

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2872 OF 2017

Mukund Pandit Maindargikar

.... Petitioner

V/s.

Danaji Pandurang Patil

.... Respondent

Mr. Ajay A. Joshi for the Petitioner.

None for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 28TH FEBRUARY 2018.

P.C. :

1. Heard Mr. Joshi, learned counsel for the Petitioner.
2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 15th December 2016 passed by the Court of Civil Judge, Junior Division, Mangalvedha, below “Exhibit-39” in Regular Civil Suit No.158 of 2015.
3. The application at “Exhibit-39” was filed by the present Petitioner, under Order 26 Rule 9 of the Civil Procedure Code, 1908, for appointment of 'Court Commissioner', in order to measure the suit property.

4. The Trial Court has rejected the said application on the ground that, the measurement of the suit property is already carried out on 24th September 2011 and as per the said measurement, it was revealed that the Petitioner himself has encroached on the suit property. In view thereof, the Trial Court held that, as the measurement is already carried out, there was no need for appointment of 'Court Commissioner' again for the same purpose.

5. Learned counsel for the Petitioner, however, submits that, earlier measurement was carried out in the year 2011; whereas, the present Suit is filed in the year 2015. During pendency of the Suit, the Respondent has made encroachment and constructed the toilet and, therefore, it has become necessary to re-measure the suit property.

6. In my considered opinion, the Suit being simplicitor for injunction, without seeking any relief of removal of alleged encroachment and further for possession of the encroached portion and without amending the plaint for seeking those reliefs, the Petitioner cannot claim appointment of the 'Court Commissioner', that too, to prove his own case that his property exists thereupon. Therefore, the Petitioner has to first seek substantial relief and then only, he can apply for appointment of the 'Court Commissioner'. In the absence thereof, the order passed by the Trial Court, rejecting the Petitioner's application for appointment of

the 'Court Commissioner', does not call for any interference. Hence, the Writ Petition stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]