

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

WRIT PETITION NO. 3271 OF 2015

ANANDA SHANKAR KADAM AND OTHERS
VERSUS
NIRANJAN SAMBUGIRI GIRI AND OTHERS

...

Advocate for Petitioners : Mr. Dhage Vaibhav B.
Advocate for Respondents 1-3 : Mr Gaikwad Anil M.

...

CORAM : V.K. JADHAV, J.
Dated: February 06, 2018

...

PER COURT :-

1. Heard finally with consent at admission stage.
2. Aggrieved by the order dated 5.2.2015 passed by the Civil Judge S.D., Loha below exh.37 in R.C.S. 43/2011, original defendant preferred this writ petition.
3. Respondents/plaintiffs have instituted the said suit bearing R.C.S. No.43/2011 for declaration and a decree of perpetual injunction in respect of the suit land. The petitioners have strongly resisted the said suit by filing written statement and also by counter claim. During the pendency of the suit, the respondents/plaintiffs have filed an application exh.37

for appointment of the Court Commissioner and by impugned order the trial court has allowed the said application. Hence, this writ petition.

4. Learned counsel for the petitioners/original defendants submits that, though, respondents/plaintiffs have instituted the suit for declaration and perpetual injunction, the application at exh.37 has been submitted seeking appointment of the court commissioner. There is no boundary dispute nor the respondents/plaintiffs have instituted the suit for removal of the encroachment/delivery of the encroached portion. Learned counsel submits that, the application at exh.37 came to be filed only for collection of the evidence.

5. Learned counsel for respondents/original plaintiffs submits that, though, respondents/plaintiffs have claimed the relief of declaration and a decree of perpetual injunction, there is a specific pleading to the effect that, the petitioners/defendants are trying to

encroach upon the suit land and they have also carved out common bandh. Learned counsel submits that, even the petitioners/defendants in their written statement and also in counter claim raised the dispute about the boundaries and as such, there is no other way but to inspect both the lands through the T.I.L.R. office. Learned counsel submits that, the conduct of the petitioners/defendants is also objectionable. They have obstructed the very process of the measurement as directed by the Civil Court and therefore, office of the T.I.L.R. office is constrained to submit the report to that effect before the civil court. Learned counsel submits that, in the given set of facts, no prejudice is likely to be caused to the petitioners/defendants in any manner.

6. Though the suit has been instituted for declaration and perpetual injunction, after going through the pleadings, it appears that there is dispute about the boundaries and the encroachment. It further appears from the written statement filed by the petitioners/defendants that they have seriously

challenged the boundaries and also raised the dispute to the effect that, the suit land is not situated at any side of the land possessed by the petitioners/defendants.

7. In view of the above, I do not find any fault in the impugned order. Further, even if the measurement is carried out, no prejudice is likely to be caused to the defendants in any manner. There is no question of collection of evidence. In the fitness of things, it would be just and proper if the land is measured through the T.I.L.R. office and if the report is submitted, the same may help the court to adjudicate the dispute between the parties. Writ Petition is hereby dismissed. No costs.

(V.K. JADHAV, J.)

...