

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

WRIT PETITION NO. 8277 OF 2018

Ramrao s/o Narayanrao Jadhav
Age 50 years, Occup. Agriculture,
R/o Khanapur, Tq. & Dist. Parbhani

.. Petitioner/
orig. Deft.
No.5

versus

1. Narayan s/o Dagdoba Wakle,
Age 74 years, occup. Agriculture,
R/o Jalalpur, Tq. & Dist. Parbhani
2. Kausabai w/o Narayan Wakle,
Age 69 years, occup. Household,
R/o Jalalpur, Tq. & Dist. Parbhani
3. Laxman s/o Punjaji Tekale,
Age 74 years, occup. Agriculture,
R/o Jalalpur, Tq. & Dist. Parbhani
4. Manik s/o Laxman Tekale,
Age 49 years, occup. Agriculture,
R/o Jalalpur, Tq. & Dist. Parbhani
5. Sonali s/o Punjaji Tekale,
Age 45 years, occup. Household,
R/o Jalalpur, Tq. & Dist. Parbhani
6. Raosaheb s/o Laxman Tekale,
Age 40 years, occup. Agriculture,
R/o Jalalpur, Tq. & Dist. Parbhani

.. Respondents
Orig.Plaintiffs

.. Respondents
Org.Def. no.1
to 4

Ms Sheetal Salunke, Advocate h/f Mr V. D. Salunke, Advocate
for petitioner

CORAM : SUNIL P. DESHMUKH, J.
DATE : 24th July, 2018

ORAL JUDGMENT:

1. Heard learned counsel for petitioner – original defendant no. 5 who strenuously urges to indulge into request under writ petition and allow application at Exhibit – 134 filed by him in regular civil suit bearing no. 238 of 2009 seeking appointment of court commissioner for measurement of land gut no. 50 and 51, by setting aside impugned order dated 28-06-2018 under which 2nd joint civil judge, junior division, Parbhani had rejected said application.

2. Respondents no.1 and 2 – original plaintiffs have instituted aforesaid regular civil suit seeking perpetual injunction against defendants in respect of property bearing gut no. 51 admeasuring 2 *Hectare*, 87 *Are* to the extent of 1 *Hectare* 37 *Are* with boundaries specifically referred to in the plaint as well as in prayer clause.

3. Plaint in aforesaid suit underwent amendments and defendant no. 5 has submitted his written statement.

Evidence had been led on either side and the matter had reached almost the stage of final hearing.

4. Petitioner has moved application Exhibit – 134 referred to above, contending that sale deed of the plaintiffs is with incorrect boundaries in respect of lands of Kundlik Punjaji and Laxman Punjaji, adding that Kundlik's land is converted into Gut No. 51 and that of Laxman into Gut no. 50 under the consolidation scheme and, therefore, in order to find out actual holdings and one as appearing in the revenue record, measurements of both the lands is necessary and also report about encroachment is supposed to have been caused.

5. Learned judge of the trial court has considered the submissions on either side and the contention of defendant no. 5 – petitioner herein that the plaintiffs are causing encroachment over the land. The court also considered that there had been measurement by district inspector of land records. It was found that the plaintiffs were occupying land gut no. 50. However, no counter-claim had been filed on behalf of defendants for possession of alleged

encroached land. The court has adverted to that plaintiffs' claim is only for protection of land in their possession and that a commissioner would not be appointed for looking into as to who is in possession of what area of the land. The commissioner cannot be appointed for collection of evidence.

6. The court has also referred to decision relied on, on behalf of petitioner i.e. *Ramzan Sheikh vs. Panjab s/o Nathuji Gawande* reported in 2014 (6) Mh.L.J. 97, and has distinguished the same. The court has specifically referred to that suit is of 2009, issues were framed in 2010, suit was fixed for final hearing and at this stage application Exhibit – 134 has been moved by defendant no. 5. On consideration of all this, the court rejected the application.

7. Learned counsel for petitioner vehemently contends that the petitioner is a purchaser of land from Laxman's progeny and has been put in possession of land. The landholding shown in revenue record and actual holding on the field would not correspond and that may emerge on carrying out measurement. There are stakeholders in suit

land but plaintiff is causing encroachment in the same. In the circumstances, it would be necessary to allow application Exhibit – 134 particularly having regard to the contention that boundaries given in the sale deed of the plaintiff are erroneous.

8. Learned counsel for the petitioner during the course of submissions referred to decision of learned single judge of this court in the case of *Malhar Ganpat Bokephod and ors. vs. Shivaji Vishwanath Pawal*, reported in 2014 (1) Bom.C.R. 806, and submitted that the case on hand is more or less same. She particularly tries to lay emphasize on paragraph no. 11 observing that in cases of boundary dispute and dispute about identity of lands the court should order local inspection.

9. However, looking at that the suit is for injunction simplicitor specifically referring to boundaries contending the same to be from land gut no.51, burden is on plaintiffs to prove their case. In such a situation, measurement to carry forward case for the petitioner, in given circumstances, would be an otiose exercise. The reasons

given by learned trial judge do not appear to be in any way capricious or away from factual or legal position, requiring interference in the order impugned.

10. Having regard to aforesaid, this is not a case wherein indulgence may have to be given to the request under writ petition.

11. Writ petition, as such, is dismissed.

12. Observations hereinabove would not impede opportunity as may be available to petitioner in case decision in the suit goes adverse to his interest. It is further made clear, observations in this order in writ petition have efficacy only to the extent to decision in writ petition and shall not influence decision of trial court on merits.

SUNIL P. DESHMUKH,
JUDGE

pnd/-