for the parties i.e. the plaintiffs. There appears to be dispute in respect of the boundaries and location of the property. There are also allegations in respect of commission of encroachment by the defendants.

09. It would obviously be open for the parties to take steps as permissible in law after framing of issues and while leading evidence. However, at the stage of consideration of application for temporary injunction, to secure appointment of court commissioner for measurement of the property would be an attempt to collect evidence which may not be permissible.

10. In the facts and circumstances of the case, the application tendered by the plaintiffs seeking appointment of court commissioner for conducting

measurement of the land appears to be premature. It would be obviously open for the petitioners - original plaintiffs to make suitable request to the trial court for appointment of court commissioner, at appropriate stage, if they so desire. Keeping the said option open, the writ petition deserves to be allowed.

11. In the result, the writ petition is allowed.

(a) The order passed by the 3rd Joint Civil Judge (Junior Division), Newasa, District Ahmednagar, below Exhibit 12 in Regular Civil Suit No. 863 of 2012, dated 26.07.2013, is quashed and set aside.

(b) However, parties shall be at liberty to make an application for appointment of court commissioner at appropriate stage, if they are so advised and if such application is made, the trial court shall consider and decide the same in accordance with law.

(c) Rule made absolute in the above terms. There shall be no order as to costs.

(R.M. Borde)
JUDGE

.....