

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

WRIT PETITION NO.1572 OF 2016

1. Rajebhau Uttamrao Kolhe
Age : 26 years, Occu: Agril.
R/o. Harki Nimgaon,
Tq. Majalgaon, Dist. Beed.
2. Dattatraya s/o Uttamrao Kolhe,
Age : 23 years, Occu: Agril.
R/o. Harki Nimgaon,
Tq. Majalgaon, Dist. Beed.

... **PETITIONERS**

VERSUS

1. Devaibai w/o Tukaram Sathe,
Age : 65 years, Occu: Agril.
R/o. Harki Nimgaon,
Tq. Majalgaon, Dist. Beed.
2. Sushala Pralhad More,
Age : 55 years, Occu: Agril.
R/o. As above.
3. Kushivarta Shrirang Wani,
Age : 50 years, Occu: Agril,
R/o. Nirmalwadi,
Tq. and Dist. Beed.
4. Baswanta Shamsundar Thonge,
Age : 45 years Occu: Agril.,
R/o. Talkhed.
Tq. Majalgaon, Dist. Beed.
5. Kashibai Ankush Nawale,
Age : 40 Occu: Household,
R/o. Kukadgaon.
Tq. and Dist. Beed.
6. Seema Vishnu Rokade
Age : 41 Occu: Household,
R/o. Wadali,
Tq. Jintur, Dist. Parbhani.
7. Ayodhya Bhimrao Nawale,
Age : 35 Occu: Household,
R/o. Kukadgaon,
Tq. and Dist. Beed.

RESPONDENTS

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Advocate for Petitioners : Mr. Swapnil M. Mule h/f. Mr. Ravindra V. Gore
Advocate for Respondent Nos.1 to 7 : Mr. Bhagwan S. Kudale
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CORAM : MANGESH S. PATIL, J.

DATE : 08.06.2022

ORDER:

Heard. Rule. The Rule is made returnable forthwith. With the consent of the parties, the matter is heard finally at the stage of admission.

2. The original plaintiffs are invoking the powers of this Court under Articles 226 and 227 of the Constitution of India to impugn the order passed by the trial court on their Application (Exhibit-86) whereby they requested to call as a witness the Court Commissioner, a surveyor through whom a measurement was carried out pursuant to an order passed by the court.

3. I have heard the learned advocates of both the sides. Admittedly the petitioners are claiming possession of a portion of land stated to have been encroached upon by the respondents defendants. Both the sides laid evidence. Thereafter the petitioners submitted an application (Exhibit-69) seeking appointment of a Court Commissioner in the form of Deputy Superintendent of Land Records to carry out the measurement and to ascertain the fact of encroachment, if any. The trial court by the order dated 01.08.2015 allowed the application (Exhibit-69) and directed commission to be executed as prayed for. It appears that pursuant to such

order the DILR carried out the measurement and submitted a report. Both the sides were not satisfied with the report. The petitioners by moving an application on which the impugned order is passed made a request to call upon the concerned DILR for examining him as a witness.

4. The trial court has rejected the application (Exhibit-86) by observing that though the Court Commissioner could have been called upon to record his evidence, the petitioners once having objected to the report were not entitled to call him as a witness.

5. *Ex facie*, the reasoning given by the learned Judge of the trial court has inherent inconsistencies. If a party is not agreeable with the report of the Court Commissioner, it would be a right inherent in such a party to demonstrate as to how and on what basis his objection to the report is justified. To this extent, the learned Judge of the trial court seems to be agreeable with the position that the Court Commissioner needs to be examined.

6. However, surprisingly, the learned Judge has refused to call the Commissioner as a witness merely because the request was made by the petitioners. Again, even the approach of the learned Judge in refusing to oblige the petitioners on the ground that they were objecting to the report is startling and not sustainable in law. Clause (ii) of Rule 10 of Order XXVI of the Code of Civil Procedure clearly comprehends a situation where a party to the suit is entitled to examine the Commissioner in open court touching any of the matter mentioned in his report.

7. The impugned order clearly ignores such a provision in law and is therefore grossly erroneous.
8. The Writ Petition is allowed.
9. The impugned order is quashed and set aside. The application (Exhibit 86) stands allowed.
10. Rule is made absolute in the above terms.

(MANGESH S. PATIL, J.)

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