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

916 WRIT PETITION NO.3009 OF 2018

HAUSRAO NAMDEO PARKALE AND OTHERS
VERSUS
YOGESH EKNATH PARKALE

...

Advocate for Petitioners : Ms. Dube Anjali (Bajpai)
Mr. Karpe Rahul R., Adv. For R-sole.

CORAM : P.R. BORA, J.
DATED : 12th June, 2019.

PER COURT:-

1. With consent of learned counsel for the parties, the petition is heard finally.

2. Petitioners and respondent are the neighbours of each other. The present Respondent has obtained N.A. Permission so far as the piece of land owned and possessed by him and has constructed Mangal Karyalaya therein.

3. The dispute arose when the respondent, i.e. Original plaintiff, started construction of the compound wall. According to the present petitioners, the compound wall is being constructed in their portion of land. Since the obstruction was created, a suit being RCS No.280/2015 was filed by the present respondent(original plaintiff)

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wherein ad interim mandatory injunction has been granted by the trial court after hearing both the parties to the suit. The objection of the petitioners is that, no such relief could have been granted by the trial court at the ad interim stage. It is further contended that the request made by the present petitioners, for joint measurement of the properties-i.e. Plots belonging to the original plaintiff and the original defendants, has been wrongly rejected by the trial court. In the circumstances, the petitioners have approached this court with the present petition.

4. The contentions, as are raised in the petition, are strongly resisted by the respondent. Learned counsel appearing for the respondent submitted that all the orders passed till this date in relation to the subject dispute are in favour of the respondent. It is further contended that the request made by the present petitioners for joint measurement, has been rejected by the trial court on merits. It is further contended that the order passed in favour of the respondent in the year 2015, has been sought to be assailed after three

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years in the present petition. It is further submitted that the respondent has undertaken to remove the construction being carried out of the compound wall, at his own, if in the suit ultimately it is decided that the said construction is carried out in the portion of land owned by the defendants i.e. present petitioners. It was, therefore, the contention of the learned counsel for the respondent that the writ petition being devoid of any substance, deserves to be dismissed.

5. After having heard the submissions advanced by the learned counsel appearing for the parties and after having gone through the orders passed by the courts below, it is noticed that the entire controversy relates to the joint measurement of the lands involved in the suit. Without going into the merits of the earlier orders passed by the courts below, it appears to me that if the petitioners are permitted to file a fresh application before the trial court, praying for joint measurement of the lands involved in the suit and if such application is allowed by appointing an appropriate person as a commissioner for carrying

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out the measurement, the entire dispute would be resolved finally.

6. The learned counsel for the respondent there upon, submitted that the construction material brought by the respondent is being wasted since the respondent has been prevented from carrying out the construction because of the orders passed in favour of the petitioners, in the circumstances if the court is inclined to remit the matter back to the trial court and is further inclined to permit the present petitioners to file an application for joint measurement, the respondent be permitted to continue the construction and the respondent reiterates his undertaking that in the event it is noticed that the construction, carried out of the compound wall, is in the portion of land owned by the defendants, he will remove all said construction at his own costs.

7. After having considered the submissions as above, it appears to me that without going into the merits of the contentions raised in the

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petition as about power of the court to grant the relief of temporary mandatory injunction at the interim stage etc., the present petition can be disposed of with the following order, -

ORDER

i. The trial court shall permit the present petitioners, i.e. Defendants in RCS No.280/2015 to file a fresh application seeking joint measurement of the lands and shall appoint appropriate person as Court Commissioner to carry out the said joint measurement within the stipulated period;

ii. After receipt of the report from the Court Commissioner, the trial court shall hear and decide the said civil suit, as expeditiously as possible and preferably within a period of one year, by giving due opportunity of adducing the evidence to parties to the said suit;

iii. It is clarified that the respondent is permitted to continue the

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construction of his compound wall on a condition that he shall file a fresh undertaking before the trial court to the effect that if ultimately it is decided by the said court that the construction carried out of the compound wall by the plaintiff is an encroachment in portion of the defendants, the plaintiff, at his own, will remove the said construction.

. Order accordingly.

(P.R. BORA)
JUDGE

BDV