

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2105 OF 2018
(Manmath s/o Girjappa Kharose Vs. Shiva s/o Girjappa Kharose and
others)

Mr.S.S.Rathi, Advocate for the petitioner.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 23/02/2018

PER COURT :

1. The petitioner is aggrieved by the order dated 06/10/2017 passed by the Appellate Court by which application Exh.19 filed by the petitioner/plaintiff, seeking appointment of a Court Commissioner under Order 26 Rule 9 of the CPC, has been rejected.

2. The learned Advocate for the petitioner strenuously submits that when the suit preferred by the plaintiff was for removal of encroachment and recovery of possession, the identification of the suit property, its boundaries and the area encroached become decisive. Though a private measurement was earlier carried out through the TILR before the plaintiff instituted the suit, the ambiguity created by the measurement and the map coupled with the deposition of the TILR needs to be cleared out. The TILR has stated that there is no encroachment which is against the record and as such, ends of justice

would be met if the Appellate Court would permit appointment of a Court Commissioner for the measurement of the suit property so as to avoid further complications.

3. Reliance is placed upon the judgment of this Court in the matter of Manohar Mahadeorao Pagrut Vs. Sunanda Ramdas Tharkar [2008(3) Bom.C.R.4]. Learned Advocate has also drawn my attention to the 11 grounds formulated by him in the memo of the petition.

4. Having considered the strenuous submissions of the learned Advocate and upon going through the petition paper book, I find from the record that one of the grounds raised by the plaintiff/appellant before the Appellate Court is that, the evidence of the TILR as well as the measurements and the map placed on record have not been properly analyzed. The petitioner/plaintiff had filed the suit based on the said measurement and map. Once this issue becomes a part of the grounds for appeal, the Appellate Court is bound to consider all the grounds raised by the petitioner/appellant on their own merits. Exhibit 19 apparently is a premature application since the issue as to whether the measurement, the map and the deposition of the TILR is reliable or not and whether it would support the case of the plaintiff or not, would be gone into by the Appellate Court. In this backdrop, the application Exh.19 filed by the petitioner was rightly rejected.

5. In the Manohar Mahadeorao case (supra), the suit was pending and the application for seeking appointment of a Court Commissioner was moved. In the instant case, the measurement and the map alongwith the evidence of the TILR were already considered by the Trial Court and the Appellate Court would now consider the probative value of the said documents and deposition in the light of the grounds put forth by the plaintiff.

6. Considering the above, this petition, being devoid of merit, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)