

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

WRIT PETITION NO. 7788/2019

Praful Dnyaneshwar Shelke...Versus...Atmaram Namdeo Dhole

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

Court's or Judge's orders

Mr. A.V.Bhide, Advocate for petitioner
Mr. H.R.Gadhia, Advocate for Respondent

CORAM : AVINASH G. GHAROTE, J.

DATE : 09/12/2021

Heard Mr. Bhide, learned counsel for the petitioner and Mr. Gadhia, learned counsel for the respondent.

The petition challenges the order dated 14.11.2019 whereby the application filed by the plaintiff to have joint measurement of the disputed property has been rejected on the ground that it has been filed belatedly at the stage of arguments.

Mr. Bhide, learned counsel for the petitioner submits that in a case dealing with encroachment, it is always necessary to decide the lis by conducting a joint measurement so as to render finality to the question involved. In the present matter, though the suit according to him has been filed on the basis of the measurement conducted by one Ashish Chavhan, the same is a private measurement and without notice to the defendant and therefore, in order to render a finality to the issue, joint measuring would be necessary. Reliance is placed upon

Ramzan Sheikh Chand Sheikh vrs. Panjab Nathuji Gawande, 2014 (6) Mh.L.J. 97

Mr. Gadhia, learned counsel for the respondent submits that this is nothing but an attempt to collect evidence, finding that the plaintiff may now loose the litigation and therefore, could not be permitted, for which reliance is placed upon **Shaikh Isak Shaikh Amir vrs. State of Maharashtra, 2011 (3) Mh. LJ 185** and judgment in CRA No. 163/1997 (**Vishnu Anant Pollshet vrs. Shankar Bhiva Shetgaonkar**), decided on 22.12.1997.

Whenever a case of encroachment comes before the Court, it would be necessary to have a joint measurement of the property in question so as to decide the lis finally, as without such a joint measurement, the matter remains lingering and leads to further litigation and therefore the question has to be given an hiatus. That in my considered opinion, should be the basic ground on which all applications for joint measurement of the property by appointment of Commissioner u Order 26 Rule 9 of CPC ought to be considered. Such view has also been taken in **Ramzan Sheikh Chand Sheikh** (supra). Though **Sheikh Isak** (supra) holds that an application at a belated stage would amount to collecting evidence, which is also what has been held in **Vishnu Anant Pollshet**, in my considered view, looking to the facts of the present case, when the initial measurement itself was done without notice to the other side, it cannot be considered as a

measurement in the eyes of law, considering which it is necessary to decide the lis on the basis of the joint measurement of the suit property. Any inconvenience caused can always be compensated in terms of money.

In the circumstances, the impugned order is hereby quashed and set aside and the application below Exh.31 is allowed, however, subject to the cost of Rs. 25,000/- to be paid by the plaintiff to the defendant. It is also made clear that the expenses for the joint measurement shall be borne by the plaintiff.

The petition is disposed of in above terms. No costs.

JUDGE

rvjalit