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

WRIT PETITION NO.2246 OF 2018

Bhoju s/o Chatru Rathod & another ... PETITIONERS

VERSUS

Chagan s/o Dagdu Rathod & others ... RESPONDENTS

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Shri K.F. Shingare, Advocate for petitioner
Shri P.F. Patni, Advocate for respondents No.3, 4-A to 4-D & 5
Shri V.M. Maske Patil, Advocate holding for
Shri N.B. Jadhav, Advocate for respondent No.7
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CORAM: R.G. AVACHAT, J.

DATED : 1st OCTOBER, 2019.

ORDER :

Heard learned counsel for the parties. The challenge in this Writ Petition is to the order dated 12.1.2018, passed by 2nd Jt. Civil Judge, Junior Division, Kannad below application Exh.143 in the suit, being Regular Civil Suit No.48/2008. By the impugned order, the application moved by the petitioner for appointment of Deputy Inspector of Land Records as a Court Commissioner for measurement of the lands bearing Gut Nos.59 and 60, came to be rejected.

2. The petitioners are the plaintiffs in the Suit (No.48/2008). The petitioners own land Gut No.59, situated at village Jaitkheda Tanda, Taluka Kannad, District Aurangabad. It admeasures 4 H 86 R. The land Gut No.60 belongs to the respondents herein (defendants in the suit). Both the lands are adjoining each other. It is the case of the petitioners/ plaintiffs that the defendants encroached upon their land Gut No.59. The encroachment is to the extent of 1 H 46 R. The petitioners/ plaintiffs got measured the land through Taluka Inspector of Land Records (T.I.L.R.) on 24.7.2007. In the measurement map, the encroachment surfaced.

3. The petitioners examined the Surveyor, as a witness in proof of the Survey/ measurement map, wherein the encroachment was disclosed. The Surveyor was extensively cross-examined. In response to the questions put to the Surveyor in his cross-examination, it has come on record that the Surveyor measured only the land comprised in Gut No.59. He did not measure the land Gut No.60.

4. After recording of the evidence of the Surveyor was over, the petitioners moved application Exh.143. The respondents resisted the application. The trial Court was pleased to reject the said application, observing that, during the cross-examination of the

Surveyor, the defence Advocate has brought on record some facts. Thereafter, the plaintiff realised that the evidence of the Surveyor is not helpful for his case. Then he has filed this application for joint measurement of the land of the plaintiffs and the defendants. The plaintiffs have come with a case of a measurement dated 24.5.2007. On the basis of the said measurement, removal of encroachment was sought. The intention of the plaintiff is only to collect the new evidence to wash out the loopholes came on record through cross-examination of the Surveyor. Plaintiffs want to prolong the matter. Plaintiffs may not be permitted to develop their case at each stage of hearing. The Court Commissioner cannot be appointed to collect new evidence to wash out previous evidence. The application was thus devoid of merits.

5. Learned counsel for the respondents would submit that the trial Court has rightly rejected the application. If the application is allowed, vital admissions that have come on record during cross-examination of the Surveyor would become redundant. In support of their contentions, the learned counsel for the respondents have relied on **2011(3) Mh.L.J. 185 [Shaikh Isak s/o Shaikh Amir Vs. State of Maharashtra & anr.]** and **2015(5) Mh.L.J. 577 [Maria Pereira & ors. Vs. Dolorosa Christina Rodrigues (D) thr. L.Rs.]**

6. The petitioners/ plaintiffs have brought the suit for possession of a land admeasuring 1 H 46 R. The said land is said to have been possessed by the defendants as an encroachment on the land Gut No.59. Both the lands Gut Nos.59 and 60 are adjoining each other. The Surveyor simply measured the land Gut No.59. The trial Court, while rejecting the application, has opined that, in a suit for removal of encroachment, joint measurement of the lands of the plaintiffs and defendants is necessary. When the trial Court was of this view, the learned Judge ought to have allowed the application of the plaintiffs. The reasons given by the trial Court for rejection of the application are not justice-oriented. It observed, in case for removal of encroachment, allegedly made on an agricultural land, measurement of both the lands is a must. The Surveyor has not done so in this case, driving the petitioners to get both the lands re-measured and then file a fresh suit, would be nothing but a multiplicity of proceedings.

7. In case of Shaikh Isak (*supra*), the facts would disclose that, recording of evidence was over in the suit, written arguments were filed by the parties. Thereafter, an application was moved for appointment of a Court Commissioner for local investigation. In this factual backdrop, it was observed that the trial Judge fell in error in allowing the application at such a belated stage when the evidence

was closed, written arguments were filed and the judgment is reserved.

8. In case of Maria Pereira (supra), the facts were such that the matter was pending in appeal. Judgment and decree already passed, based on material already brought by evidence of both the parties. The appellate Court has directly appointed the Court Commissioner to inspect the site and submit report about exact location of plot.

9. The aforesaid two authorities are quite distinguishable on facts. As stated above, the facts of the case on hand indicate that, recording of evidence for the plaintiff was underway. Since certain anomalies were surfaced during the cross-examination of the Surveyor, the application Exh.143 came to be moved. The trial Court was, in fact, of the view that, in a suit for removal of encroachment, joint measurement of the lands belonging to the plaintiffs and defendants is necessary. In view of this, the trial Court ought to have allowed the said application. Since the trial Court rejected the said application, interference is called for in the impugned order.

10. In view of the above, the Writ Petition succeeds. The Writ Petition is, therefore, allowed. The order dated 12.1.2018,

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passed by 2nd Jt. Civil Judge, Junior Division, Kannad below application Exh.143, in Regular Civil Suit No.48/2008 is set aside.

The application Exh.143 is allowed.

(R.G. AVACHAT)
JUDGE

fmp/-