

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

938 WRIT PETITION NO. 9415 OF 2015

SURESH ANANDRAO SONWANE
VERSUS
MADHUKAR GANPAT NEHTE

...
Advocate for Petitioners : Mr. V. D. Salunke.
Advocate for Respondent : Mr. Jiwan J. Patil.
...

CORAM : **V. K. JADHAV, J.**
DATE : 13th December, 2017.

ORDER:

. Being aggrieved by the order passed below Exhibit 61 dated 2nd July, 2015 in Regular Civil Suit No.189 of 2002 by 3rd Joint Civil Judge Junior Division, Jalgaon, the original Defendant approached to this Court by filing the present writ petition. The Respondent / Plaintiff has filed an application for appointment of Court Commissioner for the joint measurement of the lands of Plaintiff and Defendant under Order XXVI Rule 9 and 10-A of the Code of Civil Procedure. The learned Judge of the Trial Court by the impugned order dated 2nd July, 2015 allowed the said application and appointed DILR, Jalgaon as Court Commissioner and given directions to measure both the lands. Hence, this writ petition.

2 The learned counsel for Petitioner submits that the Respondent / Plaintiff has instituted the suit simplicitor for perpetual injunction. However, subsequently carried out the amendment in the plaint and also incorporated a prayer about removal of encroachment alleged to have been made over the portion of the suit land. The learned counsel submits that there is no material placed before the Court, *prima-facie*, indicating the encroachment. However, merely on the basis of the averments made in the application Exhibit 61, the Trial Court has allowed the application Exhibit 61 seeking appointment of Court Commissioner. The learned counsel submits that there is an open space in between the suit land and the land owned and possessed by the Petitioner / Defendant. However, only on the basis of the amended claim and subsequent incorporation of the prayer in consequence thereto, the Trial Court has passed the impugned order. The learned counsel submits that the Respondent / Plaintiff is trying to collect the evidence through the Court Commissioner and the same is not permissible.

3 The learned counsel for Petitioner in order to substantiate his submissions placed his reliance in the case of **Vij Kamgar Sahakari Patsanstha Limited Vs. Ramkrushna Dhondiram Thorat**, reported in, **2009 (1) Bom.C.R. 880**.

4 The learned counsel for Respondent / original Plaintiff submits that the Respondent / Plaintiff has filed the application seeking amendment in the plaint and after due consideration, the Trial Court has allowed the said application and the Respondent / Plaintiff has carried out the amendment in the plaint as well as in the prayer clause of the suit. The learned counsel submits that in terms of the pleadings, the Trial Court has also framed the issues including the issue of the alleged encroachment over the suit land by the Petitioner / Defendant. The learned counsel submits that it is well settled that in case of boundary dispute or removal of encroachment, the Trial Court shall appoint a Court Commissioner to prepare a measurement map in respect of the suit properties so as to assist meaningfully the Trial Court to dispose of the suit effectively.

5 On careful perusal of the pleadings, it appears that the Respondent / Plaintiff, though by way of amendment as permitted by the Court, raised a specific plea that the Petitioner / Defendant has encroached over the suit property, consequently in terms of the said pleadings, the Trial court has also re-casted the issues and framed additional issues [3A] and [3B] accordingly. The Respondent / Plaintiff has therefore, filed an application Exhibit 61 for appointment of Court

Commissioner for joint measurement of the suit land as well as the land owned and possessed by the Petitioner / Defendant. It further appears from the pleadings and the contents of said application Exhibit 61 that there is a dispute about the boundary and the construction of the compound wall. In view of the same, I do not find any fault in the order passed by the Trial Court to appoint DILR as Court Commissioner for the joint measurement of the suit land City Survey No.8153 and also the land City Survey No.8150 belonging to the Petitioner / Defendant.

6 The learned counsel for the Respondent / Plaintiff submits that during the pendency of this writ petition, the DILR has also submitted the measurement report alongwith the map before the Trial Court.

7 In view of the above discussion, the writ petition is liable to be dismissed. Hence, the following order:

ORDER

The writ petition is hereby dismissed. No costs.

[V. K. JADHAV, J.]