

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

WRIT PETITION NO.2804 OF 2019

Karbhari Pandurang Sonawane & Anr.

... Petitioners
(Orig. Plaintiffs)

Versus

Balu Sompat Sonawane & Anr.

... Respondents
(Orig. Defendants)

...

Mr. Ameet R. Vaidya, Advocate for the Petitioners

Mr. N. D. Sonawane, Advocate for Respondents

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 10th August, 2022

PER COURT :-

1. The petitioners are aggrieved by the order dated 23-11-2018, passed by the learned Civil Judge, Junior Division, Vaijapur, District Aurangabad, below Exhibit-50 in Regular Civil Suit No.390/2013, thereby rejecting the application filed by the petitioners under Order 26 Rule 9 of the Code of Civil Procedure, 1908 (for short 'CPC').

2. The petitioners are the original plaintiffs. They have filed the suit against the respondents/defendants seeking removal of encroachment. According to them, respondents/defendants have encroached on their land 27 R. land in Gat No.105. The petitioners/

plaintiffs have led evidence of the TILR, who has given admissions in favour of the respondents/defendants.

3. The petitioners/plaintiffs, thereafter, filed application (Exhibit-50) under Order 26 Rule 9 of CPC, seeking appointment of Court Commissioner to conduct the joint measurement of the land of petitioners Gat No.105 and the land of respondents Gat No.106 through TILR. The said application is resisted by the respondents and the Trial Court has rejected the same. Hence, the present petition.

4. I have considered the rival submissions of the learned Advocate for the petitioners and the learned Advocate for the respondents. Perused the grounds raised in writ petition, documents placed on record.

5. It is a settled legal position that in the suit for encroachment, it is desirable to appoint Court Commissioner. Though, in the present case, the TILR is examined, he has given certain admissions in favour of the respondents during their evidence, fact remains that there is no joint measurement on record. For the Trial Court to effectively decide the dispute between the parties, joint measurement of the land of petitioners and respondents is necessary.

6. This Court, in Writ Petition No.7263/2015 and Writ Petition No.487/2008, has observed thus;

"5. The learned Advocate for the respondents would submit that it is a clear case of filing 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".

7. These above observations support the petitioner's case.

In light of above, following order is passed:

ORDER

- (i) The writ petition is allowed.
- (ii) The impugned order dated 23-11-2018, passed by the learned Civil Judge, Junior Division, Vaijapur, District Aurangabad, below Exhibit-50 in Regular Civil Suit No.390/2013, is hereby quashed and set aside.
- (iii) The application (Exhibit-50) is allowed.
- (iv) The TILR should be appointed within a period of two weeks from the date of receipt of this writ.
- (v) The TILR shall carry out the joint measurement of the land Gat No.105 of the petitioners and the land Gat No.106 of the respondents and submit his report within a period of four weeks thereafter.
- (vi) The costs of appointment of Court Commissioner shall be borne by the plaintiffs.

[NITIN B. SURYAWANSHI, J.]