

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

WRIT PETITION NO. 2543 OF 2019

Bapurao Nanaso Atole & Ors.

... Petitioners.

V/s.

Mohan Appa Atole & Ors.

... Respondents.

Ms. Manjiri S. Parasnis, Advocate for the Petitioners.

None for the Respondents.

CORAM : M. S. KARNIK, J.

DATE : SEPTEMBER 23, 2019.

PC :

1 Heard the learned counsel for the Petitioners, who are original defendants in the suit.

2 By this petition, the challenge is made by the petitioners (org. defendants) to the order passed below Application Exh. 31 in RCS No. 510 of 2015, allowing the said application of the plaintiffs. The plaintiffs by filing the said application Exh. 31, requested for appointment of the Court Commissioner to carry out joint measurement of land Gat Nos. 710 and 709 and also to measure Gat No. 725 to show the measurements in the map of measurement. The plaintiffs had filed the RCS suit for removal of the encroachment. The defendants

filed a counter-claim, contending that the suit properties are not yet partitioned. It is submitted by the learned counsel for the Petitioners that till the suit properties are partitioned and the counter-claim of the defendants is decided, the question of appointment of the Court Commissioner for measurement of land will not arise. She would further submit that the decision of this court in the case of **Ramzan Sheikh Chand Sheikh (since deceased) through his Lrs & Ors. VS. Panjab Nathuji Gawande**, reported in 2014 (6) Mh. L. J. 97, referred by the plaintiffs, will have no application in the facts of the present case. According to learned counsel for the Petitioners, it is only when plaintiffs filed the suit for removal of the encroachment and possession of encroached land that the joint measurement of the plaintiffs and defendants is necessary in which case the decision of this court in the case Ramzan Shaikh will apply. However, the present is the case where the defendants have filed counter-claim on the basis that the suit properties are not yet partitioned.

3 I have gone through the order dated 16.11.2018 passed by the trial court. Admittedly, the defendants have filed the counter-claim for partition which will have to be decided by the trial court on its own merits in accordance with the law. Nonetheless, the suit

filed by the plaintiffs is for removal of the encroachment, on the basis of the averments made in the plaint. The trial court allowed the application below Exh. 31 made by the plaintiffs for appointment of the court Commissioner and that the Taluka Inspector Land Records, Baramati is appointed as Court Commissioner. In view of the decision of this court in the case of Ramzan Shaikh, I see no error in the approach adopted by the trial court. As to what is the bearing of the court commissioner's report on the suit as well as counter claim will obviously be decided by the trial court on its own merits, when the suit is heard. I, therefore, see no reason to interfere with the trial court's order.

4 With the above observations, the petition is rejected

(M. S. KARNIK, J.)

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