

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

WRIT PETITION NO. 6174 OF 2018

Pushpabai W/o Jaiprakash Sonwane
Age: 45 years, Occu: Service,
R/o: Ambikanagar Beside Panchshila
Nagar, Beed.

... Petitioner
(Orig. Plaintiff)

Versus

1. Babasaheb S/o Rambhau Landge
Age: 48 years, Occu: Rikshaw Driver,
R/o: Ambika Nagar (Near Mitra Nagar)
Navgan College Road, Beed.

2. Mahadeo S/o Rambhau Landge
Age: Major, Occu: Service
R/o As Above

3. Bhagirathibai W/o Rambhau Panchal
Age: 54 years, Occu: Service
R/o Sasoon Hospital Pune
Tq. Haveli Dist. Pune.

4. Mathurabai W/o Ramesh Pingale
Age: 57 years, Occu: Household,
R/o Pingale Galli Beed Tq. Dist. Beed.

5. Makrand S/o Ramesh Pingale
Age: 38 years, Occu: Agri.
R/o As Above

6. Vilas S/o Ramesh Pingale
Age: 37 years, Occu: Agri.,
R/o As Above.

... Respondents

...

Mr. D. P. Deshpande, Advocate for the Petitioner
Mr. P. K. Lakhotiya, Advocate for Respondent Nos.1 & 2

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 15th March, 2022

ORAL JUDGMENT :

. **RULE.** Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the respective parties.

2. This petition challenges the order below Exhibit-22 in Regular Civil Appeal No.64 of 2011, passed by the learned Ad-hoc District Judge-1, Beed, thereby rejecting the application filed by the petitioner for local inspection under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC").

3. The petitioner/original plaintiff filed suit for declaration, permanent injunction and removal of encroachment by respondents/defendants no.1 and 2 over the suit property from north direction. The suit was dismissed as the petitioner/plaintiff could not establish her case due to non-availability of authentic layout of Survey No. 172/A, in which the petitioner/original plaintiff and respondents/defendants are adjoining plot holders. The petitioner challenged the Trial Court's decision by filing Regular Civil Appeal No.64 of 2011. In the said appeal, application (Exhibit-22) is filed by the petitioner for local investigation under Order XXVI Rule 9 of CPC

contending that the petitioner could not establish her case due to non-availability of authentic layout of Survey No.172/A of village Beed Taraf Pingale, Taluka and District Beed. There is no dispute regarding the location of the plots of the petitioner and respondents and that they are neighbours of each other.

4. The petitioner got her plot measured as per her sale deed (Exhibit-84) and produced measurement map (Exhibit-71). The said map is denied by the respondents on the ground that it was prepared behind their back and without issuing notice to them. Therefore, unless the plots of the petitioner and respondents are measured jointly, the alleged encroachment cannot be detected and established. The petitioner prayed that the plot of the petitioner and plots of respondent nos.1 & 2 be measured as per their sale deeds to find out, whether they are in the possession of their plots as per sale deeds. The sale deeds are already on record and are proved and are admitted by the parties. The petitioner, therefore, prayed for joint measurement of three plots to settle the litigation once for all.

5. By the impugned order dated 04/04/2018, the Appellate Court has rejected the application of the petitioner holding that in absence of measurement of entire plots in land Survey No.172/A, it cannot be

ascertained as to how much area was available with the vendor of the plaintiff at the time of execution of her sale deed. The Appellate Court, therefore, held that the dispute between the parties cannot be resolved by only carrying out the measurement of the plots of the defendants and plaintiff.

6. Having heard the rival submissions of the learned Advocates for the respective parties and after perusal of documents placed on record, it is clear that the dispute is in respect of the boundaries of the petitioner and respondents' plots. Before the Trial Court, the T.I.L.R. has admitted that if there is any dispute about fixation of boundaries, then it is necessary to measure both the plots. However, he only fixed boundaries of the petitioner's plot. He did not measure the plot belonging to defendant no.1. The Trial Court, therefore, held that the measurement and the map of T.I.L.R. is not reliable piece of evidence to come to a conclusion that defendant no.1 has made encroachment over the suit plot.

7. It is a settled legal position that in cases of dispute of boundaries, Court Commissioner is to be appointed to resolve the dispute before the Court. Merely because, there is no sanctioned layout that by itself cannot be a ground to reject the prayer of the

petitioner for appointment of T.I.L.R. The T.I.L.R. can measure the plots as per the sale deeds of the petitioner and the respondents, as boundaries are mentioned in the sale deeds and that can be taken into consideration while carrying out the measurement and preparing the map. The T.I.L.R. can fix the boundaries of the plots of the petitioner and respondents as per boundaries given in their respective sale deeds. The Appellate Court has erred in coming to a conclusion that unless all the plots in Survey No.172/A are measured, it cannot be ascertained as to how much area was available with the vendor of the plaintiff at the time of execution of her sale deed. The T.I.L.R. has to take into consideration the areas mentioned in the respective sale deeds of the petitioner and respondents at the time of measurement.

8. I find no substance in the contention of the learned Advocate for the respondents that by appointing Court Commissioner, the petitioner is trying to collect evidence. Since there is a boundary dispute and the petitioner's prayer is for removal of encroachment, appointment of Court Commissioner is necessary, which would assist the Court to decide the controversy between the parties once for all. In the facts of the present case, this Court is of the considered view that to decide the controversy and the boundary dispute between the

parties, it is necessary to appoint the Court Commissioner. The impugned order, is therefore, unsustainable and the same is liable to be quashed and set aside. Hence, the following order is passed:

ORDER

(i) Writ Petition is allowed in terms of prayer clause “B”.

(ii) The impugned order dated 4th April, 2018, passed by the Ad-hoc District Judge-1, Beed below Exhibit-22 in Regular Civil Appeal No.64/2011, is hereby quashed and set aside.

(iii) Application Exhibit-22 in Regular Civil Appeal No.64 of 2011 is hereby allowed.

(iv) Rule is made absolute in the above terms. No order as to costs.

[NITIN B. SURYAWANSHI, J.]