

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.3224/2021
Mohammad Ali s/o Sheikh Abbas

...Versus...

Bisan Chhannu Thorat (Since dead, through his legal heirs) 1-A) Wasudeo
Bisan Thorat and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. Anzar B. Mirza, Advocate for petitioner.

Mrs. V. S. Gordey, Advocate h/f Ms. R. D. Raskar, Advocate for respondent nos. 1-A and 1-B.

CORAM : AVINASH G. GHAROTE, J.

DATE : 02/09/2021

Heard Mr. Mirza, learned counsel for the petitioner and Mrs. Gordey, learned counsel for the respondent nos.1-A and 1-B.

2. Mr. Mirza, learned counsel for the petitioner, raises a challenge to order passed below Exh.59 on 9.10.2019 by the District Judge – 1, Achapur, whereby the application filed by the appellant No.1 in RCA No.131 of 2011 for joint measurement of the suit land at the appellate stage has been rejected.

3. Mr. Mirza, learned counsel for the petitioner submits that in a case relating to removal of encroachment, a

joint measurement of the property of both the parties, is must for the purpose of determining the nature and extent of the encroachment. He, therefore, submits that the measurement done before the Trial Court by the TILR, in respect of the land of the respondent / plaintiff, without measuring the land of the petitioner / defendant could not have been relied upon by the learned Trial Court for holding that the defendant had committed any encroachment. He, therefore, submits that the rejection of the application for joint measurement by the learned District Judge, was incorrect and therefore, impugned order needs to be quashed and set aside and the application needs to be allowed.

4. Mrs. Gordey, learned counsel for the respondent nos.1-A and 1-B, submits that the land in question was measured by the TILR on the basis of whose measurement the suit was filed, which came to be decided on 30.11.2011. The RCA was filed in the year 2011 and the present application came to be filed on 18.2.2016. The learned counsel submits that from 2004 till 2016 the need for joint measurement was not felt and if it all, it was necessary the

same ought to have filed before the Trial Court as any report regarding joint measurement would have been susceptible to objections and cross-examination. She, therefore, submits that the impugned order does not suffer from any infirmity and the petition ought not to be entertained.

5. It is a settled position of law, that a suit in respect of removal of encroachment needs to be decided on the basis of a joint measurement of the property of the plaintiff as well as the defendant, so as to determine the nature and extent of encroachment. In case of such a joint measurement, the nature and extent of encroachment as recorded by the Surveyor / Measurer, is in turn open for challenge by way of objections and cross-examination of the concerned Surveyor / Measurer. The petitioner, did not feel such a necessity during the entire period of the suit, as a result of which, the suit came to be decided on the basis of the measurement conducted by the TILR, who was examined and cross-examined before the Trial Court and whose report has formed the basis of passing of the decree by the learned Trial Court. The absence of joint measurement may be a

good ground to be raised for setting aside the decree as passed by the learned Trial Court. However, the application has been rightly rejected by the learned Lower Court by observing that there was no plea raised for joint measurement before the Trial Court and even in the appeal for a period of five years after being filed. Since the appellant is in possession since last 16 years, the application filed at the stage of arguments has rightly held to be made for the purpose of delaying the decision in appeal.

6. I, therefore, do not find any infirmity in the reasoning of the learned Lower Court, in rejecting the application filed belatedly at the stage of arguments. The petition is therefore, without any merits and it is rejected.

(AVINASH G. GHAROTE, J.)