

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

WRIT PETITION NO.7263 OF 2015

1. Pushpa Vishnu Lande,
Age : 52 years

2. Thakubai Haushiram Lande,
Age : 63 years,

... **Petitioners
(Org. Plaintiffs
in RCS 116/2007**

Both representing through power
of Attorney, Vishnu Thakaji Lande,
Age 62 years, Occupation Agricultural.

Occupation of both the petitioners :
Agricultural & Household,
Both R/o – Village Vaghapur,
Tal – Akole, Dist – Ahmednagar.

VERSUS

1. Mhatu Bapu Lande,
Age : 44 years

2. Aashabai Mhatu Lande,
Age : 38 years,

3. Umaji Bapu Lande,
Age : 64 years,

... **Respondents
(Org Defendants
in RCS 116/2007**

Occupation of all : Agricultural,
all R/o Village Vaghapur, Tal – Akole,
Dist – Ahmednagar.

...

Advocate for Petitioners : Mr. Bhide Vinod Y.
Advocate for Respondents Nos. 1 to 3 : Mr. S.K. Shinde

...

CORAM : MANGESH S. PATIL, J.

DATE : 20.08.2021

ORAL JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. The learned advocate Mr. Shinde for the respondents waives service. On the request of the parties, the matter is heard finally at the stage of admission.

2. The petitioners are the plaintiffs claiming possession of an immovable property allegedly encroached upon by the respondents. By filing an application under Order XXVI Rule 9 of the Code of Civil Procedure (Exhibit-73) they prayed for appointment of the Deputy Superintendent of Land Records, Akole as a court commissioner and requested for carrying out measurement of their land Gat No.543 as also the land of the respondents bearing Gat No.499. By the impugned order the Application has been rejected. Hence this Writ Petition.

3. The learned advocate Mr. Bhide for the petitioners would submit that pursuant to the mandate of the Bombay High Court Amendment in Rule 3 of Order VII of the Code of Civil Procedure, the petitioners have filed the Suit by undertaking an exercise of getting their land measured through a T.I.L.R., and the map was also annexed to the plaint. The parties went for trial. The Surveyor was examined as a witness by the petitioners. However some lapses which had occurred in that measurement were brought on record during his cross-examination. It is thereafter that the petitioners realized that in order to establish the encroachment they need to get the lands measured once again through a court commissioner. It is not a case of filling any lacuna. They had *bona fide* got the land measured privately and have come to a *prima faice* conclusion based on that about the respondents having made encroachment.

4. It is, therefore, to enable the Court to arrive at a just decision as to the extent of the encroachment the lands need to be measured as prayed for by appointing a court commissioner. That is the only way out now for the petitioners and even for the Court to decide the dispute finally. He

would submit that under similar set of facts this Court in **Writ Petition No.217/2019 by the order dated 02.08.2021** has conceded to similar request of the petitioners therein. He would also place reliance upon the following decisions:

Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade; 2004(2) Mh.L.J. 722

Sukhdeo Parashramji Bhugul (Dr.) Vs. Wamanrao Nagorao Charhat; 2004 (3) Mh.L.J. 724

Manohar Mahadeorao Pargrut Vs. Sunanda Ramdas Tharkar; Writ Petition No.487/2008 decided on 01.04.2008

Vijay s/o Shrawan Shende Vs. State of Maharashtra; SA No.97/2009 decided on 04.05.2009

5. The learned advocate for the respondents would submit that it is a clear case of filling the lacuna. The clinching admission has been given by the Surveyor and to rob of the respondents of such admission that an attempt is being made to resort to the appointment of a court commissioner. A serious prejudice would be caused to the respondents if the petitioners' application is allowed which has been rightly rejected by the learned Judge.

6. I have carefully gone through the rival submissions and the papers. True it is that the Court Commissioner is not to be appointed to create evidence or collect it either. However, as is pointed out by the learned advocate Mr. Bhide for the petitioners, the petitioners are not harping in dark. Even before filing of the Suit they had undertaken that exercise by getting the land measured. It is thereafter that they had reached the conclusion about the respondents having made encroachment.

7. As can be seen, the Surveyor who had carried out private measurement specifically admitted not to have issued any notice to the respondents before carrying out the measurement. He therefore admitted not to have measured their land while carrying out the measurement. If

such is the state of affairs, it would certainly be difficult for the Court to decide as to if really there is any encroachment as has been claimed by the petitioners. It is in order to enable the Court to conclusively determine the dispute that the Court Commissioner now would come in aid rather than creating any obstacles.

8. It is apparent that the petitioners are not seeking to measure their own land but even are asking to carry out measurement of land of the respondents. If that be so, the request, indeed, seems to be *bona fide*.

9. The petitioners apparently cannot be attributed with delay particularly when they have filed the suit and are awaiting possession of the alleged encroached portion. Therefore no prejudice is likely to be caused to the respondents by allowing the Court Commissioner to be appointed and the lands to be got measured.

10. Ignoring all the aforementioned state of affairs, the learned Judge seems to have got swayed away by the mere fact that some admissions have been given by the Surveyor which would demonstrate the measurement carried out was illegal and would further cause delay.

11. The Writ Petition is allowed. The impugned order is quashed and set aside. The lower court shall now allow the application and issue appropriate directions.

12. The Rule is made absolute.

(MANGESH S. PATIL, J.)