

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

WRIT PETITION NO. 8184 OF 2017

Jaywanti Vilas Shinde & Ors.	...	Petitioners
V/s.		
Nilesh Narayan Dandekar & Anr.	...	Respondents

- Mr.Gautam T. Kanchanpurkar for the Petitioners.
- Mr.Prajakt M. Arjunwadkar for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 23rd MARCH, 2018.

P.C. :

1] Heard learned counsel for the Petitioners and learned counsel for Respondent No.1.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 4th July 2017 passed by the Ad-hoc District Judge-2, Palghar, thereby allowing Miscellaneous Civil Appeal No. 18 of 2016. The said appeal was preferred by the Respondent No.1/Plaintiff against the Petitioners, who are the Original Defendants in Regular Civil Suit No.2 of 2016 challenging the order passed below Exhibit-5 on 5th March 2016.

3] The application at Exhibit-5 was filed by the Respondent No.1/Plaintiff seeking the relief of interim injunction restraining the present Petitioners from causing obstruction and for removing the alleged encroachment made on the road ad-measuring 20 x 30 feet by removing cement pole and wire fencing. The trial Court has rejected the said application in the absence of any material showing the alleged encroachment. Hence, against the said order, the Respondent preferred the appeal and the Appellate Court has allowed the said appeal, thereby directing the Petitioners to remove the compound of their land adjacent to the road to the extent of four feet, to widen the road up to the width of 15 feet. Against this order, the Petitioners have approached this Court.

4] On perusal of the record and considering the submissions advanced by the respective parties, I find that there is some substance in the grievance raised by the Petitioners.

5] It is pertinent to note that the case of the Respondent No.1/Plaintiff is that the Petitioners have made encroachment on the road to the extent of 20 feet x 30 feet, as shown in the rough sketch and therefore, the Respondent No.1 has sought the removal of the compound wall and wire fencing, which was according to the

Respondent No.1 done by the Petitioners by committing encroachment. Therefore, the dispute pertains to the removal of encroachment and the only Authority which can *prima-facie* prove the alleged encroachment is the T.I.L.R. who can after carrying out necessary measurement, show whether there is any encroachment or not.

6] Here, in the case, the Respondent No.1 has not sought the appointment of the T.I.L.R. as a Court Commissioner to show that it is the Petitioners, who have made encroachment on the road. Respondent No.1 has sought the appointment of an Advocate as a Court Commissioner and as can be seen from the order passed by the trial Court, the trial Court has rejected the said application on the count that the appointment of an Advocate as a Court Commissioner will not help to show the alleged encroachment. It was also held that, unless and until it is decided who has committed the encroachment and up to what extent and which can be decided by the T.I.L.R. alone, who is an expert in the field and the Advocate cannot be expert, the trial Court has rightly rejected the said application for appointment of an Advocate as a Court Commissioner.

7] The said order of the trial Court dated 19th January 2016 was not challenged by the Respondent No.1. Hence, it has become

final. However, without disclosing the rejection of such application by the trial Court, Respondent No.1 filed the fresh application before the Appellate Court seeking appointment of Advocate as a Court Commissioner under Order-26 Rule-9 C.P.C.. The entire application filed before the Appellate Court is silent about the rejection of similar such application filed before the trial Court. As a result, the Appellate Court has appointed the Advocate as a Court Commissioner.

8] As per the report of the Court Commissioner, though advance intimation of his visit was given to the Petitioners and when he visited the spot also he has called upon the Petitioners to remain present, but the Petitioners did not remain present at the time of inspection, on the count that they wanted to challenge the said order. However, no such challenge was raised by taking appropriate steps. In view thereof, on the basis of the Court Commissioner report, showing that the width of the road is reduced by 4 feet on account of the fencing and compound wall of the Petitioners, the Appellate Court has, relying thereon, passed the impugned order.

9] In support of this order, the submission of learned counsel for the Respondent No.1 is that, as per the own case of the Petitioners, in view of the averments made in the sale-deed of the year 1946, the width of the road is 15 feet. Therefore, if as per the Court

Commissioner report, the said width is reduced to 11 feet, then there was nothing wrong on the part of the Appellate Court to direct the Petitioners to remove the encroachment, so that the width of the road can be restored to 15 feet.

10] In my considered opinion, however, there is fallacy in this argument, which is accepted by the Appellate Court. It may be true that, on the basis of the sale-deed, the Petitioners are admitting that the width of the road was 15 feet. However, how that width is reduced, on account of whose encroachment the width is reduced needs to be ascertained. Without ascertaining the same and merely on assumption that the Petitioners had reduced it and hence, directing the Petitioners, at the interim stage itself to remove such encroachment so as to restore the width of 15 feet, cannot be called as just, legal and correct. The proper mode, in such situation, would have been to get the T.I.L.R. appointed to measure the said property, in order to bring on record the alleged encroachment, if any, and made by which adjacent owner of the property. In the absence of such evidence, the impugned order passed by the Appellate Court, granting the relief of interim injunction cannot be sustained.

11] The Writ Petition is therefore allowed. The impugned order passed by the Appellate Court stands quashed and set-aside. As a

result, the order of the trial Court, rejecting the Respondent No.1's application for interim injunction stands restored.

[DR.SHALINI PHANSALKAR-JOSHI, J.]