

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

WRIT PETITION NO. 158 OF 2016

Mannalal Ratanlal Mistri (Rajput)

Age: 60 years, Occu.: Retired,

R/o Najar Galli, Opposite to Dulha Dulhan,
Tilak Road, Aurangabad.

..PETITIONER

VERSUS

Rajesh Bhikchand Sonwane

Age: 50 years, Occu.: Business,

R/o Najar Galli, Opposite to Dulha Dulhan,
Tilak Road, Aurangabad.

..RESPONDENT

....
Mr. P.V. Barde, Advocate for petitioner.

Mr. R.M. Joshi, Advocate for respondent.
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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 31st JULY, 2017**

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the impugned order dated 06th October, 2015 by which an application filed by the petitioner – plaintiff at Exhibit 23 seeking appointment of the Court Commissioner has been rejected.

3. The petitioner contends that the issue is as regards the construction of a building by the defendant in City Survey No. 5181. The plaintiff owns City Survey No. 5177 admeasuring 100.2 sq. meters. A rough sketch was also placed on record alongwith the plaint indicating from the dark portion which is at two places that the defendant is likely to construct his building by encroaching the part of the area belonging to the plaintiff.

4. The learned Counsel for the defendant submits that the impugned order rejecting the application for appointment of the Court Commissioner need not be interfered with considering the fact that the prayers put forth by the plaintiff are not to the extent of removing the alleged encroachment. Similarly, the prayers do not indicate that the defendant has or is likely to encroach upon the land owned by the plaintiff. Reliance is placed upon the judgment of this Court in the matter of *Syed Mushtaque Ahmad Syed. Ismail and Others Vs. Syed Ashique Ali Khan Haidar Ali 2011 (6) Mh.L.J. 334* and *Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and Others 2001 (2) Mh.L.J. 959*.

5. I find from the prayers put forth by the plaintiff that he has specifically pleaded that the defendant should not be permitted to construct any part of the proposed house/building in the land or portion thereof belonging to the plaintiff. The basic pleading that the petitioner - plaintiff apprehends a

construction by encroachment at the behest of the defendant, appears in the plaint.

6. The rough sketch placed on record indicates the grievance of the plaintiff in the darkened portion whereby it is contended that the defendant is constructing the building by encroaching on the land of the plaintiff.

7. By application Exhibit 23, the plaintiff has prayed for appointment of a Court Commissioner so as to ensure that the disputed portion and the lands of both the parties would be scrutinized. The Trial Court has rejected the application on the ground that the plaintiff desires to collect evidence.

8. It cannot be ignored that the Trial Court has granted temporary injunction in favour of the plaintiff and after the said order below Exhibit 5 was subjected to the Miscellaneous Civil Appeal before the Appellate Court, the defendant has been directed to remove a portion of the wall which was being erected purportedly in the land owned by the plaintiff. The learned Counsel for the defendant makes a categorical statement that pursuant to the order of the Appellate Court, that portion of the wall which appeared to be in the part of the plaintiff's land, has been completely removed and thereafter, the entire construction of the three storeyed building has been completed. It is also canvassed that the suit has become infructuous.

9. In so far as the contention that the suit has become infructuous is concerned, I do not find that the said contention needs to be accepted for the reason that merely because the construction has been completed, would not render the suit infructuous since the plaintiff is claiming an injunction on construction in the portion of the land which belongs to the plaintiff.

10. In Syed Mushtaque Ahmad Syed Ismail (*supra*), this Court has set aside the order of appointment of the Court Commissioner since it disclosed the direction to the Court Commissioner to report on the aspect of the possession of the litigating sides and with reference to the construction carried out by the defendant.

11. In *Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade (Decd. Thru. Pooja @ Poojari Y. Lakade) and Others 2011 (3) All M.R. 599*, this Court, by placing reliance upon *Haryana Waqf Board Vs. Shanti Sarup and Others 2008 (8) SCC 671*, has held that if there are disputes as regards the boundaries, such boundary disputes can be resolved by appointment of a Court Commissioner who can measure the land of the litigating sides and can fix the boundaries. This Court has taken a similar view in the matter of *Habibkhan Inauttalakhan and Others Vs. Waman Govind Rathod and Others 2012 (1) All M.R. 802* and several other judgments.

12. Reverting to the facts of the case, the defendant has taken a specific stand that there is no encroachment and there is no dispute about the boundaries and the wall which appeared in the portion of the land of the plaintiff has already been removed. Notwithstanding the said contention, it is obvious from the pleading in the plaint and the sketch map placed on record that the petitioner apprehends encroachment. If the properties of both the litigating sides are measured by a competent authority, it would indicate the boundaries and it would then assist the Trial Court to conclude whether there is an encroachment. If the defendant has not encroached upon the land of the plaintiff and if the disputed wall is already removed, it would be very clear before the Trial Court and the suit can then be adjudicated upon.

13. In the light of the above, I find that the Trial Court should have allowed application Exhibit 23 for directing the measurement of the plots of both the litigating sides and for fixing of the boundaries so as to consider the contention in the plaint that the construction is being erected on the property of the plaintiff.

14. As such, this petition is partly allowed and the impugned order is quashed and set aside. Application Exhibit 23 is partly allowed and the Trial Court shall therefore direct the T.I.L.R. to measure the plots/properties of both

the litigating sides at issue and fix the boundaries. The Trial Court shall issue necessary directions on Exhibit 23 to the T.I.L.R. and shall also decide the charges to be paid by the plaintiff. Such directions and other modalities shall be worked out within three weeks from today and the T.I.L.R. then could be granted time of six weeks for implementing the directions of the Trial Court.

15. Rule is made partly absolute in the above terms.

(RAVINDRA V GHUGE, J.)

SSD