

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

WRIT PETITION NO.1966 OF 2021

**CHAITANYA JAIPRAKASH SALGARE AND OTHERS
VERSUS
SHIVAJI SATAPPA BARDAPURE DIED THROUGH L.RS. VIJAYABAI
SHIVAJI BARDAPURE AND OTHERS**

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Advocate for Petitioners : Mr. Sushant B. Choudhari
Advocate for Respondents No.1A, 1B, 2, & 3 : Mr. S. N. Lale
Yelwatkar

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 25th JULY, 2022

PER COURT :

1. This petition impugns the order dated 16/03/2020 passed by learned Civil Judge Junior Division, AUSA below Exhibit-44 in Regular Civil Suit No.444/2013, thereby rejecting application filed by the petitioners/plaintiffs for appointment of Court Commissioner.
2. The petitioners filed suit for demarcation of boundaries in respect of the suit property. It is the case of the petitioners that respondents are adjacent land holders and they are trying to encroach on the suit property. Therefore, it is necessary to appoint Taluka Inspector of Land Records for measurement of suit property.
3. The suit is resisted by the respondents by filing written statement. Thereafter the petitioners examined their witness and then filed present application seeking appointment of Court Commissioner. The said application is opposed by respondents. The

trial Court has rejected the application on the ground that petitioners have not sought appointment of Court Commissioner for demarcation of boundaries and there is no case of the petitioners of encroachment. Hence, the present petition.

4. Heard learned advocate for petitioners and learned advocate for respondents.

5. Perusal of the plaint shows that the fact of encroachment is specifically pleaded by the plaintiffs/petitioners in paragraph Nos.3 and 4 of the plaint. Respondents/defendants have dispute about the area of suit property purchased by petitioners from Somani under the sale deed. In these facts when the suit is filed for measurement and demarcation of the suit property and petitioner is claiming that respondents have encroached on the suit property, taking into consideration the settled legal position, trial Court ought to have appointed Court Commissioner in the present matter.

6. This Court in ***Ramzan Sheikh Chand Sheikh (Died) Through LRs. and Others Vs. Panjab Nathuji Gawande, 2016(4) ALL MR 765***, held:-

"7. The trial Court should have taken into consideration that it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent and that, oral evidence cannot prove such contentious issue conclusively. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute."

7. In ***Kashinath Ramkrishna Chopade Vs. Purushottam***

Rulshiram Tekade and Others, 2005(6) Bom.C.R. 267, it is held:-

"....The object of the local investigation is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary disputes and disputes about the identity of lands are instances when a Court should order a local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure...."

8. In ***Sulemankhan and Others Vs. Bhagirathibai and***

Others, 2014(5) ALL MR 552, it is held:-

"8. In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute..... the extent of encroachment cannot be proved in absence of public records without following due procedure emerging from Section 36 and Section 60 of the Evidence Act. "

9. In the light of the above ratio, impugned order cannot be sustained and the same is hereby quashed and set aside.

Application Exhibit-44 is allowed.

10. Writ petition is allowed in the above terms.

(NITIN B. SURYAWANSHI, J.)