

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

WRIT PETITION NO. 4213 OF 2020

Shaikh Noor Shaikh Maheboob and others ... Petitioners

Versus

Shaikh Kadu Shaikh Rahim and others ... Respondents

....

Mr. N. T. Tribhuwan, Advocate for petitioners

Mr. B. R. Kedar, Advocate for respondent Nos. 1 and 2

....

CORAM : R. G. AVACHAT, J.

DATED : 11th JANUARY, 2021

PER COURT :-

. Heard learned counsel for the parties.

2. The challenge in this writ petition is to the order dated 17.02.2020 passed by the Court of Civil Judge Junior Division, Paithan (Trial Court) on application Exh.57 in Regular Civil Suit No.98 of 2013, moved by respondent Nos. 1 and 2 (original plaintiffs in R.C.S. No.98 of 2013). By the impugned order, the application Exh.57 for appointment of Court Commissioner, Deputy Superintendent of Land Records, Paithan, to measure the suit land, has been allowed. The petitioners – original defendant Nos. 1 to 3, are therefore before this Court.

3. Shri N. T. Tribhuwan, learned counsel for the petitioners would submit that there existed a way through the suit land. The said way has been used by the petitioners and others since long. The respondent Nos. 1 to 3 initiated various proceedings before the revenue authorities and the civil Court as well. They have been unsuccessful therein. The revenue authorities have cleared the obstruction and allowed these respondent Nos. 1 to 3 to use the suit way. The respondent Nos. 1 to 3 moved the application with a view to protract hearing of the suit. Attention of this Court was invited to various orders passed by the trial Court and the revenue authority as well. The learned counsel also placed on record a document whereunder respondent Nos.1 and 3 to 5 have relinquished their right, title and interest in the suit land in favour of respondent No.2. The learned counsel submits that the cause of action did not survive for these respondents to continue with the suit. He, ultimately, urged for setting aside the impugned order.

Learned counsel for the respondents would on the other hand submit that the suit for injunction simpliciter has now been converted into suit for possession. The petitioners by joining hands with the revenue authorities have encroached upon the suit land.

The possession thereof has been sought by amending the plaint. According to the learned counsel, the suit for removal of encroachment and evidence of an expert, namely, Cadastral Surveyor is a must. Measurement of the land is required, so as to ascertain exact portion of the alleged encroachment. The learned counsel supported the impugned order.

4. I have considered the rival submissions. Also perused the documents relied upon. It appears that the revenue authorities have cleared the obstruction in the way that runs through the suit land and allowed the petitioners to use the suit way. According to the learned counsel for respondent Nos. 1 to 3, no way existed through the suit land. The petitioners by joining hands with the revenue authorities, have deprived respondent Nos. 1 to 3 of their one *guntha* of the suit land. The possession thereof has been sought for.

5. True, it was a suit for injunction simpliciter. Respondent Nos. 1 to 3 amended the plaint and sought for possession of one *guntha* land alleged to have been encroached by the petitioners under the guise of being a way/road in existence through the suit land for long.

6. Needless to mention that merits of the rival claims cannot be gone into at this stage. The order seeking amendment of the plaint so as to introduce a claim for possession had not been challenged by the petitioners.

7. As such, it is a suit for possession of the alleged encroached portion. Encroachment on agricultural land cannot be ascertained unless and until the suit land and adjoining lands are measured by an expert, namely a Surveyor. The trial Court has rightly allowed the application Exh.57. No interference with the impugned order is therefore called for. The writ petition is disposed of. The trial Court shall expedite the hearing of the suit.

[R. G. AVACHAT, J.]

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