

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2902 OF 2017

Keshav Govind Pashte

... Petitioner

Vs.

Madhukar Vitthal Pashte and ors

... Respondents

Mr. Nitin Gangal, for the Petitioner

Mr. Vinay J. Bhopatrao, for Respondent No.1.

Ms. Namita M. Mestry, for respondent Nos.7 to 19.

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 12, 2017**

P.C. :

1. This petition is directed against the order dated 31st January, 2017, passed by Civil Judge Junior Division, Wada, below exh. 106 in Regular Civil Suit No.80 of 2009 thereby rejecting the application for appointment of Court Commissioner for fresh measurement.

2. Respondent No.18 has filed suit for injunction simpliciter. The present petitioner was transposed as plaintiff in the year 2016. Earlier respondent No.18-plaintiff has filed an application at Exh.46 for appointment of Court Commissioner i.e. T.I.L.R. Wada, for the purpose of measurement. The said Court

Commissioner has filed report of measurement alongwith the map. However, the plaintiff filed application at Exh.47 stating that he did not agree with the measurement report and the map. Thereafter, he moved application at Exh.49 for appointment of Court Commissioner (T.I.L.R.). The said application was rejected. Thereafter he has moved this application in the year 2016 for appointment of Court Commissioner i.e. T.I.L.R for fresh measurement, which has been rejected. Hence this petition.

3. Learned counsel or the petitioner has submitted that the plaintiff has committed mistake in not asking for the joint measurements of properties as the property of plaintiff and the property of defendants, are adjacent and there is boundary dispute. He submitted that by application exh.45, the measurements of the property of plaintiff only was asked for. Accordingly though the report was submitted at Exh.46, it was not acceptable to the plaintiff and immediate challenge was given to the said report. He further submits that plaintiff has got measured the suit properties privately on 18.4.2011 through one Surveyor Mr. Desai. He, moved an application for witness summons of Mr. Desai. However, at the time of hearing of this application before

the trial Court, no explanation for not bringing Mr. Desai, as witness to prove this map and measurement report was given. Learned counsel submitted that now he has obtained health report of Mr. Desai that he is invalid and is unable to move. Learned counsel for petitioner submits that joint measurement is necessary and therefore, this application be allowed.

4. Learned counsel for respondent has vehemently opposed this petition and has submitted that the suit is filed in the year 2009 and the evidence of two witnesses i.e. plaintiff and the other witness is recorded. Learned counsel submits that this dispute is between the family members. He submits that it was a duty of the plaintiff/petitioner to get survey done properly of both the properties which he failed to do so and therefore, for the mistake of the petitioner/plaintiff, original defendants should not suffer. He further submits that since 2009 till today, defendants are dragged in the litigation only because of the petitioner plaintiff, who is an advocate. He further submits that said application ought to have been filed much earlier at the time of filing of the suit before settlement of the issues. Learned counsel for the respondent further submits that appointment of Court Commissioner or T.I.L.R.

in this matter will cause prejudice to the Respondents. He further submits that one report is already on record at Exh.46 and the said measurement is to be first examined and thereafter if required, Court Commissioner can be appointed.

5. I have considered the submissions. Perused the application and the order. It is true that petitioner plaintiff ought to have asked for joint survey much earlier. But it is not done by him. However, it is a suit for injunction simpliciter; wherein the issue of boundary is involved. If at all there is joint survey conducted by Court Commissioner, it will help the Court to adjudicate the matter effectively

6. In view of the submissions made by both parties and as Mr. Desai is not available to give evidence and the plaintiff has challenged the report of T.I.L.R. Exh.46 by immediately placing an application on record Exh.47, I am inclined to allow this petition. Hence following order.

Order

- I. Petition is allowed in terms of prayer clause (b) subject to payment of costs of Rs.15,000/-.

- II. The expenses of the Court Commissioner are to be borne by the plaintiff alone.
- III. The work of this Commission is to be carried out till 24th July, 2017 and thereafter trial Court to proceed with the evidence.
- IV. Suit is expedited.
- V. Parties to act on the authenticated copy of this order

(MRIDULA BHATKAR, J.)