

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

WRIT PETITION NO. 5603 OF 2016

Smt. Anusaya Madhukar Gaikwad & Ors.

... **Petitioners**

V/s.

Smt. Sulochana Balwant Gaikwad & Ors.

... **Respondents**

Mr. Sandeep Koregave for the Petitioners.

Mr. Prashant Bhavake for the Respondent Nos. 1 and 2.

CORAM : MRS. MRIDULA BHATKAR, J.

DATE : 14th AUGUST, 2018

P.C.:

. Rule. Rule made returnable forthwith. By consent of the parties, the petition is heard finally and disposed of at the stage of admission.

2 By invoking the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, this petition is filed wherein the Order dated 05.01.2016 passed by the 9th Joint Civil Judge, Junior Division, Kolhapur thereby allowing the application at Exh. 33 in Regular Civil Suit No. 593 of 2014 is challenged. The Respondents/original Plaintiffs have made an application for appointment of Commissioner under Order XXVI Rule 9 read with XXXIX Rule 7 of the Code of Civil Procedure, 1908. The said application, though opposed by the present petitioners was allowed. Hence, this Writ Petition.

3 The learned Counsel Mr. Koregave for the Petitioners submits that by this application of appointment of the Commissioner, the Respondents/Plaintiffs want to take a measurement of the suit property which as per their plaint was already partitioned. He submits that the property is partitioned, then where is the question of measurements. He further submits that under garb of the measurement by the Commissioner, the Plaintiffs in fact, are collecting the evidence which is not permissible under Order XXVI of the Code of Civil Procedure, 1908. The learned Counsel further submits that as per the plaint, the Plaintiffs have shown 8 properties out of which the Plaintiffs claimed property No.'D' and as per their case the Petitioners i.e. Defendant Nos. 1 and 2 are the owners and in possession of land which is named as 'A' in the plaint. The learned counsel submits that the Trial Court ought to have passed the order of the measurement of these two properties only, instead of the prayer of Plaintiffs of taking measurement of all eight properties is illegally allowed.

4 The learned Counsel Mr. Koregave further submits that the Plaintiffs seek the appointment of Engineer from the Corporation who is already defendant No.17 in the suit. He submits that TILR can be appointed for carrying out the work of measurement and order dated 05.01.2016 passed by the 9th Joint Civil Judge, Junior Division, Kolhapur is to be set aside.

5 The learned Counsel Mr. Bhavake for the Respondents submits that land falls within the limits of Kolhapur Corporation and therefore, City Engineer and

staff subordinate to him are authorised to carryout measurement and therefore, instead of TILR, the prayer was made for appointment of Engineer or any other person who is empowered to carryout the measurement of the land. He supported the order passed by the Trial Court.

6 Perused the application and the impugned order. The suit is for perpetual and mandatory injunction based on the encroachment by the Defendants on the suit land. Though, there are pleadings of partition of the suit property in order to decide the encroachment, some time it is required to measure all the adjacent properties or properties on whom the correctness of the measurement depends.

7 The learned Trial Judge has considered this aspect and passed a reasoned order. The suit land as submitted by the learned Counsel for the Respondents/Plaintiffs falls within Corporation's limits and hence, though any Engineer from the Corporation is appointed, it is not to be considered as illegal appointment. Though, Corporation is a party Defendant No.17, the person who is empowered and officiating that post, can very well as an independent person for the purpose of measurement.

8 In view of this, order dated 05.01.2016 passed by the 9th Civil Judge Junior Division, Kolhapur is hereby maintained.

9 Hence, Writ Petition is dismissed. Rule is discharged.

(MRIDULA BHATKAR, J.)